

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHISTCHURCH**

[2011] NZERA Christchurch 196
5363208

BETWEEN TURNERS & GROWERS
 LIMITED
 Applicant

AND MICHAEL WAGNER
 First Respondent

AND MARKET GARDENERS
 LIMITED

Member of Authority: M B Loftus

Representatives: Penny Swarbrick, Counsel for Applicant
 Peter Macdonald, Counsel for Respondents

Investigation Meeting: 1 December 2011 at Nelson

Submissions Received At the investigation

Determination: 9 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Turners & Growers Limited (T&G), seeks to enforce the restraint of trade provision contained in a written employment agreement between it and the first respondent, Mr Michael Wagner.

[2] It seeks:

- (a) An order requiring that Mr Wagner comply with the terms of his employment agreement and, in particular, those contained within a provision entitled 'Non-Competition'; and

- (b) An order restraining the second respondent, Market Gardeners Limited (MGL), from employing Mr Wagner before the expiry of the restraint period; and
- (c) An order that MGL cease aiding and abetting Mr Wagner's alleged breach of the employment agreement.

[3] In support of the application, the Authority received original affidavits from Mr Alastair Petrie, T&G's general manager, New Zealand markets, Ms Delys Tansley, T&G's general manager human resources and Mr Nick Bright, T&G's Nelson based manager, wholesale, and Mr Wagner's direct manager. In addition, and after receipt of the respondent's statements, further affidavits were received from both Mr Petrie and Ms Tansley.

[4] The position of the respondents is that the restraint is unenforceable given:

- (a) Its sole purpose is to avoid and/or prevent competition;
- (b) There are no trade secrets or other sensitivities that could be said to constitute a legitimate proprietary interest;
- (c) It is harsh and oppressive;
- (d) It is unworkable.

[5] That position was supported by two affidavits, one from Mr Wagner and one from Mr Peter Hendry, the chief executive of MGL.

Background

[6] Mr Wagner commenced employment with T&G as a product specialist on 26 October 2004. In late 2005, the position was "upgraded" and retitled sales specialist. On 5 December 2005, and in recognition of that change, Mr Wagner signed a new, and second, employment agreement. Contained therein was a provision which reads:

Non-Competition

If this agreement is terminated, whether by expiry or termination for breach or otherwise; then you will not either alone or in conjunction with or on behalf of any other person, directly or indirectly, as

promoter, shareholder, director, consultant, or staff member in any other manner:

- (a) [not applicable]; *nor*
- (b) *For a period of six months following termination contact, solicit or attempt to solicit the custom in respect of similar goods or services of any person to whom the company provided goods or services during the nine months prior to the termination of your employment; nor*
- (c) *For a period of three months following termination, engage in New Zealand for or on behalf of any business or enterprise that is engaged in the purchasing and/or marketing and/or storing and/or importing/exporting and/or distribution of horticultural produce where that business or enterprise is in competition with the business of the company or its subsidiaries or associated companies, either alone or in conjunction with another...*

[7] There follows a provision entitled ‘Garden Leave’ which permits T&G to make various amendments to the employee’s terms and conditions during a period of notice, whether it is initiated by the company or the employee. Such changes may include an alteration of duties, a direction to take garden leave or, at T&G’s behest, an earlier termination provided the full period of notice is paid.

[8] Mr Wagner had, prior to his engagement by T&G, amassed some 15 years’ experience in the industry, the bulk of which he had gained as an employee of MGL.

[9] As a sales specialist, Mr Wagner is required to develop and maintain relationships with both suppliers and growers. In essence, he becomes an intermediary between the two and, according to T&G, requires an intimate knowledge of the applicant’s business, its customers, their buying patterns, suppliers, pricing and business practices.

[10] According to T&G, a strong relationship with both growers and retailers is vital. T&G says that it therefore invests a significant amount of time, training, resource and money into both the sales staff (such as Mr Wagner) and the nurturing of those critical relationships. The company, through Mr Petrie, goes on to say:

The reality is that these relationships are personal in nature. Growers tend to form a relationship with a particular individual and to work closely with them, building and developing the relationship over time. Accordingly, the Company’s relationship with the customer and grower is potentially in jeopardy when the individual the grower or customer had been dealing with leaves the Company. This is particularly so if the employee leaves to work for a competitor.

