IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 261/09
5274850

	BETWEEN	ENERGI NEW ZEALAND LIMITED Applicant
	AND	BRENDON GLEESON Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Phillipa Muir, counsel for Applicant Anthony Drake, counsel for Respondent
Investigation Meeting:	31 July and 3 August 2009
Determination in writing:	4 August 2009

DETERMINATION OF THE AUTHORITY

Application for interim injunction

[1] Energi New Zealand Limited (ENZ) has sought an urgent interim injunction against Mr Brendon Gleeson, the company's former employee and Chief Executive Officer.

[2] The circumstances leading up to this application are as follows. Mr Gleeson, who had been the CEO since November 2007, notified ENZ of his resignation with immediate effect on 15 July 2009. He advised that he viewed recent actions of the company carried out by its group managing director as being repudiatory of the employment agreement and that he had concluded that acceptance of the repudiation was his only option.

[3] ENZ immediately notified Mr Gleeson that he had been placed on garden leave for the one month notice period under the agreement, until 14 August 2009, as in its view the employment was not terminated until the expiry of that period.

[4] Mr Gleeson had given no notice because he viewed himself as having been discharged from all his obligations under the employment agreement, including the requirement to give notice of resignation.

[5] As well as the notice provision the employment agreement included non-solicitation and restraint of trade covenants. Mr Gleeson regarded himself as being discharged from those too, as a consequence of his having accepting the company's repudiation of the employment agreement.

[6] On 16 July, the day after Mr Gleeson had notified his resignation, ENZ was advised by a major client or customer, the New Zealand Heart Foundation, that it had decided not to renew a contract with ENZ which had expired on 30 June, but would be having its work done by another company, Tenfold Creative Limited.

[7] Tenfold was registered on 22 July 2009 with one director, Mr Gleeson's wife.

[8] Also on 16 July, Mr Gleeson contacted two employees of ENZ who had been engaged in Heart Foundation work and asked them to come and work with him through Tenfold, which was taking over the Heart Foundation work. The two employees agreed and resigned from ENZ. They are now working for Tenfold in some capacity on Heart Foundation work.

[9] In these circumstances ENZ has sought an interim injunction on an urgent basis preventing Mr Gleeson (until further order of the Authority at any substantive hearing) from:

- Undertaking work in any capacity for the Heart Foundation;
- Undertaking work in any capacity for any other customer or client of ENZ for whom, or with whom, Mr Gleeson has worked in the 12 month period prior to the termination of his employment with ENZ; and
- Either on his own account or for any other person, firm, organisation or company, soliciting, endeavouring to entice away from, or discouraging from being employed by ENZ, any other employee or actual client/customer or prospective client/customer of ENZ.

[10] After hearing counsel Ms Muir for ENZ and Mr Drake for Mr Gleeson, on 3 August 2009 the Authority orally granted the application and made the orders as expressed above. My determination is now recorded in writing, as required.

Tests applied

[11] The Authority considered the three tests that are usually applied in relation to applications for interim injunctive relief;

- Whether there is an arguable case, or a serious question;
- Where the balance of convenience lies – to be considered in conjunction with a sub-test of whether other adequate remedies such as damages are available; and
- What does the overall justice of the case require?

Arguable case

[12] The threshold for meeting this test is a relatively low one and in my finding it has been met in this case.

[13] A serious question to be determined is whether Mr Gleeson has breached the non-solicitation and restraint of trade provisions ENZ seeks to enforce against him.

[14] There is no dispute that since he left ENZ, in some capacity Mr Gleeson has been working for the Heart Foundation, apparently through the medium of his wife's company Tenfold Creative Ltd.

[15] There is also no dispute that Mr Gleeson contacted two employees of ENZ who had been engaged in Heart Foundation work and asked them to work for him on the same work under contract of some kind with Tenfold.

[16] Also there is no dispute that the employment agreement Mr Gleeson had with ENZ contained express provisions purportedly applying to him in relation to non-solicitation and restraint of trade.

[17] No issue has been taken by Mr Gleeson about the reasonableness of those provisions which are limited to a period of six months after termination of

employment. In scope they seem to be no wider than necessary to protect ENZ's recognised proprietary interest in its trade secrets and trade connections.

[18] There is therefore a strong case that on their terms those provisions are enforceable, particularly given the CEO position held by Mr Gleeson. As well, arguably in that position he was a fiduciary with separate obligations to be implied into his employment agreement. To some extent the contractual provisions gave emphasis in writing to what was to be implied by law.

[19] There was also no argument raised about the adequacy of consideration Mr Gleeson received from ENZ in return for the restraints.

[20] It was submitted on behalf of Mr Gleeson that the restraints could not be applied to him as a result of a representation made by a director of ENZ in 2007 when the employment agreement was entered into that the provisions, or one of them in particular, *"were not really enforceable."*

[21] This to me seems no more than an opinion (of apparently a non-lawyer) given about how a court or tribunal might at some future time view these restraints, rather than any representation about the way ENZ would in the future conduct itself with regard to enforcement of them.

