

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 67  
5383690

BETWEEN	FARMER'S TRANSPORT LIMITED Applicant
AND	ROBIN JOSEPH HISLOP First Respondent
AND	CENTRAL TRANSPORT LIMITED Second Respondent

Member of Authority: P R Stapp

Representatives: Mr G W Calver, Counsel for Applicant  
Mr S Cook, Counsel for Respondents

Investigation Meeting: 14 June 2012 at Napier

Date of Determination: 18 June 2012

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**INTERIM DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] On 10 April 2012 Robin Hislop ceased his employment as a branch manager with Farmer's Transport Limited (FTL) located in Waipawa. On 14 May 2012 Mr Hislop started work for Central Transport Limited (CTL) as a livestock manager and works from an office located at Reporoa. He moved from Waipawa and resides in Taupo on his own as he has left his family behind to take up the employment with CTL. While he was employed at FTL he signed an Individual Employment Agreement (2000) and a variation (first variation) to that agreement (2006). The variation includes restraint of trade and confidentiality provisions to protect FTL's proprietary interest. There was consideration of \$1,000 paid by FTL to Mr Hislop for the restraint.

[2] FTL is worried that Mr Hislop will not comply with the obligations set out under the restraint and confidentiality clauses. FTL claims Mr Hislop has breached at least the restraint by working for CTL. FTL relies on Mr Hislop conducting work within 150 Kilometres from Waipawa (based on information relating to three clients to support its claims) and that Mr Hislop is potentially acting maliciously in regard to his attitude towards FTL that puts its business at the risk of Mr Hislop inadvertently disclosing information. It considers it is at a huge risk given Mr Hislop's actions.

[3] FTL is seeking the enforcement of the covenants.

[4] Mr Hislop says he moved to work at Reporoa which is outside the 150 kilometres under the restraint. He says he signed the first variation (with the restraint) and a second variation (second variation) about notice, and faced constraints upon him leaving induced by unfair bargaining. He has offered FTL undertakings to comply with the terms under the individual employment agreement and the first variation.

[5] The parties have been to mediation. FTL has applied for interim relief until a full hearing takes place in the Authority on 19 July 2012. FTL has filed an undertaking for damages. The application for an interim injunction is opposed by Mr Hislop. Both parties are seeking costs.

[6] CTL is not directly involved in the interim application, but there are issues that will need to be tested in time because of claims that there has been aiding and abetting in alleged breaches of the restraint and non solicitation provisions of Mr Hislop's agreement.

### **The issues**

[7] The issues relate to the principles applied by the Authority to an application for an interim injunction. There are a number of credibility issues between key witnesses including Mr Hislop, Mr Jason Roebuck the Chief Executive Officer of FTL and Mr Brian Kelsey FTL General Manager. The issues to be determined by the Authority are:

- a. Is there a serious question and any arguable case to be answered in respect of each of the restraints of trade and Mr Hislop's obligations of confidentiality? In particular:

- (i) are the restraints of trade contained in the first variation valid and enforceable by FTL against Mr Hislop; and if so
  - (ii) has Mr Hislop breached the restraints of trade in the variation; and/or
  - (iii) has Mr Hislop breached the obligations of confidentiality to FTL.
- b. Are there alternative remedies available, and will damages cover any breaches?
  - c. Whether the balance of convenience lies in favour of granting an injunction?
  - d. If an injunction is appropriate, where does the overall justice of the case lie?

### **Background to Mr Hislop's employment at FTL and CTL**

[8] Mr Hislop commenced his employment at FTL in 1976 and was employed as a truck driver. He had a gap in his employment with FTL from 1997 – 2000, and was employed as the branch manager of FTL's Waipawa branch upon rejoining.

[9] In late 2005 a proposal was made by FTL to incorporate a restraint of trade into its employment agreements. In late January 2006 FTL's branch managers were called to a meeting with Peter Roebuck (FTL's executive director), Hamish Durant (FTL's accountant), Brian Kelsey (FTL's CEO) and Dick Heasley (FTL's general manager) to discuss the implementation of restraints of trade.

[10] The key provisions of the clauses are as follows:

#### *...(1) Total Prohibition*

- (i) *The Employee shall not at any time, either during this agreement or for a period of 12 months after the termination of this agreement of this agreement (other than by the reason of redundancy), either directly or indirectly, and whether as principal, partner, agent, employee or however else, carry on business of rural transport within 150 km's of the*

*Employee's Branch location, or have an interest as a director or shareholder in, or otherwise assist, such a business without the express written consent of the Employer.*

...

