



Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2015](#) >> [2015] NZEmpC 208

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Caffe Coffee (NZ) Limited v Farrimond [2015] NZEmpC 208 (26 November 2015)

Last Updated: 1 December 2015

IN THE EMPLOYMENT COURT AUCKLAND

[\[2015\] NZEmpC 208](#)

EMPC 198/2015

IN THE MATTER OF a challenge to objection to disclosure

BETWEEN CAFFE COFFEE (NZ) LIMITED Plaintiff

AND SUNE FARRIMOND Defendant

Hearing: (hearing by telephone held on 5 November 2015) Appearances: D Clark, counsel for the plaintiff

C Patterson, counsel for the defendant

Judgment: 26 November 2015

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] The issue for resolution in this decision is the extent of disclosure which should be given by Mr Farrimond to Caffe Coffee (NZ) Limited (Caffe Coffee).

[2] The context of this issue is a challenge brought by Caffe Coffee to a determination of the Employment Relations Authority (the Authority).¹ The Authority was required to investigate whether Mr Farrimond, who ceased to be an employee of Caffe Coffee on 10 June 2014, had breached or continued to breach the terms of his employment agreement by establishing a competing coffee roasting business, had misused its confidential information and intellectual property, and had

incurred excessive expenditure upon entertainment expenses. It sought injunctions restraining him, and also a penalty.

[3] The Authority determined that Mr Farrimond had not acted unlawfully by breaching his obligations under his employment agreement, except for the incorporating of a company. This breach was not so serious as to justify the imposition of a penalty. No injunction was ordered. Caffe Coffee has challenged the Authority's determination.

[4] By an amended statement of claim dated 6 November 2015, Caffe Coffee now asserts that breaches occurred both before and after Mr Farrimond resigned from the company; and that Mr Farrimond's employment obligations have accordingly been breached.

[5] Caffe Coffee seeks a hearing de novo in respect of the Authority's substantive determination, and its costs determination.² The relief which it now seeks are penalties up to a maximum of \$5,000 per breach, compensatory damages for losses allegedly suffered in a sum to be quantified, and repayment of the expenses incurred for the entertainment of customers which were not approved.

Procedural history

[6] On 31 August 2015, Caffe Coffee served a notice requiring disclosure under reg 42 of the [Employment Court Regulations 2000](#) (the Regulations). The documents which were the subject of the notice were described in this way:

List of documents

The Plaintiff requires disclosure of all documents referred to and defined by

Counsel for the parties in a Consent Memorandum of Counsel dated

12 December 2014 (at paragraph 12) in the Employment Authority proceeding *Caffe Coffee (NZ) Limited v Sune Farrimond* File No. 5530744.

Such documentation should include (but is not limited to);

Purchase of the Roaster

- All emails, phone calls and texts to and from the Defendant and Chinook Air Flow Coffee Roaster regarding the purchase of the Air Roaster commencing from the date Chinook was first contacted to

10 June 2014.

- All documents such as travel itineraries, invoices, receipts and payments in relation to travel and accommodation in Australia by

the Defendant in connection with the negotiation and purchase of the Air Roaster commencing from the date Chinook was first contacted to 10 June 2014.

Agreement to Lease

- All documents such as correspondence, phone records, emails and texts (hardcopy and electronic) between the Defendant and any other third party, including without limitation any real estate agent, relative, spouse or third party contact, in relation to enquiries for the purchase or lease of any commercial premises commencing from the date enquiries were first made by the Defendant to 10 June 2014;

- All documents such as invoices, receipts, payments (including deposits), correspondence, phone records, texts (hard and electronic) in relation to the negotiation of and entering into the Agreement to Lease dated 18 June 2014;

- All documents such as invoices, receipts, payments (including deposits), agreements, correspondence, texts (hard and electronic) in relation to fitout works at The Village Roaster premises.

Supply Agreements

- All documents such as invoices, receipts, payments, correspondence, texts (hard and electronic) in relation to the negotiations and entering into any agreements (oral or in writing) with suppliers to the Defendant and his company, The Village Roaster Limited;

- Suppliers list of names (hard copy and electronic).

Customers

- All documents such as correspondence, texts, (hardcopy and electronic) between customers of the Plaintiff and the Defendant between the period 10 March 2014 to date;

- Customer lists of names (electronic and hard copy).