[11] What T&G seeks, is effectively a grace period afforded by the restraint and during which it may seek to consolidate and reinforce the existing relationship through a new representative.

[12] MGL has a different view. It contends the ability to establish and maintain a good relationship with clientele is integral to the skills toolkit required of a sales person and that T&G's reliance on that skill ignores the fact that, in its view, price is equally important in this market.

[13] Mr Wagner states that he has a real interest in, and passion for, the industry in which he works and intends to stay for the remainder of his career. He also states that he is a committed Nelson resident and has no desire to move from there. He goes on to say:

What this means is that, to stay in my industry of choice and to continue living in Nelson provides me with very restricted career opportunities and that [T&G and MGL] are the only two "employer" options available.

[14] He goes on to say that he was beginning to have concerns about employment security with T&G given a recent trend of supplying more South Island provincial centres from Christchurch. That, combined with a belief that MGL offered better prospects, meant that when it approached him with an offer of employment, he considered the matter seriously. Ultimately, he decided to accept MGL's approach and he advised T&G via a letter of resignation dated 31 October 2011. That letter reads:

Dear Nick,

I would like to inform you that I am resigning from my position as a Sales Representative for Turners and Growers in accordance with the notice period in my Individual Employment Agreement (effective 12 December).

I have accepted an offer of employment at Market Gardeners Limited as a Sales Representative. Taking up this offer was not an easy decision to make but I felt I was ready for a new challenge in my career.

I intend to start working for MG Marketing immediately following my notice period. If required the company contact for MG Marketing is ... or you may contact the companies and my employment representative, Peter McDonald on ...

I would like to thank you for the many opportunities I have had with this organisation. I've enjoyed being part of your team and have worked alongside some excellent people.

I wish you and the company all the best for the future.

Thanks again for everything.

Yours sincerely,

[15] Since that time correspondence has passed between the parties with T&G asserting what it considers to be its contractual rights in respect of the restraint and seeking acknowledgement thereof along with an undertaking that both Mr Wagner and MGL would comply. Both have refused.

Determination

[16] The law is well settled in respect of applications such as this. The Authority is required to determine:

- (a) Whether there is a serious issue to be tried;
- (b) Whether the balance of convenience favours the granting of the orders sought;
- (c) Whether the breach is reasonably immanent; and
- (d) What does the overall justice require?

[17] In deciding whether there is a serious issue to be tried the Authority must be cognisant of the fact that a covenant in restraint of trade is, prima facie, unenforceable unless reasonably necessary to protect proprietary interests of the (in this case soon to be) former employer and is in the public interest (*Gallagher Group Ltd v. Walley* [1999] 1 ERNZ 490).

[18] The Authority is required to consider whether the restraint of trade was reasonably necessary to protect a proprietary interest or is it simply to limit competition and, secondly, whether the duration, geographical area and scope of the restraint of trade covenant is reasonable.

[19] In support of their contention there is a serious issue to be tried, T&G cite *Airgas Compressor Specialist Ltd v. Bryant* [1998] 2 ERNZ 42 at 53:

The employer may possess proprietary interest and trade secrets, confidential information, and its business or trade connections. The employer is permitted to protect its business connection – that is, to prevent the departing employee from enticing its clients or customers. These are the most obvious but not only examples of legitimate proprietary interest.

[20] It is argued that given the judicial approbation (19 above), Mr Wagner's position and the evidence developing and maintaining customer relationships is critical to T&G's business there is an obvious interest worthy of protection. The counter-proposal tendered on behalf of both Mr Wagner and MGL is that it is fundamental that any successful sales representative working in a consumer-based company establish and maintain close relationships with his or her customers/clients. It is submitted that the development of relationships is an intrinsic tool of trade, part of the job and not indicative of any proprietary interest.

[21] The respondents also argue that there is an additional issue; namely that there are only two significant industry players in the Nelson/Marlborough region – T&G and MGL. They also state that the customer overlap is absolute - all buyers and sellers are clients of both and the extent of their daily activity is determined primarily by price.

[22] It is argued that Mr Wagner is not party to any trade secret or commercial sensitivities and given the effect of price, he should be allowed to offer his skills openly and without restriction in the furtherance of his career.

