

then placed at a disadvantage because PGW subsequently resiled from its initial waiver and sought to impose the restraint after all.

[3] PGW resists all of Mr Blincoe's claims, contending that the restraint is not unlawful and therefore enforceable and denying that there was a waiver of the enforcement of the restraint in the agreement. PGW accepts that there was a *conditional waiver* but alleges that as the conditions of the waiver were not subsequently met, the conditional waiver was a nullity and the restraint remained.

[4] In the normal course of events, urgent applications for interim relief such as this one, would be dealt with exclusively by way of oral argument before the Authority, supported by appropriate affidavit evidence. However, in the particular circumstances of this case, as one of the principal bases on which Mr Blincoe brought his claim turned what happened in a meeting between Mr Blincoe and a senior manager of PGW, with the able assistance of counsel, I directed that both Mr Blincoe and Mr Robert Sharkie, the senior manager concerned, be available to the Authority (and counsel) to give oral evidence and to respond to questions.

[5] Accordingly, the Authority's hearing proceeded first by the examination of the two witnesses giving oral evidence and then by way of oral submissions confirmed in writing. While only one of the grounds of Mr Blincoe's application is affected by the oral evidence heard by the Authority, it is convenient for the purposes of this determination to describe that evidence first and then revert to the more traditional structure of determinations such as these, which turn on the four broad questions required to be answered by the Authority in granting or refusing interim relief of this kind.

The oral evidence

[6] In order to place the oral evidence in context, it is useful to sketch the background, which is common ground. Mr Blincoe was a senior and experienced livestock representative specialising in the dairy industry. He had worked for PGW for many, many years and was held in high esteem by that firm.

[7] It is accepted that Mr Blincoe was previously subjected to a restructure within PGW which, to put it shortly, caused him distress. It seems to be accepted that he vowed and declared at the time that he would not undergo a restructure again and that were one to happen, he would leave.

[8] PGW initiated a fresh restructure on 11 October 2010, the effect of which was to disestablish four positions within the Canterbury dairy livestock area, which included Mr Blincoe's own position. PGW was very clear that Mr Blincoe would have been appointed to one of the restructured full time positions, had he involved himself in PGW's process. Like other applicants, Mr Blincoe was given until 22 October to advise PGW if he wished to be considered for one of the new roles.

[9] Mr Blincoe was as good as his word and made it clear to his immediate superior, Mr Shane Dickson, that he was not applying for any of the new positions and that in fact he was resigning from PGW. He indicated this intention first in a telephone discussion with Mr Dickson on 20 October 2010. It is apparent to the Authority from the evidence available to it that PGW was both surprised and disappointed that Mr Blincoe had decided to leave the business.

[10] Two days later, on 22 October 2010, Mr Blincoe met with Mr Sharkie who was then PGW's regional manager. It is what happened in that conversation that is central to the question whether PGW waived its right to enforce the restraint or not.

[11] It was plain to the Authority from the exchanges between the two men during the course of the investigation meeting and their subsequent behaviour immediately after the formal proceedings were over, that Mr Blincoe and Mr Sharkie had a strong personal relationship and, not to put too fine a point on it, that each trusted the other. Both men gave credible, level-headed evidence and both struck me as honest and believable.

[12] Notwithstanding that, their accounts of the meeting on 22 October 2010 are quite different. There were no other witnesses to the discussion and no notes were taken by either party. The essence of what Mr Blincoe took out of the meeting with Mr Sharkie was that the latter had told him definitively that the restraint would not be enforced by PGW and Mr Blincoe then proceeded to arrange his affairs accordingly, in particular by obtaining fresh work with a competitor. Having done that and signed the employment agreement with the competitor (CRT) on 28 October 2010, Mr Blincoe was then told by his direct manager, Mr Dickson, on 5 November 2010 that the restraint would be enforced and that intelligence was confirmed in writing in a letter dated 10 November 2010. It is common ground that Mr Blincoe received a memorandum from Mr Dickson dated 28 October which referred to his imminent departure but did not refer in any way to the restraint of trade issue.