Financial Information

- All of the Plaintiff's documents in relation to the cost of manufacture of coffee and supply held by the Defendant (hard copy and electronic);

- All documents relating to the supply of coffee to existing or former customers of the Plaintiff;

- All documents relating to the pricing of coffee to existing and former customers of the Plaintiff;

- All financial records such as bank statements and credit card receipts showing all payments made in relation to the Air Roaster, Agreement to Lease, suppliers and the purchase of coffee and other

supplies in the establishment of The Village Roaster commencing from the date the first payment was made to 13 October 2014.

Recipes

- All copies (hard copy and electronic) of the Plaintiff's roasting recipes as well as recipes created by the Defendant or his

company The Village Roaster Limited for former customers of the Plaintiff.

Smart Phone

- The full electronic copy of the Smart Phone owned by the Plaintiff as agreed to between Counsel in paragraph 13 of the Consent Memorandum dated 11 December 2014.
- All telephone and text records and telephone statements for the Smart phone from September 2013 until the date the electronic data from the Smart phone was deleted.

The Village Roaster Limited

- All documents and correspondence (hard copy and electronic) in relation to the incorporation of The Village Roaster Limited.

[7] For Mr Farrimond, an objection to disclosure was raised on the grounds that documents created after the date of termination of his employment were not relevant or would require disclosure of commercially sensitive information by a non-party to a competitor. The non-party is The Village Roaster Limited (the Village Roaster), of which Mr Farrimond is the owner and director. The objection states that disclosure would have the effect of breaching that party's rights and would detrimentally affect free and lawful competition between the non-party and Caffe Coffee.

[8] Caffe Coffee filed a challenge to objection to disclosure on

10 September 2015. After hearing from the parties at a telephone directions conference I directed that affidavits and submissions be filed and served which would be followed by a submissions-only hearing by telephone. This process resulted in the issues requiring resolution by the Court being refined.

[9] Counsel for Caffe Coffee, Mr Clark, confirmed that having regard to the affidavits which were filed by Mr Farrimond, it was no longer necessary to seek orders for the categories in respect of the purchase of the roaster, the agreement to lease and the Village Roaster.

[10] As regards the remaining categories, it is apparent that the issues are:

a) Are the documents which were created after the date of termination,

10 June 2014, relevant having regard to the issues raised by the pleadings?

b) In respect of the same categories of documents, are those documents confidential and if so should protective orders be made?

c) With regard to the smart phone, counsel agreed in a consent memorandum placed before the Authority that an electronic copy of the electronic record would be produced; that had not occurred. Should disclosure of that record and any related documents now be ordered?

[11] Mr Farrimond filed a narrative affidavit in which he elaborated on his concerns with regard to the various categories referred to in the notice requiring disclosure:

13. I have outlined below the documents I have but that I oppose having to provide copies of and my reasons for being so opposed:

a) **Supply agreements** – all documents created after 10 June 2014 such as invoices, receipts, payments, correspondence and/or texts (hard copy and electronic) in relation to the negotiations and entering into any agreements (oral or in writing) with suppliers to the Village Roaster. As discussed above, my documentation is limited as most of my business is done over the phone and in person. I have listed what I do have in my affidavit of documents;

b) A list of suppliers' names post June 2014;

c) **Customers** – all documents created after 10 June 2014, such as correspondence and/or text (hard copy and electronic) between customers of the plaintiff and me;

d) A customer list (electronic and hard copy);

e) **Financial information** – all documents created after 10 June

2014 relating to the supply of coffee to existing or former customers of the plaintiff;

f) All documents created after 10 June 2014 relating to the pricing of coffee to existing and former customers of the plaintiff;

g) All financial records created after 10 June 2014 such as bank statements and credit card receipts showing all payments made in relation to the Roaster, Agreement to Lease, suppliers and the purchase of coffee and other suppliers in the establishment of The Village Roaster; and

h) **Recipes** – all copies (hard and electronic) of recipes created by or for The Village Roaster, for former customers of the plaintiff created after 10 June 2014.

14. I would be willing to provide my recipes that I have developed for previous customers of the plaintiff to the Court. The plaintiff has accused me of stealing its recipes and seeks to enforce its rights in relation to its recipes. I do not want the plaintiff to have access to my recipes as I believe I have a right to keep the details of those recipes confidential.