[22] I do not find that the estoppel argument detracts from the strength of the arguable case I have found in favour of ENZ in its application.

***General Billposting* case**

[23] *General Billposting Company Limited v. Atkinson* [1909] AC 118 (HL), and *Rock Refrigeration Limited v. Jones* [1997] 1 ALLER 1(CA) are usually cited as authority for the proposition that a party repudiating a contract cannot rely on its provisions as against the innocent party. Mr Gleeson's response to the application for an interim injunction is largely built upon this proposition of law and its application to the circumstances of his case.

[24] The view or belief that Mr Gleeson formed about his rights and obligations if there was a situation of repudiatory breach led him to declare his acceptance of a contended breach and then act as if he was no longer bound by any provisions of his former employment agreement. As Mr Gleeson stated in his affidavit (at para.91):

> *… acting on advice from my legal team, once I had accepted the company's repudiation of my employment agreement I understood that my post-employment obligations including the non-solicitation and restraint of trade clauses no longer applied.*

[25] While reviewing the relevant law in the course of giving this determination orally, I referred in particular to a paper given by Judge Travis at a CLE Seminar held in March 2007 on the subject of restraints of trade and confidential information.

[26] The paper cites authority from the Court of Appeal and the High Court to the effect that an argument raised by a defendant in proceedings for an interim injunction that the contract sought to be enforced had been repudiated, should not effect the question of whether there is a serious question to be tried.

[27] Repudiation, if that arguably may have occurred, and the *General Billposting* principle raise a factor to be taken into account along with many others in considering the strengths and weaknesses of the parties cases; *Grey Advertising (NZ) Ltd v. Marinkovich* [1999] 2 ERNZ 844.

[28] Mr Drake referred in submissions to the High Court decision, in *AG & S Building Systems Pty Ltd v. G & J Holdings Limited* unreported, HC Auckland, 8 October 2004, CIV-2004-404-2565, Allan J. In that case where interim injunctions were sought for alleged breach of a restraint of trade, the High Court, citing both *General Billposting* and *Rock Refrigeration*, found that due to uncontested evidence that the plaintiff had repudiated the contract, the plaintiff could not rely on the contract to enforce a restraint. There were other difficulties as well facing the plaintiff in succeeding with its application including, in the case of one of the several defendants, a lack of evidence that the restraint provisions had been agreed to at all.

[29] By contrast, ENZ in this case has strongly denied any repudiation of the employment agreement with Mr Gleeson, and there is no dispute by him that he agreed in November 2007 to the inclusion in the agreement of the non-solicitation and restraint provisons.

[30] The evidence to this point certainly raises doubt that there was any repudiation, so that the whole question of the application of *General Billposting* remains a step back from the primary issue of whether there was any repudiation.

[31] It is clear that not every breach will support a claim of repudiation or, in the context of an employment agreement, what may amount to a claim of constructive dismissal. The breach must be sufficiently serious. There is also a question to be answered as to whether, in view of the seriousness of the breach, a substantial risk of resignation was reasonably foreseeable.

[32] Up to 15 July the position of Mr Gleeson about the seriousness of contended breaches by ENZ of his employment agreement, to which he drew attention, was that the issues *"can be resolved."* On 15 July however Mr Gleeson was advised that ENZ did not regard his request to go to mediation as an urgent matter but proposed that the mediation could take place in about three weeks time, after 4 August, when the Managing Director of ENZ's group of companies had returned from annual leave.

[33] This attitude of ENZ towards the need for urgent mediation seems to have been the trigger for Mr Gleeson deciding to accept the repudiation (contended by him to have occurred) and leave his employment immediately.

[34] In my view however the period of three weeks of delay before mediation in circumstances where a reasonable explanation was put forward for some of that delay, may not have been a breach of sufficient seriousness making a substantial risk of resignation reasonably foreseeable.

[35] There is also a question so far unanswered in the evidence as to how long Mr Gleeson had been aware of the 24 March 2009 email that raised his concerns about ENZ's motives in its conduct towards him. If he had delayed by several weeks in communicating those concerns then he could not reasonably expect the company to have dealt with the matter immediately either.

[36] While there is tenable evidence that ENZ did not deal openly with Mr Gleeson over the future role intended for the consultant Mr Darroch, and also that ENZ acted from ulterior motive, the evidence does not go so far as to show that the employer was deliberately dishonest in dealing with Mr Gleeson. This is an impression Mr Gleeson claims he gained but it may have been based on reading (or misreading) between the lines, particularly from email messages he saw.

[37] Although there is some evidence of a breach of the duty of good faith that was owed by ENZ to Mr Gleeson during his employment, so far it falls short of showing

any serious and sustained breach, such as might found a claim for a penalty or show there had been repudiation of the employment agreement by the employer.