[13] PGW says that Mr Sharkie did no more than indicate that, based on what Mr Blincoe had said in the interview, Mr Sharkie did not believe the restraint would be invoked but that the matter would have to be clarified in writing. Mr Sharkie was clear that what he was told by Mr Blincoe was that the latter had no job to go to and it was on that basis that Mr Sharkie says that he indicated that the restraint would not be *invoked*. This is why PGW says the waiver of the restraint was conditional; it was conditional, it says, because it was based on what Mr Blincoe said he was doing when he finished up.

[14] Mr Blincoe says that he went to the meeting with Mr Sharkie without having the question of the restraint uppermost in his mind. Mr Blincoe claims that he did not ask about the restraint during the conversation the two men had, and that Mr Sharkie volunteered the information about the restraint. The meeting with Mr Sharkie was apparently designed to give Mr Sharkie the opportunity of trying to talk Mr Blincoe into staying. But Mr Blincoe was adamant he was going. Mr Blincoe's evidence is that once Mr Sharkie accepted that he (Mr Blincoe) was not going to change his mind about leaving, Mr Sharkie then set out what would happen. Indeed, Mr Blincoe remembers Mr Sharkie saying *this is what will happen*. Mr Sharkie denies saying those words. According to Mr Blincoe, Mr Sharkie said that he would go onto garden leave for a month but that he would have the next few days to finish up what he was doing and then start the garden leave. He had to hand in the PGW gear that he had by 28 October 2010, according to Mr Blincoe, but he could keep the car until 17 November 2010. Then, critically, Mr Blincoe said that Mr Sharkie told him *there will be no restraint of trade*. Mr Blincoe's brief of evidence then continues:

He said they would not be going down that track, and wouldn't impose one on me.

[15] In his oral evidence, Mr Blincoe also remembered Mr Sharkie saying something to the effect *I don't believe in people sitting on their bums doing nothing*, being a reference to the restraint process. Mr Blincoe was challenged by counsel for not including that last mentioned observation in his brief of evidence, but he maintained that Mr Sharkie had said something to that effect.

[16] Mr Blincoe was also clear in his evidence before the Authority that he did not tell Mr Sharkie where he was going to be working after the employment with PGW ended because at that time he did not know where he would be working. Even later

on when he had already made his ongoing employment arrangements, Mr Blincoe is adamant that nobody from PGW ever asked him where he was going and that had they asked him, he would have told them quite openly.

[17] Mr Sharkie's recollection of that conversation is, as I have already noted, quite different. First, Mr Sharkie made the point that, having received Mr Blincoe's written resignation and read it, he immediately apologised if anything had done to Mr Blincoe had *pissed him off*. Mr Sharkie claims that Mr Blincoe raised the question of the restraint of trade whereas Mr Blincoe claims that he never raised it at all. Whoever raised it first, it is clear from Mr Sharkie's evidence that he did say to Mr Blincoe that the restraint would not be *invoked* but he claims to have articulated to Mr Blincoe that that statement was made in response to Mr Blincoe's intelligence that Mr Blincoe had nowhere to go workwise. Mr Sharkie says that Mr Blincoe told him specifically *that he had nowhere to go* and that was why Mr Sharkie made the observation he did about the restraint. When I asked Mr Sharkie whether it was possible that Mr Blincoe had said words to the effect nowhere to go *at this point*, Mr Sharkie accepted that that was quite likely. Of course, it is plain from the evidence that, in truth, Mr Blincoe did have nowhere to go on 22 October 2010. He had after all only resigned (verbally) two days earlier and his evidence (which seems to have been accepted by PGW), was that he made no active steps to obtain alternative employment; potential employers came to him to solicit him working for them. Under questioning from counsel for PGW, Mr Blincoe considered that it was more likely than not that he had not received the CRT offer until after he met with Mr Sharkie.

