



[2] In the respondents' statement in reply, they deny wrongdoing, contend that Canstaff repudiated the employment agreement and that the repudiation was accepted and also allege that the subject clauses are legally unenforceable as being too broad.

[3] The matter came before the Authority on an urgent basis and was dealt with, as all such matters are, by the furnishing of oral and written submissions from the respective representatives supported by affidavits filed in support. I note for the sake of completeness that no formal undertaking to abide by any order made by the Authority concerning damages was filed by Canstaff although the matter is referred to in passing in one of its supporting affidavits.

[4] An application for injunctive relief is, by its very nature, a discretionary remedy and it is clear law that injunctive relief cannot and should not be granted where the remedy of damages will suffice to remedy the default of a party, if any: *Transmet NZ Ltd v. Dulhunty Power (NZ) Ltd* CIV-2007-404-002000, 21 May 2007 per Keane J applied. It follows that it is appropriate to exercise *caution* in the granting of the remedy (to borrow an expression used by Mr Brodie).

[5] It is also worth emphasising that, by virtue of the way in which applications of this kind are dealt with, and in particular the need for such applications to be given urgency, the Authority has before it the benefit of the submissions of the representatives but no more than affidavit evidence in support. That evidence has not, of course, been tested by the Authority's usual investigatory process nor subject to the rigours of cross-examination, if any. That being the position, the evidence before the Authority in matters of this kind must, of necessity, be treated circumspectly.

### **The context**

[6] Canstaff is an entity that recruits staff for other businesses. To that end, Canstaff has its own employees who act as recruitment consultants. One such was the first respondent (Mr Hinds).

[7] Mr Hinds was engaged in that capacity from 19 September 2007 down to 4 September 2008 and it is alleged that soon after Mr Hinds completed his employment, Canstaff discovered that the third respondent (NZES) had recently been incorporated with the second respondent (Ms Hinds) as sole director and shareholder. Canstaff alleges that further inquiry disclosed that Mr Hinds was employed or engaged by NZES. Canstaff further contends that, in breach of Mr Hinds' various obligations, but

particularly his obligations under the restraint of trade and non-solicitation clauses of his employment agreement, Mr Hinds behaved in a way that was inconsistent with the express terms of those provisions.

[8] For the sake of completeness, I note that Mr Hinds denies the allegations made by Canstaff in their entirety, contends that there is no lawful basis for preventing him from working for NZES, alleges that the terms of the employment agreement are so broad as to be unenforceable and further alleges that, in any event, Canstaff, by its actions, repudiated the employment agreement, which repudiation Mr Hinds accepted.

### **Issues**

[9] The first issue for determination is the scope of Canstaff's application. Canstaff seeks injunctive relief not just against Mr Hinds but also against Ms Hinds and NZES.

[10] Then it will be useful to assess the three broad questions that must be answered in respect to any application for injunctive relief. These questions are respectively:

- If there a serious question to be tried;
- Where does the balance of convenience lie;
- What are the requirements of the overall justice of the case.

[11] Next, the Authority needs to consider whether, in truth, there has been a repudiation of the employment agreement.

[12] Finally, the Authority must consider the legal efficacy of the clauses in question in the employment agreement.

### **The two other respondents**

[13] Canstaff seeks relief against Mr Hinds, Ms Hinds and NZES, the company incorporated by Ms Hinds. Neither Ms Hinds nor NZES were ever in an employment relationship with Canstaff. The Authority's powers relate to the making of ... *determinations about employment relationship problems* but it plainly has no authority to consider relief in respect to parties who are outside of the employment relationship.

[14] It follows that the application for relief against Ms Hinds and NZES must be dismissed.

***Is there a serious question to be tried?***

[15] I am satisfied on the basis of the untested evidence before me that Canstaff does not have an arguable case.

[16] I reach this conclusion because I am not satisfied that the affidavit evidence before the Authority supports the contention that Canstaff is able to justify interim intervention.

[17] In particular, I am troubled by the serious allegations about Canstaff's behaviour both generally and more particularly in respect to the contention that the employment agreement was repudiated. Moreover, the breadth of the clauses Canstaff rely upon are in my judgment unenforceable seeking as they do to limit competition rather than protect a proprietary interest.

***Where does the balance of convenience lie?***

[18] I am satisfied the balance of convenience lies with the status quo. Nothing in the supporting affidavit evidence satisfies me that damages are not an appropriate remedy in the event that Mr Hinds is found guilty of wrongdoing in respect to his obligations.

[19] Indeed, the affidavit evidence for Canstaff provides no comfort to the Authority at all that matters could not be dealt with appropriately by an award of damages (assuming there was wrongdoing by Mr Hinds).

