New Zealand Employment Relations Authority Decisions

Advanced Personnel Services Limited v Pitman (Christchurch) [2017] NZERA 1112; [2017] NZERA Christchurch 112 (3 July 2017)

Last Updated: 12 July 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 112
5644196

BETWEEN ADVANCED PERSONNEL SERVICES LIMITED Applicant

A N D GRAHAM PITMAN Respondent

Member of Authority: David Appleton

Representatives: Jeff Goldstein, Counsel for Applicant

Peter McRae, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 9 June 2017, from the Applicant

29 June 2017, from the Respondent

Date of Determination: 3 July 2017

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment relationship problem

[1] This determination addresses the effect of a consent determination of the Authority1 on the terms of the individual employment agreement between the parties dated 10 February 2016, and in particular, restraint of trade and non-solicitation clauses contained in that employment agreement.

Background

[2] The applicant brought proceedings against Mr Pitman originally seeking interim relief on the basis that Mr Pitman was allegedly acting in breach of the restraint of trade and non-solicitation clauses contained in his employment agreement

with the applicant.

1 [2016] NZERA Christchurch 192

[3] During the course of the investigation meeting of that application for interim relief, the parties reached agreement settling that application in return for undertakings from Mr Pitman. Upon the joint application to the Authority of the parties, a consent determination recording the terms of those undertakings was issued.

[4] Whilst that consent determination settled the application for interim relief, proceedings are still live before the Authority to establish whether Mr Pitman breached the terms of the restraint of trade and non-solicitation clauses within his employment agreement, and whether damages are due to the applicant.

[5] The Authority has already made known to the parties its preliminary view that some of the clauses that are being relied upon by the applicant may not be enforceable. Mr Goldstein argues, on behalf of the applicant, that the undertakings entered

into by Mr Pitman, and recorded in the consent determination, operate to vary the original terms of the restraint of trade and non-solicitation clauses so as to rewrite them in a form that makes them enforceable.

[6] It is not necessary to replicate in this determination the terms of the original clauses, nor of the consent determination in full. This is because Mr Goldstein's argument is predicated upon a single fact, namely that the undertakings given by Mr Pitman and recorded in the consent determination state that they would be effective from 23 September 2016, the date when Mr Pitman left his employment with the applicant. This is the date when the original restraint of trade and non-solicitation clauses became operational (subject to enforceability).

[7] Mr Goldstein submits that the consent determination does more than settle the injunction application because it, in fact, rewrote the restrictive covenants and backdated their application to the date of the respondent's employment ending. If the purpose/intention of the determination had been only to settle the issue between the parties going forward, the commencement date of the restrictive covenants would have been 27 October 2016, the date of the investigation meeting and settlement.

[8] Mr Goldstein submits that, as a consequence, the Authority is bound to accept these modifications to the respondent's employment agreement and, as a result, there are no enforceability issues in regard to the restrictive covenants. Therefore, the only matter to be determined by the Authority, according to Mr Goldstein, remains whether Mr Pitman breached those clauses as rewritten.

[9] Mr McRae, on behalf of Mr Pitman, submits that the consent determination is not a modification or amendment by consent to Mr Pitman's employment agreement and that nothing in the determination says that this is what is being done.

[10] Mr McRae points to the following terms of the consent determination:

(a) In paragraph1, it states "... the parties have reached agreement as to the terms of undertakings that Mr Pitman was prepared to give to the applicant".

(b) In paragraph 2 it states "The parties have accordingly jointly applied to the Authority for a consent determination to record the terms of those undertakings. I grant that application and set out in this determination the terms of Mr Pitman's undertakings, which are now the orders of the Authority, and take effect immediately".

[11] Mr McRae submits that this is a normal event in the context of an urgent application for interim injunctive relief and that the respondent offered and the applicant accepted undertakings that would allow the reasonable preservation of the applicant's position in the interim until the substantive issues could be considered and determined according to law.

[12] Mr McRae refers to clause 7 of the consent determination which stated as follows:

The substantive investigation shall proceed on 1st and 2nd December

2016 as already arranged. That investigation shall consider whether the post-employment restraints of trade and restrictive covenants

relied upon by the applicant are enforceable, whether Mr Pitman has

breached any of them and, if so, what damages may be due to the applicant.

[13] Mr McRae's submission is that, contrary to the way Mr Goldstein paraphrased it, this clause anticipates and requires that the case must still be decided in terms of the restraints of trade and prohibition on non-solicitation contained in the original clauses, not the undertakings.

[14] Mr McRae submits that Mr Pitman has not agreed to his employment agreement being amended, and the enforceability or otherwise of restraints fall to be determined by reference to the agreement's original terms.

Determination

[15] I must accept Mr McRae's submissions in preference to Mr Goldstein's in this matter. Mr McRae's characterisation of the purpose of the consent determination is entirely correct. It would be pushing its purpose too far to suggest that it also had the effect of varying Mr Pitman's employment agreement. That is not what is stated in the consent determination.

[16] Furthermore, and I believe this is the key point which must render Mr Goldstein's argument incorrect, the rewriting of the restraint of trade and non- solicitation clauses in the way suggested would have a retrospective effect, in that actions taken by Mr Pitman between 23 September and 27 October 2016 which may not have been unlawful, by virtue of the unenforceability of the clauses, could be retrospectively rendered unlawful by the "rectification" of those clauses.

[17] Whilst it is possible in law to have retrospective agreements, these arise where the parties have proceeded on the basis of an inchoate agreement with an expectation of a later agreement being applied retrospectively2. This is a completely different

scenario. I cannot accept that Mr Pitman would have agreed to enter into the undertakings if it had been expressly made clear to him that the effect of doing so would have been to have deprived him of a key plank of his defence in the proceedings; namely that the restraint of trade and non-solicitation clauses were unenforceable.

Conclusion

[18] I find that the effect of the consent determination dated 28 October 2016 does not have the effect of rewriting the restraint of trade and non-solicitation contained in Mr Pitman's employment agreement dated 10 February 2016. Accordingly, the issue of enforceability of these clauses remains a live issue in the proceedings before the

Authority.

2 Section 3.7.5 of Burrows, Finn & Todd, Law of Contracts in New Zealand, 5th ed, LexisNexis

2016

Costs

[19] Costs are reserved. They will be addressed when the substantive matter has been disposed of.

David Appleton

Member of the Employment Relations Authority