[23] T&G accepts that there is significant overlap in respect to the client base, but rejects the proposition that it is absolute. T&G also rejects the argument about price, stating that there are a range of intricacies that differentiate their approach from MGL's.

[24] In this instance, I am inclined toward T&G's view. The Court's conclusion that trade connections can constitute a proprietary interest tends to undermine the argument that Mr Wagner has nothing to offer other than skills which are inherent in any successful salesperson.

[25] There is then what I consider the significant evidential difference over what stimulates and drives the clientele – personal relationships, price or perhaps a combination of both.

[26] There is also a significant argument over an allegation by Mr Petrie that he and Mr Hendry entered into a gentleman's agreement whereby their two companies would honour the restraint of trade provisions contained in the employment agreements each had with its employees. MGL is adamant in its denial of such an arrangement, indeed it goes so far as to state it does not use restraint provisions but it accepts there have been previous occasions upon which it has engaged staff directly from T&G on the basis that they would not commence employment until expiry of their restraint but that they would be paid by MGL during the ensuing period. To me, such arrangements clearly indicate the possibility of interests worth protecting.

[27] Then there is Mr Wagner's resignation letter. It states that he had sought legal advice; that the advisor is also retained by MGL and gives his contact details. That is not normal behaviour and is, I consider, indicative of knowledge of potential issues and the fact that T&G was likely to consider there was an interest worth protecting.

[28] I make the following observations in respect to respect to duration and geographical coverage. One of the provisions T&G seeks to enforce has a life of three months and the other six. In support of their reasonableness Ms Swarbrick referred to a number of occasions upon which similar periods were considered acceptable by both the Court and the Authority. There is also the evidence that the goal T&G seeks to attain, namely the ability to retain current relationships via a new representative needs time as the recruitment process can not occur overnight – there is an advertising period followed, once an appointment has been made, by an inevitable period during which a prospective employee must discharge any obligations such as those pertaining to notice to his or her present employer. Mr Macdonald did not raise a specific challenge regarding duration, choosing instead to adopt a holistic approach and argue that the restraint, when viewed as a totality, was simply unenforceable. I consider the duration reasonable when I weigh the current circumstances, the favourable precedent against the lack of specific challenge.

[29] The question of geographical coverage is not as easy to address. The restraint on solicitation applies to Mr Wagner's current client base. The evidence suggests that is limited to the Nelson/Marlborough region. That is not, in the circumstances, unreasonable. The second restraint, namely that prohibiting employment with a competitor is, however, expressed to operate nationwide. The evidence does not assist me in ascertaining whether or not that is reasonable. Mr Wagner's position is

that his employment aspirations are limited to Nelson and that which T&G is seeking, namely an opportunity to protect its relationship with clients previously serviced by Mr Wagner, is similarly located. The reasonableness or otherwise of a nationwide restraint was not addressed. I shall return to this issue later.

[30] This is an injunctive application with evidence proffered through untested affidavits. Given significant evidential differences and the other indicators referred to above, I have no qualms in concluding that there is an arguable case.

[31] The balance of convenience is addressed by considering the adequacy of remedies. This is also, in my view, relatively easy to address. Should Mr Wagner be restrained from commencing employment with MGL on an interim basis and should T&G be incapable of justifying that restraint in a substantive hearing should one occur, the loss is obvious. It is the wages that Mr Wagner would have earned during the period of unjustifiable restraint. T&G is a large company with significant resources. It has provided the requisite undertaking as to damages and is more than capable of making good any loss Mr Wagner may inappropriately suffer.

[32] On the other hand, Mr Wagner has given evidence of significant personal commitments and limited financial means. This means that, should the restraint not be granted but T&G subsequently, and in the context of a substantive hearing, show that it should have been, its loss is potentially significant. The proprietary interest it contends, namely that it has in its trade connections, would already have been damaged – perhaps irretrievably. Not only would it have suffered that loss, but Mr Wagner's evidence would suggest that his ability to pay is limited.

[33] There is also the issue of quantification. If MGL is correct in its view that price is a significant determinant of client behaviour and given the overlap, the quantification of damage may prove virtually impossible.

[34] Then there is MGL, the second respondent and an organisation potentially liable by virtue of having aided and abetted a potential breach. Whilst there is no suggestion it would be incapable of paying should an award be made, the issue of quantification remains.