15. I confirm that I do not have copies of the plaintiff's recipes. I have started my own company with my own coffee blends i.e. recipes.

16. Recipes for coffee blends can change from time to time for a number of reasons. ...

[12] Against that context I shall deal with the three issues which arise for resolution.

Issue one: relevance

[13] It emerged in the course of counsels' submissions that the question of whether documents which were created after the termination of Mr Farrimond's employment with Caffè Coffee rested on whether the plaintiff had expressly pleaded post-termination breaches in its statement of claim. Arguably it had not. An oral application was made for leave to file an amended statement of claim on the grounds that Caffè Coffee intended to raise post-termination breaches but it had emerged that this required clarification. The application for leave was not opposed. Leave was granted so that the uncertainty could be resolved.

[14] An amended statement of claim and an amended statement of defence were subsequently filed. It is clear from those pleadings that there is now an express allegation of post-termination breaches on the part of Mr Farrimond, which he denies. Documents defined in the notice of disclosure which were created after termination of Mr Farrimond's employment are accordingly now relevant. The

defendant's objection as to relevance is no longer valid; in terms of reg 45, it is ill-founded.

Issue two: confidentiality

[15] The first issue I must consider is whether the documents in each of the categories for which this objection has been raised are in fact confidential for disclosure purposes; if I reach such a conclusion I must then determine whether protective orders should be made.

[16] It was common ground between the parties that the Court could determine both these issues. I agree. In *Zhou v Chief Executive of the Department of Labour*, Chief Judge Colgan said this on the matter of jurisdiction:³

[75] I am satisfied that the Court is empowered to require disclosure and inspection of relevant documents on conditions that are not set out expressly in the Regulations. Reg 6(2)(b) permits this. It is the final empowering provision in a hierarchy that starts with express statutory provisions in the Act or Regulations, moves in the absence of such expressed powers to the High Court Rules and finally, in the absence of such provisions in the High Court Rules, mandates a form of procedure "as the Court considers will best promote the object of the Act in the ends of justice".

[17] Chief Judge Colgan went on to observe that the Court frequently directs disclosure and inspection of sensitive documents by requiring undertakings as to confidentiality, specifying the return of all copies of documents, "requiring the redaction of privileged parts of documents and the like."⁴ An example of this principle in action is found in *Vice-Chancellor of Massey University v Wrigley*.⁵ I

proceed on the basis of these principles.

[18] There are many cases where Courts have been required to consider whether particular classes of information are in fact confidential.⁶ But it is unnecessary for the purposes of the present dispute to go beyond Mr Farrimond's employment

agreement with Caffe Coffee, which it is common ground contains this provision:

³ *Zhou v Chief Executive of the Department of Labour* [2011] NZEmpC 36.

⁴ At [76].

⁵ *The Vice-Chancellor of Massey University v Wrigley* [2010] NZEmpC 52 at [17]- [19].

⁶ *Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 617, at 626; *M v Independent Newspapers* [1991] NZHC 1274; [1992] 1 ERNZ 202 (HC) at 208-214; *Nedax Systems Ltd v Waterford Security New Zealand Ltd* [1994] NZEmpC 65; [1994] 1 ERNZ 491 at 505; *Associated Property Holdings NZ Ltd v Smith*, HC Auckland CP

426-SW99, 3 February 2000 at [28]-[34].

9.2 Confidential information

Confidential information: means for the purposes of this Agreement all information belonging to the Employer or a Related Corporation, and includes information which:

(a) the Employer indicates is confidential

(b) by its very nature, might reasonably be understood to be confidential or to have been disclosed in confidence;

(c) would be of commercial value to a competitor of the Employer; (d) relates to the Employer's financial or business affairs (including

financial information, accounts work, financing information,

management reports and performance or profitability reports and margins);

(e) relates to any arrangements or transactions between the Employer and a third party (including details of the arrangements or transactions between the Employer and those third parties) and without limitation includes arrangements or transactions with customers, suppliers and financial institutions and or credit providers;

(f) relates to or is contained in any of the Employer's computer

databases or software;

(g) relates to the marketing and selling techniques used by the Employer (including marketing plans, sales plans, research and data surveys);

(h) relates to trade secrets, technical specifications, know-how, plans, design concepts, ideas, design specifications, manufacturing or development processes, research, formulae, processes, applications, unique features of techniques in respect of any of the Employer's products or services, whether existing or in development.

