New Zealand Employment Relations Authority Decisions

Ellis v Transpacific Industries Group (NZ) Ltd AA 204/07 (Auckland) [2007] NZERA 592 (5 July 2007)

Last Updated: 17 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 204/07 5091465

BETWEEN	KIMMITT ROWLAND ELLIS Applicant
AND	TRANSPACIFIC INDUSTRIES GROUP (NZ) LIMITED Respondent

Member of Authority: Robin Arthur

Counsel: Don McKinnon for Applicant

Kit Toogood QC and David France for Respondent Telephone conference: 27 June 2007

Submissions received: 3 July 2007 from Respondent

5 July 2007 from Applicant

Determination: 5 July 2007

DETERMINATION OF THE AUTHORITY

[1] The Respondent seeks removal to the Employment Court of the applicant's request for a declaration on the validity and enforceability of restraint of trade provisions.

[2] The removal application has been decided on the papers, as agreed with counsel by telephone conference.

The issue

[3] The applicant wants to know if he would be breaching a non-competition covenant with his previous employer, the Respondent, if he accepted a recent offer to

become Chairman of EnviroWaste Services Limited ("EnviroWaste"), another major company in the waste management industry.

[4] He was formerly Managing Director of Waste Management (NZ) Limited, a publicly listed company. He was made redundant in July 2006 after that company amalgamated with an Australian company to form the corporate entity that is now the Respondent.

[5] Under an exit agreement he received a lump sum payment equivalent to six months notice plus two years of base salary and benefits to which he was entitled under his individual employment agreement. The Respondent's statement in reply says this amounted to a payment of $2.4 million (gross) and the Applicant was also paid out all accrued share options but the amount of the payment for options is not identified.

[6] The agreement also referred to complying with the restraint of trade in his employment agreement. The relevant clauses are:

6. *Covenant not to compete*

6.1 You acknowledge that the services that you are to perform for us are of a special, unique, unusual, extraordinary and intellectual character. You appreciate that we would suffer serious injury if you took the knowledge and skills acquired during your employment with us and applied them for the benefit of a competitor of ours. Accordingly, you agree that, for three years after the termination of this Employment Contract, you shall not be employed by or involved directly or indirectly (whether as a shareholder, partner, director, investor, employee, contractor, consultant or otherwise) with any company or entity which is involved directly or indirectly in any business which is similar to any of the present or future businesses of the company.
6.2 You acknowledge that the above restriction is reasonable for the following reasons:
6.2.1 It is only for three years.
6.2.2 Your knowledge and skills are easily transferable to other management positions with companies that do not compete with us.
6.3 Since we may suffer immediate and irreparable injury if you breach the above restriction, we reserve the right to seek injunctive relief against you, beside our other legal rights.

6.4 The restriction in Clause 6.1 does not prohibit you from holding up to 5% of a publicly traded company that is a competitor.
6.5 It is noted that Exhibit C contains arrangements whereby options will be forfeited if these Restraint of Trade agreements are breached.

...

8.3 We may terminate your employment contract upon six months' written notice. At the end of the notice period, pursuant to 8.1, your employment will terminate at the end of a further two years. At our option, we may choose to pay you for all or any part of the notice period; and/or for all or any remaining part of the contract period, one lump sum in amount equivalent to salary and other benefits (excluding any entitlement to new options) which amount shall constitute full and final satisfaction of employer obligations with regards to such termination (apart from rights to options per Exhibit C). For avoidance of doubt, in the event of payment for notice and/or contract period, the effective date of termination (insofar as options exercise is concerned) is the end of the notice and contract period.

[7] The Exhibit referred to is an attachment to the Applicant's 2000 employment contract. It contains a Board resolution setting out how the company's executive share option scheme would operate in the event of the termination of employment of the Applicant, including options up to 100 per cent of 1999 base salary for the Managing Director. The Applicant was to remain entitled to hold and exercise options within three years beyond the date of termination. In the event that he became involved with a competitor company, he could be given notice to accelerate the period in which to exercise those options, and lose any options not exercised within 10 business days of that notice.

[8] Through counsel, the Applicant says the non-competition restraint is unlawful and unenforceable. However rather than accept the offer of the chairmanship of EnviroWaste, and risk possible injunction proceedings for breaching the restraint, the Applicant has taken the responsible step of first seeking a declaration on the validity of the restraint.

[9] The Applicant seeks an urgent or at least very prompt hearing of his request for a declaration because the business needs of EnviroWaste means it cannot leave the offer to the Applicant open for many months.

The removal application

[10] The Respondent seeks removal of this matter to the Employment Court under s178(2)(a) and (d) of the Employment Relations Act 2000 ("the Act").