[18] Mr Sharkie also denied Mr Blincoe's evidence that there was any mention of garden leave and he was adamant that he made it clear the whole arrangement would be the subject of subsequent written communication. He said in his brief:

My concern with Rob's actions while he was employed was that he did not divulge to me in our meeting on 22 October 2010, or at any other time, that he was in discussions with potential competitors, specifically CRT.

[19] However, as I have already made clear, I am satisfied on the evidence that at the point at which the seminal discussion took place, that is 22 October 2010, Mr Blincoe had no offer from CRT and Mr Blincoe is adamant that while he never volunteered any information, either to Mr Sharkie at that meeting or in any subsequent discussion with Mr Sharkie, or indeed with anybody else from PGW, *if*

Rob [Mr Sharkie] had of asked me I would have told him that I was going to CRT, when I knew. It is plain also from Mr Sharkie's evidence that the reason he did not press Mr Blincoe about where he was going, either at the 22 October meeting or subsequently, was because he still entertained the hope that Mr Blincoe might not be lost to the organisation. He was anxious not to do anything which would make it more difficult to try to persuade Mr Blincoe to change his mind and stay. Mr Sharkie told me frankly that he did not want to *piss Mr Blincoe off even more.*

[20] It is also apparent on the evidence that Mr Sharkie did not tell Mr Blincoe that he would need to meet with senior managers and human resources about the issue and Mr Sharkie also confirmed in response to a question from counsel that even if Mr Blincoe had told him clearly that he was intending to go to CRT, Mr Sharkie would still have adopted broadly the same approach but done it more quickly.

[21] Mr Blincoe points out, not surprisingly, that having been told (on some basis or another) that the restraint would not be invoked when he met with Mr Sharkie on 22 October, it was not until 5 November that he was told verbally that the restraint would be invoked and not until 10 November that that was confirmed in writing. Mr Blincoe protests (understandably) that that delay is unreasonable and that a fair and reasonable employer would assume that somebody who was able and in demand would continue to work and would be looking for alternative ways of earning an income. Mr Blincoe also stoutly maintained, as I noted above, that if any of these PGW managers had asked him, he would have told them where he was going if he knew at that time.

[22] While it is always difficult to draw conclusions from only hearing part of the evidence, of necessity the Authority must make some provisional conclusions about the 22 October meeting between these two men. The first conclusion that can safely be drawn is that the purpose of the meeting was to enable Mr Sharkie to endeavour to persuade Mr Blincoe not to persevere with his apparent intention to resign. I accept Mr Sharkie's evidence that he apologised to Mr Blincoe for causing him any distress but it seems to me likely that, having failed to turn Mr Blincoe, Mr Sharkie would then have dealt with the termination of the employment relationship in a businesslike way. While there is difference between the two protagonists about exactly what those arrangements were, the only thing of moment is what was agreed in respect of the restraint. There is dispute about who raised the issue of the restraint itself. Nothing

turns on that question, but I am satisfied that the evidence discloses that Mr Sharkie gave Mr Blincoe some basis for understanding that the restraint would not be imposed. Both men agree that Mr Sharkie said words to that effect, although Mr Sharkie's evidence is that those words were qualified by his reliance on what little Mr Blincoe told him.

[23] Given that at the time this meeting took place I am satisfied on the evidence that Mr Blincoe did not know what he would be doing in the future, it seems to me that the message which Mr Blincoe took from Mr Sharkie's remarks was the right one, namely that no restraint would be imposed. This is because I am satisfied that Mr Blincoe had no knowledge of where he was going so even if Mr Sharkie's recollection of events is absolutely accurate, any qualification that he put on his remarks about the restraint would be a nullity anyway because Mr Blincoe had no information, **at that time**.