Balance of convenience

[38] The Authority is satisfied that the balance of convenience test also must be answered in favour of ENZ and its application for an interim injunction.

[39] A key question arising in association with this is whether there are adequate alternative remedies available to ENZ, such as damages.

[40] The evidence from witnesses on behalf of ENZ supports the finding on a provisional basis that there is an appreciable risk to the company of losing not just the business of the Heart Foundation but other major clients or customers with which Mr Gleeson had close dealings while employed as CEO.

[41] Some of that evidence is hearsay as to what Mr Gleeson has done since leaving ENZ to attract any of those clients or customers away from ENZ. The email from the customer Marley to Mr Gleeson more directly indicates that discussions have taken place about transferring that business to Mr Gleeson. It is also a reasonable inference from the fact that having accepted the contended repudiation by ENZ and believing himself to be no longer bound by any of the provisions of his employment agreement, Mr Gleeson will naturally look to secure the business of ENZ customers and clients in the new venture he is now engaged. It would be logical for him to seek that business, as a relationship with the customers or clients had existed previously and from which his abilities had been assessed.

[42] I therefore accept there is a considerable threat to the survival of ENZ if it should lose other customers or clients in addition to the Heart Foundation.

[43] There is a question as to the ability of Mr Gleeson to pay an award of damages at the likely level they would be assessed against him in that event. While it is clear Mr Gleeson has interests in real property assets, the extent of that is less clear. On the other hand damages will be an adequate remedy for Mr Gleeson if he successfully brings a claim of constructive dismissal.

[44] The Authority was urged to consider the interests of third parties in deciding whether to grant the orders sought. In this regard the interests of the two former

employees of ENZ who now work in some capacity for Tenfold was raised. The injunctions sought of course if granted would not directly prevent them from contiung to work for Tenfold, with whom apparently they have some form of contractual relationship. It is Tenfold that has been engaged by the Heart Foundation to perform its work and it may be more accurate to say Tenfold is the third party that has an interest in whether Mr Gleeson is injuncted from further involvement with the Heart Foundation. Tenfold however has given no evidence.

[45] I do not consider that the delay of about 14 days on the part of ENZ in applying for the injunction should swing the balance of convenience to any great degree, as the delay is not so great as to be unreasonable or prejudicial. It is also relevant that the Heart Foundation made its decision to follow Mr Gleeson on about 16 July, a day after Mr Gleeson said he was leaving his employment with ENZ immediately. The company therefore had no real opportunity to bring an application that might have caused the Heart Foundation to hesitate before making its decision to follow Mr Gleeson.

Overall justice

[46] Having found that the applicant ENZ has an arguable case and that the balance of convenience favours the company, in my view the overall justice requires the application to be granted and the injunction made in the terms sought. The evidence at least at a provisional level shows more clearly a breach of contractual provisions by Mr Gleeson than by ENZ.

Interim injunction

[47] I record that ENZ has given an undertaking as to damages.

[48] The following order is made against Mr Gleeson and will remain in effect until discharged or varied by any further order of the Authority, particularly after a substantive hearing. Mr Gleeson shall not:

(a) Undertake work in any capacity for the Heart Foundation of New Zealand;

(b) Undertake work, in any capacity, for any other customer or client of ENZ for whom, or with whom, Mr Gleeson has worked in the 12

month period prior to the termination of his employment with ENZ; and

(c) Either on his own account or for any other person, firm, organisation or company, solicit, endeavour to entice away from, or discourage from being employed by Energi New Zealand, any other employee or actual client/customer or prospective client/customer of ENZ.

[49] As the provisions on which the above order is based are effective for six months only (until 14 February 2010 at the latest), in the unlikely event of this matter remaining unresolved by that time a discharge from the order continuing to apply after that period can be sought.

Mediation

[50] ENZ and Mr Gleeson are directed by the Authority to participate in mediation urgently, with a view to trying to resolve all issues between them before any substantive investigation by the Authority takes place.

[51] I record the matter I raised orally with Mr Gleeson about the risk of continuing to have any involvement with the two employees who left ENZ and who now work in some capacity for Tenfold. That risk, which he may wish to take advice about from Mr Drake, arises under s 134 of the Employment Relations Act 2000 which provides that a party who breaches an employment agreement is liable to a penalty under the Act. It also provides that every person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty imposed by the Authority. The penalty in the case of an individual is one not exceeding $5,000 for each breach.

[52] I raise this on the basis of some evidence put forward that the two employees also had restraint provisions in their employment agreements and which they may arguably have breached by working for Heart Foundation under new arrangements with Tenfold. It is not a matter however that the Authority has been required to determine, and of course the two employees have not been heard on the issue and no penalty proceedings have been brought at this stage.

Costs

[53] Costs are reserved.

A Dumbleton
Member of the Employment Relations Authority