***What are the requirements of the overall justice of the case?***

[20] In my judgment, the overall justice of the case requires a continuation of the status quo pending the matter being brought on for a substantive hearing should that be required.

[21] I am not satisfied that Canstaff has any proprietary interest it can legitimately protect by the application of the relevant clauses in the employment agreement, even assuming those clauses can be construed such as to create legal obligations.

[22] The size and scope of NZES's business is such as to raise real doubt about its ability to inflict any damage on Canstaff, even assuming Canstaff can satisfactorily demonstrate it has legal interests it is entitled to protect.

### **Repudiation**

[23] There is some information in the affidavits in support that Canstaff, by its behaviour, has repudiated the employment agreement. The contention is that that repudiation was effected in two ways. One was by a refusal to pay the remuneration agreed and, second, by Canstaff's general behaviour towards Mr Hinds in particular but also more broadly towards other people in the office and towards clients of the firm.

[24] Of course, if there has been repudiation of the agreement by Canstaff that has been accepted by Mr Hinds, then the employment agreement is a nullity and its various provisions of no force or effect.

[25] The untested evidence filed on Mr Hinds's behalf suggests that is precisely the position. I am particularly troubled by the suggestion that an agreement was struck between Mr Hinds and Canstaff to the effect that Canstaff would pay Mr Hinds a certain minimum sum. It is said that, having made that commitment, Canstaff promptly resiled from it. If, as Mr Hinds contends, he took employment with Canstaff on the basis of a certain expectation of income and notwithstanding the commitment to that sum, Canstaff then paid him less, it is difficult to see how that could not be a repudiation which Mr Hinds is perfectly entitled to accept and act accordingly.

### **The employment agreement**

[26] The employment agreement between the parties contains three relevant sets of provisions. The first is a poorly drafted set of clauses related to remuneration. I am satisfied that a proper construction of those provisions require that Canstaff is to pay Mr Hinds a guaranteed salary of \$40,000 per annum and I accept that there may be some entitlement beyond that figure in respect of commissions and the like, but the provision is confusing and unclear.

[27] The short point is that Mr Hinds says in his affidavit that he never received \$40,000 per annum, or indeed anything like that figure. Those points, if true, tend to

support Mr Hinds' contention that there was a cynical repudiation of the agreement by Canstaff after his commitment to the employment had been obtained.

[28] A further factual element which bears on this issue and which supports my conclusion is Mr Hinds' contention that Canstaff sought to have him sign a fresh employment agreement recording the amount that he was actually paid rather than the amount that his original employment agreement provided. Both documents are before the Authority. The signed document dated July 2007 provides for a \$40,000 salary and an unsigned draft document provides for a base salary of \$500 per week, an amount which equates to \$26,000 per annum.

[29] The other relevant provisions from the employment agreement are the restraint of trade provision and the non-solicitation clause. I am satisfied that each of these clauses is too broadly drawn to be in conformity with the law and accordingly that neither could be enforced, even assuming the employment agreement in which they are contained is not repudiated and is still in full force and effect.

[30] It is clear law that an employer may protect proprietary rights which might include key staff, exclusive committed customers, trademarks and other intellectual property, unique systems of work and such like, but cannot effectively stop a man from working in his calling which I hold these provisions do. I am satisfied that these provisions are simply anti-competitive and, as such, in principle, illegal and unenforceable.

[31] The inadequacies of these three sets of provisions in the employment agreement make them either unenforceable or at best confusing and contradictory. Where there is doubt in matters of this kind, a document will be construed against its author – the *contra proferentum* rule. This means that, in a matter such as this, where there is doubt, those provisions would be construed against Canstaff and in favour of Mr Hinds.

### **Determination**

[32] For reasons which I have enunciated above, I am satisfied that the application for interim relief must fail in its entirety.

**Costs**

[33] Mr Brodie seeks costs of \$3,000 on this matter. He urges me that this was a matter which needed to be dealt with quickly, that it involved a reasonable degree of legal research and the preparation of not insignificant affidavit evidence and he noted that the proceeding itself took a full half day to hear.

[34] Mr Thompson, while accepting the principle that costs usually follow the event, considers the claim for costs from Mr Hinds to be excessive. He argues that a more appropriate figure would be \$750. Mr Thompson relies on the application of the tariff based approach but fails to take account of the passage of time.

[35] I think this was a complex matter, dealt with expeditiously by the parties. The application was completely unsuccessful and the successful respondent is entitled to a reasonable contribution to costs.

[36] I think an appropriate costs award in the circumstances is \$2,000 and I direct that Canstaff is to pay to Mr Hinds that sum as a contribution to his costs in this matter.

James Crichton  
Member of the Employment Relations Authority