Employment Court of New Zealand

Air New Zealand Limited v Kerr [2013] NZEmpC 141 (26 July 2013)

Last Updated: 9 August 2013

IN THE EMPLOYMENT COURT AUCKLAND

[2013] NZEmpC 141

ARC 38/13

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

AND IN THE MATTER of an application for further disclosure, an application for leave to extend time to file briefs in reply, an application for leave to file an amended statement of claim

BETWEEN AIR NEW ZEALAND LIMITED Plaintiff

AND GRANT KERR Defendant

Hearing: (on the papers by way of submissions dated 10, 18, 22 and 24

July 2013)

Counsel: Jennifer Mills and Christie Hall, counsel for the plaintiff

Peter Chemis, Hamish Kynaston and Jennifer Howes, counsel for the defendant

Judgment: 26 July 2013

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

The application

[1] On 11 July 2013, Air New Zealand Limited (the plaintiff) filed an application for further disclosure. As the case had been granted urgency, a telephone directions conference was convened for later that same day. After discussion, counsel for the defendant, Mr Chemis, invited the Court to reject the application but instead I made a timetabling order allowing the opportunity for both parties to present written submissions in relation to the application.

[2] As the proceeding is set down for a three-day hearing before me next week, commencing on 31 July 2013, I propose to say no more about the facts of the case at

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2013]

this stage than is absolutely necessary. The defendant (Mr Kerr or the defendant) had been employed as General Manager of one of the plaintiff's wholly-owned subsidiaries, Air Nelson Limited. On 4 February 2013, Mr Kerr gave notice of his resignation. He informed the plaintiff that on 5 August 2013 he intended to commence employment with Jetstar Airways Limited (Jetstar) in the position of Head of New Zealand. Since his resignation, Mr Kerr has served his notice period on what is called "garden leave" and the plaintiff has continued to pay his remuneration as provided for in the employment agreement.

[3] In their employment agreement the parties agreed, inter alia, to a confidentiality clause and to a six-month post employment restraint provision which the plaintiff contends will remain in force until 4 February 2014. The plaintiff alleges

that the actions of the defendant are or will be in breach of the employment agreement. Apart from the restraint provision, it is pleaded that the defendant has breached an implied term of fidelity and that there is a significant risk that he will (whether knowingly or inadvertently) breach his obligations of confidentiality. By way of relief, the plaintiff seeks a permanent injunction, a compliance order, an enquiry as to damages, a penalty order for breach of the employment agreement, interest, costs and disbursements.

[4] For his part, the defendant alleges that the post employment restraint provision preventing competition is unlawful and unenforceable and cannot be modified to provide a party with more than it bargained for. He denies the other allegations.

[5] As the Court understands it, informal disclosure has already taken place between the parties. On 25 June 2013, I issued consent orders relating to the handling of various confidential documentation to be made available through that process. The application before me relates to the plaintiff's request for further disclosure. The plaintiff now seeks disclosure of documents and communications relating to the defendant's recruitment and employment with Jetstar including his employment agreement and any financial incentives. The documentation requested and the order sought in the application are described as follows:

(a) a copy of any communications, file notes, memoranda and/or written documentation regarding the negotiations or exchanges

between Mr Kerr and Jetstar regarding the terms and conditions of his employment with Jetstar, and his position with Jetstar more generally;

(b) a copy of Mr Kerr's employment agreement and position description for the position of Head of New Zealand at Jetstar (with any salary information redacted);

(c) a copy of any documentation regarding long term incentive (LTI) or short term incentive (STI) entitlements, or the conditions upon which any other bonus entitlements are based (with the level of any bonus, or amount payable, redacted);

(d) all correspondence (whether sent by email or any other documentary form) between Mr Kerr and Derwent Executive (including any email attachments) between July 2012 and

5 February 2013;

4. In the event that the Court makes the orders outlined above, the plaintiff respectfully requests an order that:

(a) the independent expert instructed by the parties to review Mr Kerr's home computers, be required to search for the above information.

[6] The defendant opposes the application on two grounds. First, he contends that the plaintiff is not entitled to further disclosure because the documents sought are not relevant to the proceeding and, secondly, in reliance on reg 39(2) of the Employment Court Regulations 2000 (the Regulations) and the judgment of this Court in *New Zealand Air Line Pilots Association Inc v Jetconnect Ltd (No 2)*,[1] he contends that a party is not required to give disclosure of documents in any case where a plaintiff seeks a penalty.