...(2) Restraint of Solicitation/Performance of Services

*The Employee will not, for a period of 12 months from the termination of the Employee's employment, whether personally, in partnership, as an Employee, or through any employee or other agent, or in any other way:*

- (i) *Make any attempt or effort to solicit, direct, or otherwise be instrumental in the diversion of any of the Employer's clients or customers or business away from the Employer.*
- (ii) *Perform services for any such person or organisation for whom the Employee has provided services as an Employee of the Company within the 12 months preceding the termination of this contract.*

...

[11] It is deposed that the proposed restraints of trade were explained to the branch managers and the branch managers were told that they were required to sign them. Mr Hislop has made an issue about the circumstances in which these discussions took place and deposes that he was denied the opportunity to get independent legal advice at that time. This has been challenged by Mr Kelsey who was also present at the time. Mr Hislop now claims that FTL's actions then were unfair, despite evidence of him signing the variation, that allegedly all staff had been notified of their right to obtain independent advice on the conditions, that Mr Hislop says he was supportive of the need for restraints and that they were "*a good idea*" and that he indicated that the company "*trusted its senior management*". He is not helped in that he has now claimed sometime much later that he "*had no other choice but to sign the restraint*". He accepted the consideration, and his position is weakened by the fact that the first time he has ever complained about unfair bargaining is in this application.

[12] It is also common ground that Mr Hislop “*actively supported the restraints and counselled departing employees [names withheld] not to breach their restraints*”. Mr Hislop has been challenged about whether or not the branch managers (two of whom support FTL) had been advised of their right to seek independent advice.

[13] It is common ground that Mr Hislop was a member of the senior management team, and as a result of this and his long association with FTL, that he had knowledge of FTL’s systems, customers and other confidential information.

[14] Mr Hislop resigned from FTL once before and was persuaded by Mr Jason Roebuck to remain with FTL, and he withdrew that resignation. However as part of FTL accepting the withdrawal of Mr Hislop’s resignation in April 2011, Mr Roebuck required Mr Hislop to sign the second variation to his employment agreement extending his notice period from two months to three months. Mr Hislop claims that he was not advised of his right to seek independent advice on signing this variation also. FTL deny the claim.

[15] On 9 March 2012 Mr Hislop gave another letter of resignation to Mr Roebuck. He gave three months’ notice first in accordance with the second variation so his last day of work was planned for 9 June 2012. However, it was agreed that Mr Hislop would finish earlier and his employment was terminated on 10 April 2012. Arrangements were made for Mr Hislop to return the company car and Mr Hislop says that he did not take any confidential information with him. FTL has concerns as to what happened to his diary. Mr Hislop says that he did not print off or copy any confidential information from his computer and left his rate book behind. He has subsequently deposed that he threw some items including his diary in a skip at the Waipawa branch. It is common ground that any confidential information of FTL’s that Mr Hislop has is retained in his head.

[16] After his termination of employment with FTL Mr Hislop began searching for jobs outside the 150 kilometre radius of Waipawa. He obtained employment with CTL based in Reporoa. Mr Hislop maintains that this complies with the restraint because CTL is outside the 150 kilometre zone. He also says that he has not used or divulged any of FTL’s confidential information and has not discussed FTL’s customers, rates or systems with any CTL employees. He says that he has not solicited any of FTL’s clients or employees away from FTL since he commenced work with CTL.

[17] CTL is a rural transport business in Reporoa. According to Brendon Cane managing director CTL does not operate in the Hawkes Bay, but is engaged to transport livestock in the Hawkes Bay, and looks to back-load its trucks on the return journey. It has two way loading arrangements with three meat companies. Mr Cane deposed that CTL does not generally compete with Hawkes Bay based rural transport companies. CTL employs two livestock despatch managers in its Reporoa office. They are responsible for the despatch and management of CTL's livestock trucks, drivers, and customers and associated office work. As one of these managers decided to resign Mr Hislop was approached about a vacancy. It is accepted that Mr Hislop was employed, and Mr Cane deposed that Mr Hislop disclosed that he had a restraint of trade in his employment agreement with FTL. His role at CTL is described as a livestock despatch manager. He has responsibility for customer management, team support and is required to obtain new business and meet sales performance requirements.

**Is there a serious question and arguable case?**

[18] I am satisfied that there is a seriously arguable case relating to the following:

- a. That there is a question on the enforceability of the restraint, but both parties signed the first variation with the restraint and confidentiality provisions.
- b. That there is an interpretation issue relating to the application of the restraint in regard to the distance applied (150 kilometres from Waipawa). Mr Hislop believes the restraint applies to his place of work and FTL says although Mr Hislop is located at his place of work outside the zone, the work involves the rural transport industry and applies inside the zone and this covers Mr Hislop.
- c. There are a number of credibility matters between Messrs Jason Robuck, Brian Kelsey and Robin Hislop and a number of other witnesses involved in the matter.
- d. There is an issue on the application of the duration of the restraint (12 months). FTL wants it to apply for the full 12 months.