[19] This clause is important because one of Caffe Coffee's claims is that Mr

Farrimond has not maintained the confidentiality of its information as defined in cl

9.2, a clause which has been drafted in a broad and comprehensive way. I am satisfied that each of the categories which Mr Farrimond now asserts is confidential (being documents relating to supply agreements, customers, financial information and recipes) fall within the description of confidential information contained in cl 9.2.

[20] As counsel for Mr Farrimond, Mr Patterson, in essence submitted, where

Caffe Coffee expects particular categories of its information to be confidential, it is

reasonable for Mr Farrimond to have the same expectation for the documents in those categories which he possesses.

[21] In reaching that conclusion, I do not overlook the distinction between the different categories of documents involved. Documents relating to supply agreements, customers and financial information are different from recipes. However, given the context in which the dispute has arisen including the parties' agreement as to the wide scope of confidential information, I am satisfied that all the categories under consideration meet the necessary pre-requisite of confidentiality.

[22] Although it was pleaded that the documents in question are in fact those of the Village Roaster, in the end the submission made for Mr Farrimond did not proceed on the basis of that distinction. In effect, it was realistically accepted that he himself has possession of those documents for the purposes of the small business operation of which he is the owner and director.

[23] I turn now to the issue of protections. In the leading decision as to issues of confidentiality arising in the process of

discovery and inspection, *Port Nelson Limited v Commerce Commission*,⁷ the full bench of the Court of Appeal confirmed that in some cases sufficient protection of confidential documents can be given by reason of the conditions which apply to discovered documents – which in the case of this Court are described in reg 51 of the Regulations. The Court went on to state that

in other instances, the courts have directed that particular documents are to be shown only to nominated persons, typically lawyers and expert witnesses.⁸

[24] Often a court will order the persons who may see confidential documents to provide confidentiality undertakings on terms that require those documents “not be disclosed to that party or its employees.”⁹ It is common ground in this case that if the Court needs to make orders to protect confidentiality, the documents may be provided to the plaintiffs’ lawyers and any independent expert, subject to the

provision of necessary undertakings.

⁷ *Port Nelson Ltd v Commerce Commission* [1994] NZCA 527; (1994) 7 PRNZ 344.

⁸ At 347-348.

⁹ *Pernod Ricard New Zealand Ltd v Lion/Beer Spirits & Wine (NZ) Ltd*, HC Auckland CIV 2011-

404-1664, 1 December 2011, at [13] per Allan J. See also, *Hager v Attorney-General* [2014] NZHC 3293, at [32] per Dobson J.

[25] The parties have not agreed, however, whether staff of Caffe Coffee should see Mr Farrimond’s confidential documents – and in particular copies of roasting recipes, and recipes relating to blends of coffee which the plaintiff asserts it has created and supplies to some of its customers. The issue arises because it is alleged Mr Farrimond is using confidential recipes to replicate blends which Caffe Coffee has created. Mr Clark submits that only the staff of Caffe Coffee have the expertise to determine whether recipes produced by Mr Farrimond are based on the blends they use. Mr Patterson submits that release of the subject documents to such persons would defeat the purpose of ordering their protection.

[26] A balance must be achieved between facilitating the provision of documents which are relevant to one or more causes of action in the present proceeding on the one hand, and on the other recognising that the subject documentation may be commercially sensitive in a competitive market. It is my assessment that the category of documentation relating to recipes could be satisfactorily evaluated for the purpose of the litigation by an independent expert retained for the plaintiff, and that at this stage it would not be appropriate for other persons to inspect them.

[27] Accordingly, I shall order disclosure of the disputed categories of documents on the basis that the plaintiff’s lawyers, and any independent expert retained by the plaintiff, shall give confidentiality undertakings on terms that require the confidential documents not to be disclosed to the plaintiff, its employees or any other person. I also direct that the terms of the undertaking are to be agreed between the parties. These constraints will be subject to the reservation of leave for further directions if need be.

[28] So that the parties are clear as to the Court’s expectations, the making of these confidentiality directions may have flow-on consequences for the substantive hearing. As Asher J observed in *Intercity Group New Zealand Limited v Naked Bus New Zealand Limited*, there are various methods by which the integrity of such protection can be maintained so, a set of confidential briefs of evidence, or portions thereof, can be prepared on different coloured paper, and a specific confidential

bundle can be provided.¹⁰ If required, the Court can be cleared when confidential information is traversed.¹¹ In addition, the judgment could be written to avoid disclosure of the sensitive material. These are issues which may need to be discussed further with counsel prior to the hearing.