[24] Mr Blincoe then promptly went ahead and on and from 28 October 2010, had a settled intention of moving to CRT. He had entered into that arrangement on the explicit understanding that PGW would not enforce the restraint. I am satisfied that is the case because of the affidavit evidence filed on Mr Blincoe's behalf by CRT managers who record what Mr Blincoe told them.

[25] It seems to me self-evident that Mr Blincoe relied on the statement made by Mr Sharkie that the restraint would not be invoked and arranged his affairs accordingly. Arguably, if Mr Blincoe had not been given to understand that was PGW's position, his own actions and/or the actions of CRT might have been different. PGW simply says that if Mr Blincoe relied on the statement made by Mr Sharkie, then he was placing undue reliance on a conditional statement. But if, as the Authority accepts, Mr Blincoe had no settled intention of taking any steps on 22 October 2010, and even if it is accepted that Mr Sharkie placed the conditions that he remembers placing on the statement about invoking the restraint, the condition which PGW relies upon is really no condition at all. Mr Sharkie may well have relied on what little Mr Blincoe told him at that time, but Mr Blincoe knew very little about what his intentions were in the future and it was not until later that those intentions firmed up, by which time Mr Blincoe had acted in reliance on Mr Sharkie's statement that the restraint would not be invoked.

[26] In my opinion, the onus was really on Mr Sharkie to make clear what the basis of PGW's restraint policy might be. If, for instance, Mr Sharkie had said that the restraint would not be invoked if Mr Blincoe were not going to a direct competitor for instance, then that would have placed Mr Blincoe in some greater knowledge than was the case here. Similarly, if Mr Sharkie had said to Mr Blincoe that if Mr Blincoe were to firm up on his future and decide to work for a direct competitor then the restraint would be imposed, that also might have assisted Mr Blincoe to make sensible arrangements about his future. As it was, I am satisfied that the factual position is that that condition was no condition at all because, at the time, Mr Blincoe told Mr Sharkie what little he knew about his future.

[27] I am reinforced in that conclusion by the fact that PGW effectively gave an intimation of its view on the restraint in the meeting on 22 October and then, whatever the explanation, took more than two weeks to tell Mr Blincoe that it had changed its mind, and even longer to confirm that in writing. PGW must have expected that Mr Blincoe would seek to earn a living and that he was likely to try to do that within his area of expertise. It must have known that by delaying it risked precisely this outcome.

[28] Furthermore, I am also reinforced in my conclusion by the fact that it is common ground that Mr Blincoe was not told that Mr Sharkie would need to meet with senior managers to discuss the matter. Even Mr Sharkie's evidence is clear about that. And again, that meeting did not take place until 3 November, long after Mr Sharkie's intimation that the restraint would not be invoked.

[29] In conclusion then, my provisional view, for the purposes of this interim application, is that it was reasonable for Mr Blincoe to regard the intelligence that he received from the 22 October meeting that the restraint provision would be waived. Both protagonists acknowledge that Mr Sharkie said something to the effect that the restraint would not be invoked; the only gloss is that PGW maintains that Mr Sharkie made that waiver conditional on what Mr Blincoe told him. But as I have made clear, at the time this meeting took place, Mr Blincoe had no idea what he was going to do and so the condition was no condition at all.

The application for interim relief

[30] The law relating to interim injunctions is usually encapsulated in three or four discrete issues or questions. For present purposes, the Authority poses the following four questions:

- (a) Does Mr Blincoe have an arguable case;
- (b) Would damages be an alternative remedy;
- (c) Where does the balance of convenience lie; and
- (d) What is the overall justice of the case?

Does Mr Blincoe have an arguable case?

[31] I am satisfied Mr Blincoe does have an arguable case. I have already dwelt at length on the evidence about the 22 October meeting and I am satisfied that, having concluded that it was reasonable for Mr Blincoe to rely on the observations of Mr Sharkie to the effect that the restraint would not be invoked, it follows that Mr Blincoe has an arguable case for the relief he seeks, namely an interim order enabling him to commence work with CRT on 29 November 2010.