The law

[7] Regulations 37-52 of the Regulations codify the provisions relating to disclosure and inspection of documents. Regulation 38(1) provides:

38. Relevant documents

(1) For the purposes of regulation 37 and regulations 40 to 52, a document is relevant, in the resolution of any proceedings, if it directly or indirectly–

(a) supports, or may support, the case of the party who possesses it;

or

(b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or

(c) may prove or disprove any disputed fact in the proceedings; or

(d) is referred to in any other relevant document and is itself relevant.

[8] Regulation 39 provides:

39. Applicability

(1) Subject to subclause (2), regulations 40 to 52 apply to all proceedings in the Court.

(2) Nothing in regulations 40 to 52 applies to any action for the recovery of a penalty.

[9] In terms of relevance, both parties accepted that the leading authority regarding relevance in the Employment Court is the decision of the Court of Appeal in *Airways Corporation of New Zealand Ltd v Postles*.[2] In that case, the Employment Court had ordered the plaintiff to discover and produce for inspection all documents containing the development, operation and review of a certain employment policy. The respondents were air traffic controllers who claimed that the policy had been applied to them in breach of their employment contract and to their detriment. The plaintiff contended that it did not apply to them although it

admitted the policy was in force at an earlier time. Following an earlier decision of Chief Judge Goddard in *Kelly v Accident Rehabilitation and Compensation Insurance Corporation*,[3] the Employment Court ordered production of the documents holding that a matter may be relevant even if it is not one on which direct issue had been joined in the pleadings.

[10] The Court of Appeal allowed the appeal, concluding that the development of the policy in question did not have any relevance to the key issue raised in the pleadings. Delivering the judgment of the Court, Tipping J stated:

[5] With respect we consider the Judge erred in law in drawing for present purposes a distinction between pleadings and proceedings. The pleadings define the ambit of the proceedings, and thereby define the issues to which questions of relevance must be related. While the concept of relevance should not be looked at narrowly, it can never be divorced from the issues raised by the pleadings. That is what is meant by the reference in reg 48 to any disputed matter in the proceedings.

[11] Counsel also referred to the more recent decision of this Court in *Lawrence v*

Lock[4] where the Court stated:

[14] The starting point in determining whether any document is relevant to particular proceedings is the pleadings. That is because the pleadings describe the case of each party and, to a large extent, identify issues of fact.

[12] Although overseas case law authorities need to be considered with some degree of caution, in *Framus Ltd v CRH plc*,[5] the Supreme Court of Ireland was called upon to consider the requirement that documents sought on discovery must be relevant, directly or indirectly, to the matters in issue between the parties in the proceedings. In doing so, the Supreme Court endorsed the following statements of principle:

(1) The Court must decide as a matter of probability as to whether any particular document is relevant to the issues to be tried. It is not for the Court to order discovery simply because there is a possibility that documents may be relevant.

(2) Relevance must be determined in relation to the pleadings in this specific case. Relevance is not to be determined by reason of submissions as to alleged facts put forward in Affidavits in relation to the application for further and better discovery unless such submissions relate back to the pleadings or to already discovered documents ...

(3) It follows from the first two principles that a party may not seek discovery of a document in order to find out whether the document may be relevant. A general trawl through the other party's documentation is not permitted under the rules.

(4) The Court is entitled to take into account the extent to which discovery of documents might become oppressive, and should be astute to ensure that the procedure of discovery is not used as a tactic in the war between the parties.

Submissions

[13] The plaintiff has described the documents sought in its present application as falling into two categories:

(a) information relating to the defendant's negotiations with Jetstar for the Head of New Zealand role and his subsequent employment documentation with Jetstar; and

(b) correspondence between the defendant, Jetstar and the recruiters who placed him in the Jetstar role - Derwent Executive.

[14] In relation to the first category, the plaintiff claims that the documentation sought is relevant in terms of reg 38(1)(b) in that it supports or may support the plaintiff's case. It is alleged that the documents sought relate to matters pleaded in the plaintiff's statement of claim, in particular paragraph 13 which provides:

13. The actions of the defendant are or will be in breach of the

Employment Agreement.

Particulars

(a) The defendant has notified the plaintiff that he intends to breach clause 5(a) of the Employment Agreement by

commencing employment with Jetstar on or around 5 August 2013.

(b) The defendant has breached the implied term of fidelity contained in the Employment Agreement by:

(i) notifying the plaintiff, while still in employment, that he does not intend to comply with a fundamental term of the Employment Agreement; and

(ii) publicising his appointment with Jetstar while still an employee of the plaintiff.