[11] It says the important questions of law likely to arise other than incidentally are about the extent to which an employer can legitimately protect its proprietary interests by way of a lengthy restraint of trade, particularly:

(a) whether the respondent has legitimate proprietary interests which may lawfully be protected by a non-competition covenant; and
(b) what constitutes adequate consideration for a three-year restraint; and
(c) whether the Applicant's employment agreement and exit agreement provided such consideration.

[12] It says the Authority should exercise its general discretion to remove the matter because of all the circumstances of this particular case. These include:

(a) That this restraint is of a relatively rare kind, in its length and application to a former managing director of a publicly listed company; and
(b) Few, if any, such restraints have been considered and upheld by the Authority or the Court, and the basis for this particular restraint has not previously been considered by the Court; and
(c) The importance or value of this issue for three parties – the Applicant, the Respondent and EnviroWaste – mean, whichever way it falls, the Authority's determination will almost certainly be challenged in the Court in any event; and
(d) Both parties support removal; and
(e) The urgency of resolution, or relative certainty, sought by the parties is best served – in this particular case – by a declaration from the Court.

[13] The Respondent submits that while none of the factors identified alone provide a basis for removal, taken together, that course is appropriate in all the circumstances of this case.

[14] The Applicant generally supports the grounds for removal advanced by the Respondent while having a different view about the factual circumstances in which

the restraint was entered. However the Applicant accepts that, in order for the Respondent to be successful, the Authority would have to enter what Mr McKinnon submits is "uncharted territory" in respect of restraints in employment agreements. He also submits that the "pragmatic issues" of experienced counsels' consensus on removal, costs and likely challenge add to overall circumstances making this employment relationship problem an appropriate case to be heard by the Court at first instance.

Discussion

[15] I accept the parties' submissions for removal, but place some different emphasis on particular factors.

[16] Whether a restraint clause is in its particular circumstances reasonable and thus valid and enforceable is fundamentally a question of law but that can be answered only upon a consideration of the factual setting.1 The questions of law posed by the Respondent are probably mixed questions of fact and law but the answers to them are capable of being decisive or strongly influential in deciding the matter.2

[17] If they don't quite meet the statutory test for removal under s178(2)(a), they are nevertheless a sufficiently strong factor to be influential in exercising the general discretion allowed to the Authority under s178(2)(d).

[18] There is a question in this case about whether the circumstances and arrangements of the Applicant and the Respondent take them across the line of the 'pure' employee restraint cases to something more of a commercial and employee hybrid, of the kind discussed in the *O'Sullivan* and *Bierre* cases.3 As with those cases, this matter involves substantial sums of money paid in consideration of terms in an employment agreement which included a lengthy restraint. Here the Respondent says the agreed exit payment of two-and-a-half years' salary plus a buyout of share options was expressly linked to the three year restraint period. Taking account of the

1 *Gallager Group Limited v Walley* [1999] NZCA 333; [1999] 1 ERNZ 490, 495 at [21] (CA)

2 *Hanlon v International Education Foundation (NZ) Inc* [1995] NZEmpC 2; [1995] 1 ERNZ 1 (EC).

3 *Fletcher Aluminium Limited v O'Sullivan* [2001] NZCA 92; [2001] 2 NZLR 731 (CA) and *Bierre v Diagnostic Medlab Services Limited* (ERA, AA11/03, 10 January 2003, Member Monaghan).

totality of that transaction – albeit made at the end of the employment rather than at the time that the employment agreement was entered into – may be a factor affecting the reasonableness of the restraint to be assessed as a question of law.

> [19] Along with that question I have come to the opinion that in all the circumstances the Court should determine the issue because the parties agree it should be dealt with there at first instance and the practical reality that it would – because of its commercial and personal value to the respective parties – certainly go to the Court on challenge in any event. Such consent and certainty are not factors which automatically favour removal but taken with the others discussed may support an overall conclusion that removal is warranted. I accept this matter is of significant importance to the parties and it is cost effective for them to have the matter heard promptly in one forum only. Mr Toogood told me in a telephone conference with counsel that he understood the Court had dates available in July and early August. I have had inquiries made of the Court's Registry which confirms that possibility. When the matter, on removal, is scheduled by the Court for hearing is of course entirely within its hands but I take the strong possibility of the parties securing a fixture there within a relatively short time as a factor favouring removal in these particular circumstances.

Order for removal

> [20] For the reasons given, and exercising the general discretion allowed under s178(2)(d) of the Act, I am of the opinion that in all the circumstances the Court should determine this matter. Accordingly this matter is to be removed to the Court for its hearing and determination without prior investigation by the Authority.

Robin Arthur

Member of the Employment Relations Authority