[32] In addition, Mr Blincoe also argues that the restraint itself, looked at in its totality, is illegal by reason of being too wide. In that regard, Mr Blincoe also points out that PGW has pleaded that the restraint is enforceable and it has not sought to argue its modification pursuant to s.8 of the Illegal Contracts Act 1970.

[33] On its face, I accept that there is some difficulty with the scope of the restraint clause as drafted. It is trite law that restraints of trade are prime facie unenforceable because they are void for public policy reasons. However, it is held to be in the public interest that a restraint will be upheld if it is reasonably necessary to protect proprietary interests.

[34] Here, those proprietary interests are clear enough. Mr Blincoe has significant skills and abilities in his chosen field. He is well regarded within his industry by employer and client alike. Wherever he works, he will likely have a significant following. A restraint designed to limit his effectiveness for a short period to enable

his former employer to re-establish client contacts in the marketplace with a new employee is, I consider, a reasonable restraint.

[35] However, I am satisfied that the restraint clause in this agreement goes further than what is reasonable. I accept the submissions made on Mr Blincoe's behalf that the clause is just too wide. Clause 20.2, for instance, seems, on its face, to restrain Mr Blincoe from doing any work which competes with any like work being performed by PGW. It follows that Mr Blincoe is restrained from any profession or calling which is provided by PGW and that I am satisfied goes further than the necessary protection of PGW's proprietary interests.

[36] There are similar problems with clause 20.4.2 which would prevent Mr Blincoe from seeking orders from any clients of PGW anywhere in New Zealand. In relation to this part of the provision, there is no geographical limitation at all. Again, that seems to me to go further than is necessary to protect PGW's proprietary interests.

[37] Finally, clause 20.4.3 is also, in my opinion, too widely drawn as it restrains Mr Blincoe from doing any work for any person who is or was a recent PGW client.

[38] I am satisfied, then, that there is an arguable case that the restraint clause in the agreement is illegal by reason of being too wide and therefore unenforceable.

[39] Finally under this head, I note that Mr Blincoe also advances a claim for unjustified disadvantage. This is on the footing that Mr Blincoe was told that the restraint would not be relied upon on 22 October and then, two weeks later, he was told something different. It is suggested that this change in position by PGW constituted a disadvantage to Mr Blincoe and that because the election had already been *used*, it constitutes an unjustified action. Certainly, I have already made clear that my provisional view is that it was reasonable for Mr Blincoe to conclude that PGW was not relying on the restraint by the words uttered by Mr Sharkie at their meeting on 22 October. Further, the agreement is clear that the election by the employer to rely on the restraint or not is not associated with any particular formality; in particular, it does not have to be conveyed in writing. Furthermore, it is plain on the face of the agreement that there cannot be, as it were, more than one election; once the election is made, that is it. Again, I think these contentions are arguable.

[40] I conclude then that on the basis of the several contentions of Mr Blincoe, he has an arguable case for the interim relief that he seeks.

Would damages be an alternative remedy?

[41] I am satisfied that damages would not be an appropriate alternative remedy. Effectively, Mr Blincoe seeks the Authority's assistance to fulfil his contractual obligations to CRT, which obligations he has entered into in good faith. He says (and I accept) that he hates being idle and that it would be difficult for him to not work and simply be paid as the restraint clause in his agreement with PGW provides. It is difficult to see how damages could ameliorate those understandable feelings.

[42] Of more import, though, is the damage to Mr Blincoe's reputation with his new employer. As I mentioned above, Mr Blincoe has entered into a contractual arrangement with CRT and he seeks to fulfil that. It is arguable that any significant absence from the new workplace of the sort that would be in place if the restraint were enforced would both reduce the quality of Mr Blincoe's life in the short and medium term and, more importantly, damage his relationship with his new employer and potentially damage his future income stream.