(c) If the defendant commences employment with Jetstar in breach of clause 5(a) of the Employment Agreement, there is a significant risk that the defendant will (whether knowingly or inadvertently) breach confidentiality obligations set out in clause 3.2 of the Employment Agreement.

[15] The plaintiff contends that the documentation referred to at [5](a), (b) and (c) above, which is encapsulated in the first category of documentation described in [13](a) above, should be disclosed because it is relevant to the pleading in paragraph

13(c) of the statement of claim, namely that Mr Kerr will knowingly or inadvertently

disclose the plaintiff's confidential information. Counsel for the plaintiff submitted:

19. ... the documentation sought regarding the role that the defendant will be carrying out, and the duties and responsibilities of that position, relates directly to the degree of risk of deliberate or inadvertent disclosure of the plaintiff's confidential information to Jetstar. The degree of risk relates directly to the question of whether the confidentiality clause in the defendant's employment agreement provides sufficient protection to the plaintiff's legitimate proprietary interests and the core question of whether the additional restrictive covenant is necessary.

20. By way of example, if the defendant's terms and conditions of employment or position description state that a major part of the defendant's role is to expand Jetstar's market share (necessarily at the plaintiff's expense), to explore the possibility for regional expansion or to develop a strategic response to deal with Jetstar's competitors, then this would serve to support the plaintiff's pleadings in respect of the risk of inadvertent disclosure.

[16] In response, counsel for the defendant submitted that the plaintiff's submission was "a novel submission, unsupported by the case law." Elaborating on this point, counsel stated:

8. ... The plaintiff does not need information about Mr Kerr's remuneration or job description to make an argument that there is a risk of inadvertent disclosure. That is a matter of submission, based on the case law.

9. Nor will it assist the plaintiff or the Court to know the precise terms of

Mr Kerr's remuneration structure or employment agreement.

10. Mr Kerr is going to work as the 'Head of New Zealand' for Jetstar, the plaintiff's main Australasian competitor in a highly competitive industry. The risk of Mr Kerr disclosing information - and the outcome of this case - will not depend on what or how he is paid, or his 'KPIs'. It will depend on what proprietary information (if any) Mr Kerr has and whether it is lawful, necessary and reasonable to restrain him from working for Jetstar for a further period in circumstances where he will have been out of the workforce for six months, and has not seen any proprietary information for approximately eight months.

[17] Turning to the documentation referred to in [5](d) above, which is encapsulated in the second category of documentation described in [13](b) above, the plaintiff contends that it should be disclosed because, it would either support the case of the plaintiff or the defendant or would prove, or disprove, a disputed fact in the proceeding. Reference is again made to the provisions of paragraph 13(c) of the statement of claim (see [14] above) but the reference to the pleadings is rather oblique. Instead, reference is made to a lengthy letter dated 27 February 2013 which the defendant sent to the plaintiff and to an affidavit filed in the proceedings on behalf of the plaintiff in which the deponent expressed concern that, despite Mr Kerr's assertions to the contrary, he "may have accessed confidential information while he was in discussions with Jetstar."

[18] In response, counsel for the defendant submitted that there was no basis on which the plaintiff could seek disclosure of the second category of documentation described in [13](b) above relating to correspondence between the defendant and Jetstar's recruiter, Derwent Executive, because there is no allegation in the statement of claim that Mr Kerr disclosed confidential information to Derwent Executive.

Discussion

[19] For the reasons stated in [2] above, I do not intend to make any further reference to the correspondence or affidavit evidence referred to in [17]. The difficulty with the plaintiff's application for further disclosure, however, is that questions of relevance must be related to the pleadings and, as the defendant submits, the issues defined in the pleadings do not extend to the category of documentation identified by the plaintiff in [13] above. In paragraph 8 of the statement of claim, the plaintiff describes the nature of the confidential information the defendant was privy to during his employment with the plaintiff. The

plaintiff then pleads that on 4 February 2013 the defendant provided notice of his resignation. At the same time he informed the plaintiff that he had accepted employment with Jetstar in the position of Head of New Zealand and that he intended to commence employment with Jetstar on 5 August 2013. The plaintiff further pleads, "Jetstar is concerned in business activities which are in competition with the business carried on by the plaintiff and its related companies."