[35] Given the above, I must conclude that while it is easy to recompense Mr Wagner for any loss that he may suffer as a result of an interim determination that

cannot later be substantiated in a substantive setting, the same cannot apply to T&G. The balance of convenience favours T&G.

[36] There is then the issue of whether or not the possible breach is reasonably imminent. This arises as the relief T&G seeks is that known as a *quia timet* injunction. Such an injunction does not deal with an invasion of rights already in progress but considers something threatened or about which there is good reason for apprehension. To obtain a *quia timet* injunction, the plaintiff has to establish that the actions it wants restrained are reasonably imminent (refer *Kumar v. Elizabeth Memorial Home Ltd* [1998] 2 ERNZ 61).

[37] In this instance, there can be little argument that that requirement is met.

[38] The event T&G fears is a potential encroachment upon its client base which it contends may occur as a result of Mr Wagner acting in breach of his current employment agreement. The contended breach is the commencement of employment with MGL and, according to the letter of resignation, that will occur on or about 13 December 2011. That date is indeed imminent and I conclude the requirement of imminency required by a *quia timet* injunction is met.

[39] The conclusion there is an arguable case; that the balance of convenience favours T&G and that the requirement of immediacy necessary for the grant of a *quia timet* injunction has been met strongly points to a conclusion that the overall justice favours the granting of some form of relief.

[40] There is, however, a question about the form of that relief that arises given the ability to amend a restraint which I consider appropriate given the evidence proffered and, in particular that applying to the geographic scope of the restraint and the workability of a restraint on soliciting given the argument about the overlap in clientele. These issues affect both of the provisions T&G are attempting to enforce.

[41] The restriction on solicitation faces the issue of overlap in clientele. It is this that Mr Macdonald contends makes the provision unworkable. As the parties are well aware from comments I made during the investigation, I have some sympathy with that view, especially if MGL is correct in its assertion that price plays a significant part in client behaviour. Whilst not inviting me to amend the restraint, Ms Swarbrick countered by suggesting questions of workability would be removed should the provision be amended to apply to clients of T&G who were not also clients of MGL

(and obviously about whom Mr Wagner knew and with whom he had developed a relationship in which T&G may have a proprietary interest). I agree.

[42] The restriction on employment is stated to apply nationwide but, as said earlier, I have no evidence as to whether or not that is appropriate. That which T&G seeks to protect appears to be located in the Nelson Marlborough region and given the argument tendered in support of the application, I consider that a reasonable limitation. In reaching this conclusion I am also cognisant of the evidence about previous arrangements under which the income of individuals have been protected while giving effect to restraint. By making this amendment it may be that Mr Wagner and MGL can come to some temporary arrangement whereby he is employed elsewhere while still complying with the tenor of his restraint in that he not engage in activity that could undermine T&G's relationship with clients he previously serviced and which are to the best of my knowledge located in the Nelson/Marlborough region.

Orders

[43] For the above reasons, the following orders are made:

- a. That Mr Wagner comply with the terms of the clause entitled Non-Competition which resided in the employment agreement he has with T&G as amended below.
- b. Subclauses (b) and (c) of the Non-Competition clause are amended to read:
 2. *For a period of six months following termination contact, solicit or attempt to solicit the custom in respect of similar goods or services of any person to whom the company provided goods or services during the nine months prior to the termination of your **employment and who is not already a client of MGL**; nor*
 - (c) *For a period of three months following termination, **work in the Nelson / Marlborough region or any other geographical area in which you engaged with T&G's clients** for or on behalf of any business or enterprise that is engaged in the purchasing and/or marketing and/or storing and/or importing/exporting and/or distribution of horticultural produce where that business or enterprise is in competition with the business of the company or its subsidiaries or associated companies, either alone or in conjunction with another...*

(Changes highlighted);

- c. MGL is to cease any activity which may aid and abet a breach of Mr Wagner's employment agreement as amended.

The last order sought, namely that MGL not employ Mr Wagner is not granted as to do so would undermine the rationale behind the change in respect to the geographical area covered by sub-clause (c) of the restraint.

Costs

[44] I reserve the issue of costs and ask that the parties attempt to resolve this between themselves.

M B Loftus
Member of the Employment Relations Authority