Does the balance of convenience favour Mr Blincoe?

[43] Here, the Authority has to balance the relative inconvenience to each party of the other succeeding. Looked at practically, the Authority must weigh the relative hardship to PGW of Mr Blincoe being successful against the potential hardship to Mr Blincoe in being restrained from his new employment for a period of three months or until the matter can be brought on for substantive hearing in the Authority if the latter event happens first.

[44] PGW says that granting Mr Blincoe's application and thus enabling him to commence his new employment with CRT immediately will have the effect of making it very difficult for it to introduce a new employee into the marketplace with its client base and would effectively ensure that Mr Blincoe gets a head start in his new employment.

[45] Mr Blincoe's submissions on this question concentrate particularly on the potential damage to CRT in reliance on the decision of Chief Judge Goddard in *Clarke v. Attorney-General* [1997] ERNZ 600 where His Honour made clear that the

interests of parties not before the Court were also relevant factors. Ms Brook, for Mr Blincoe, emphasised the expenses CRT had already incurred in setting up an infrastructure for Mr Blincoe to join it, noting that much of that was in effect a *sunk* cost. In addition, there are ongoing revenue stream implications in that CRT would derive no income from Mr Blincoe's efforts for a three month period and, most importantly in my view, CRT is denied the opportunity of engaging with an alternative potential employee who is not subject to restraint and who can therefore commence in the marketplace immediately.

[46] While I accept that there will be consequences for PGW if the restraint is not enforced, I am not persuaded that they will be as dramatic as is claimed. This is because the evidence before the Authority is that CRT is only now, with Mr Blincoe's engagement, commencing into this marketplace in this area of the country, and it is likely that even a person of Mr Blincoe's experience will take some few months to establish himself in the new environment. I am satisfied that while the matter is finely balanced, the balance of convenience favours Mr Blincoe by a slim margin.

Where does the overall justice lie?

[47] I am satisfied that the overall justice of the case, standing back and looking at all of the evidence available to the Authority, supports the conclusion that Mr Blincoe ought to be granted his application for interim relief, such that he may commence his employment on 29 November 2010 at CRT pending resolution of his application for substantive relief and/or any challenge brought before the Employment Court.

[48] I reach this conclusion for two primary reasons, the first being my considered view that the restraint provision in the agreement is so wide as to be unenforceable and the second is my conclusion that it was reasonable for Mr Blincoe to rely on the statement made by Mr Sharkie that the restraint would not be relied upon.

[49] I am reinforced in those broad convictions by the fact that PGW undertook a restructure and knew or ought to have known the effect of that on Mr Blincoe. Even by its evidence, PGW knew how Mr Blincoe would react. Furthermore, PGW must have had some reasonable apprehension that Mr Blincoe would end up working for a competitor if he left it, and so the statement made by Mr Sharkie that the restraint would not be enforced seems, at best, odd if, as PGW now maintains, that statement did not represent its intention.

[50] As I have already made clear, I am satisfied that the information Mr Blincoe provided Mr Sharkie with on 22 October was accurate at the time and, based on that information, Mr Sharkie told Mr Blincoe that the restraint would not be enforced. Mr Blincoe then acted on that advice, entered into certain obligations, and in my opinion is entitled to proceed with those commitments unless and until a challenge in the Court overturns this determination or the substantive determination deals with the matter differently.

Determination

[51] Mr Blincoe is granted his interim order that he may commence work for CRT on 29 November 2010 pending either a successful challenge in the Employment Court or resolution of his application for substantive relief in the Authority.

[52] For the avoidance of doubt, I record that Mr Blincoe has filed a signed undertaking in the Authority that he will abide by any order that the Authority may make in respect of damages:

- (a) That are sustained by PGW through the granting of the order for interim relief; and
- (b) That the Employment Relations Authority decides that he ought to pay.

Costs

[53] Costs are reserved.

James Crichton
Member of the Employment Relations Authority