[20] Those pleadings form the basis for the allegation in paragraph 13(c) of the statement of claim (which appears under the heading "Particulars") relating to the risk of the defendant knowingly or inadvertently breaching his confidentiality obligations. There is no issue raised in the statement of claim relating to the defendant's employment negotiations with Jetstar, his employment agreement or his correspondence with Derwent Executive. As the Court of Appeal emphasised in *Postles*, the pleadings define the issues to which questions of relevance must be related. An application for disclosure cannot be based on mere suspicion or speculation falling outside the ambit of the pleadings. For the reasons stated, I am not satisfied that the additional documentation for which disclosure is sought is relevant in terms of reg 38 of the Regulations, nor have I been persuaded that

disclosure is necessary for the fair and effective resolution of the matters in issue.

The plaintiff's application for further disclosure is, therefore, declined.

[21] My conclusions in this regard are sufficient to dispose of the plaintiff's application for further disclosure and it is unnecessary for me to consider the further ground (noted in [6] above) advanced by the defendant in opposition to the plaintiff's application, namely, the penalty privilege contained in reg 39(2) of the Regulations. For completeness, however, I record that in response to that submission, the plaintiff sought to distinguish the *Jetconnect* decision on the basis that in the present case the penalty is not sought in respect of the cause of action relating to the restraint of trade provision to which the disclosure application relates. It was submitted that the claim for a penalty related to a separate cause of action, namely, the defendant's alleged breach of his duty of fidelity in publicising his appointment with Jetstar while still in the plaintiff's employment (pleaded in paragraph 13(b)(ii) of the statement of claim - (see [14] above)). The plaintiff sought leave, if necessary, to file an amended statement of claim confirming this intent.

[22] The defendant opposed the plaintiff's application to amend the statement of claim on the grounds that it had not been accompanied by an affidavit verifying the grounds on which the application was made as required by reg 13A of the Regulations and on the grounds that it had been made solely to facilitate the disclosure of documents. Counsel for the defendant also submitted that, contrary to the plaintiff's submissions, there were actually two breaches of fidelity pleaded, namely, that Mr Kerr publicised his appointment with Jetstar while still in the plaintiff's employment and also that he notified the plaintiff, while still in its employment, that he did not intend to comply with the non-competition provision in his employment agreement.

[23] Both of the submissions raised by the defendant would appear to be correct. Had it been necessary, however, I would have accepted the plaintiff's primary submission that, as pleaded, the penalty claim can only relate to the alleged breach of fidelity cause of action and not to the restraint of competition cause of action. The reasoning for this conclusion being simply that a penalty cannot be sought in respect of an intended or future breach and it is not alleged that any breach of the defendant's restraint of trade or confidentiality obligations has yet occurred. For

these reasons, I do not consider that disclosure would have been precluded by the penalty privilege provision in reg 39(2) of the Regulations.

[24] Another interlocutory matter has been raised which I will briefly deal with now so that the parties can concentrate on preparation for the substantive hearing scheduled for next week. In my interlocutory judgment[6] of 9 July 2013, I made certain timetabling orders including an order that the plaintiff was to file any briefs of evidence in reply by 5.00 pm on Monday, 22 July 2013. A brief of evidence in reply by Mr Bruce Parton was duly filed in time. Yesterday, however, the plaintiff made application for leave to file an additional brief of evidence in reply from

Ms Sarah Williamson and a final version of Mr Parton's brief of evidence in reply. Copies of the proposed briefs in reply were filed with the application and the application fully particularised the grounds upon which it was based.

[25] No formal response has been received from the defendant to the plaintiff's application for leave to file further evidence in reply but the Registrar was able to make contact with one of the defendant's counsel during the luncheon adjournment of a court case he is presently engaged in. Counsel for the defendant advised that his instructions were that the defendant did not consent to the evidence being filed late and he stressed the fact that the parties had known their respective deadlines for some weeks. Whilst that is correct, the situation is that this entire proceeding has proceeded under urgency and in those circumstances a certain amount of flexibility is often necessary in order to do justice between the parties. I am satisfied that the grounds for the plaintiff's late application to file the additional evidence in reply have been properly made out and fully explained in the application. The application to adduce the further evidence in reply is, therefore, granted.

[26] For the reasons stated, the plaintiff's application for further disclosure is declined but its application for leave to file additional evidence in reply is granted. Costs are reserved.

A D Ford
Judge

Judgment signed at 10.30 am on 26 July 2013

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[1] [2009] ERNZ 207.

[2] [2002] NZCA 155; [2002] 1 ERNZ 71 (CA).

[3] [1996] NZEmpC 246; [1996] 2 ERNZ 693.

[4] [2012] NZEmpC 9.

[5] [2004] IESC 25; [2004] 2 IR 20.

[6] [2013] NZEmpC 126.