Issue three: smart phone issues

[29] The notice of disclosure focused on an electronic copy of the electronic record which counsel for Mr Farrimond acknowledged had been taken when the consent memorandum of 10 March 2014 was provided to the Authority.

[30] That agreement appeared to recognise that the record of use of the smart phone could potentially be relevant to the causes of action which arise in this proceeding. An issue arises as to whether the electronic record referred to in the consent memorandum actually exists.

[31] The evidence is that the smart phone has been returned to the plaintiff, as has a SIM-card; but the plaintiff’s Commercial Manager, Mr Matthew Johnston, said that the SIM-card which was returned related to a new mobile number and that Mr Farrimond had retained his former SIM-card and all the data that went with it.

[32] For his part, Mr Farrimond said that when it was initially asserted he was in breach of his employment-related obligations, he deleted all business contact information on his smart phone, and that as a result any backup which was stored on the relevant iCloud service was “automatically amended”. He said that at that point he no longer had access to any non-

personal contact information. He further stated that Caffe Coffee had remotely deleted his emails. Finally, he said that he did not see any issue with “the business contact’s remaining on the phone as they were publicly listed numbers”.

[33] In response, Mr Alford, Chief Executive of the company which owns and manages the plaintiff, said that the company had the ability to prevent remote access

to its server via a protocol which would have been implemented as would be the case

¹⁰ *Intercity Group NZ Ltd v Naked Bus NZ Ltd* [2013] NZHC 2261 at [37].

11 At [37].

for any other departing employee. Mr Alford also said that Mr Farrimond would still have access to all personal and business contacts, text messages and his personal email address.

[34] Mr Alford noted that Mr Farrimond in his affidavit confirmed retention of contact details for customers of Caffe Coffee after his employment, now asserting that such information was deleted prior to the signing of the consent memorandum, or that it was otherwise information within the public domain. Mr Alford also said that Mr Farrimond’s current position on these issues is inconsistent with his previous position, and in particular the agreement to produce an electronic record as recorded in the consent memorandum. Mr Alford asserted that Mr Farrimond would be aware that most, if not all, customers of Caffe Coffee are contacted through private mobile phone numbers which are not readily available in the public domain. He said that the true position as to the information which should have been provided under the consent memorandum is now unclear.

[35] The Court is not in a position to resolve these factual issues at this stage, which may have to be tested in due course. I do observe, however, that Mr Farrimond in his supplementary affidavit made no comment about the agreement relating to the electronic copy of the cell phone’s electronic record which had been referred to in the consent memorandum; he did not assert that such documentation does not exist. It is this information on which the notice of disclosure focuses.

[36] The appropriate course at this stage is to direct disclosure of the documents sought in the notice requiring disclosure. These documents relate to Mr Farrimond’s smart phone. In case it is relevant I use the word “documents” in the wide sense which is provided for in the High Court Rules, which includes information recorded

or stored electronically, and information derived from that information.¹²

¹² High Court Rules 1.3; see also [Evidence Act 2006, s 4](#).

Conclusion

[37] The challenge to objection in respect of the categories of documents described in the notice requiring disclosure relating to supply agreements, customers, financial information, recipes and smart phone is allowed; I rule that the objections raised for Mr Farrimond in respect of those categories are ill-founded.

[38] Documents which exist within the scope of those categories (whether or not they are referred to in the affidavit of documents filed by Mr Farrimond) are to be disclosed on the conditions contained in reg 51 modified and/or supplemented as follows:

a) The documents provided by way of disclosure may not be copied except by agreement between the parties or leave of the Court.

b) Disclosure is to be confined to the plaintiff’s lawyers, and any independent expert retained by the plaintiff subject to each such person having first provided to the defendant a confidentiality undertaking that requires the documents not to be disclosed to the plaintiff, its employees or any other person; the terms of each such undertaking are to be agreed between the parties, or failing agreement settled by the Court.

[39] Disclosure is to take place within 14 days of the date of this judgment.

[40] I reserve leave to both parties to apply for any necessary directions arising from this order.

[41] Costs are reserved.

B A Corkill

Judge