[19] Mr Hislop's defence is that the bargaining for the first variation was unfair, and the arrangement in regard to the notice in the second variation was also unfair. This defence is a significant issue in regard to the question of the enforceability of the restraint, but is not a factor supporting an arguable case.

[20] The above arguments are all serious issues between the parties. This relates to the extent of the concern that Messrs Roebuck and Kelsey have that Mr Hislop will not comply with the restraint and the confidentiality clauses. The interpretation of the duration and the geographical restriction is a serious issue in respect of the enforceability because on the face of it there was a proprietary interest and consideration at the time the restraint was entered into. Both parties have taken quite different views on this matter, albeit Mr Hislop has accepted that the issue is arguable, but says it was not seriously arguable. It is also clear that Mr Hislop will argue that there is insufficient proprietary interest and that the consideration was insufficient.

#### **The alternative remedies available**

[21] FTL's concern is about Mr Hislop not complying with the restraint and confidentiality provisions, and thus he should not be working at CTL. FTL believes that this is the only remedy available to the enforcement of the restraint provision and to avoid Mr Hislop inadvertently using confidential information that he knows about with any employee at CTL. FTL and CTL do compete despite trucking arrangements and there appears to be work associated with them both operating in the zone. FTL claims that damages as an alternative remedy would be very difficult to prove and to do so would involve considerable cost to recover. I agree that an interim injunction is an option that would appear to have more direct impact in enforcing obligations that have been signed off by both parties, at least in the interim given the full hearing is scheduled for 19 July 2012.

#### **Balance of convenience**

[22] The balance of convenience is affected by there being just under four weeks to run until the substantive hearing. The balance of convenience has to be weighed in regard to Mr Hislop's right to work and not to unjustifiably stifle competition in the market. Mr Hislop has worked most of his life in the rural transport industry and there are broad arrangements that apply in the industry. Mr Hislop has deposed that not working for CTL or any other rural transport operator would cause him and his

family significant personal and actual hardship. He deposed that he only has limited savings and would have to dip into his superannuation fund and that the only alternative for him in any period of unemployment would be to consider moving to Australia in order to work in the rural transport industry there. His evidence suggests that clearly there are issues related to his convenience. I note that he resigned at the time without work and then was approached later about the availability of work at CTL, so he had the risk then that he now faces. In such circumstances I can not therefore give his personal convenience much weight. However, he is entitled to work in as much as he is working outside the kilometres of the restraint, but he must not perform services in regard to any of FTL's customers and business for CTL under the non-solicitation. I am satisfied that alternative work and arrangements can apply between Mr Hislop and CTL in its business so long as it does not involve FTL's business and information because Mr Hislop and Mr Cane have deposed that Mr Hislop has not attempted to solicit or deal with FTL's clients.

[23] In view of the defence that there was some alleged unfair bargaining, the deposed evidence suggests that Mr Hislop signed the variation with the restraint and non solicitation clauses and the confidentiality provisions with his eyes open, and given that there are witnesses who say that he was given an opportunity for independent advice, until that is tested more fully, I have to accept it. Weighing any inconvenience that Mr Hislop (and CTL) would suffer, and the concern that FTL has, it is more likely there is greater risk to FTL. This is exemplified by the evidence of Messrs Jason Roebuck and Brian Kelsey deposing that they are very worried about what might happen if the restraint and non solicitation are not enforced. They have deposed three examples relating to the possibility of inadvertent disclosure of information with regard to, for example, matters relating to work for the Crafar farms, the Maxwell farms, and a family account which has been lost. Mr Hislop has deposed that he has had no involvement in these matters. Messrs Roebuck and Kelsey have raised other issues concerning local work for meat companies out of the Hawkes Bay involving CTL and that meat companies' agents could be directed to Mr Hislop and he could then use confidential information to leverage relationships for CTL to gain more work. However there is no direct proof of any action by Mr Hislop, except that the comments FTL say Mr Hislop has made means he has strong views about what FTL is doing to him. It has also emerged that Mr Hislop attended a yard used by CTL in Taupo and where there is a major transport hub and there are issues about what he

was doing for CTL at the time. Furthermore I have had regard to Mr Hislop's seniority while he was employed at FTL, his length of service there, and the type of information involved that he has knowledge of. I hold that the balance of convenience favours the applicant, but that Mr Hislop is entitled to work outside the 150 kilometres of the restraint and non solicitation provisions.

### **Analysis of the overall justice of the matter**

[24] I am also required to weigh the strength of FTL's case and although the respondents contend that it is at best weak and would not justify requiring Mr Hislop not to work, I am satisfied that there are some very real issues in this matter that will require being more fully tested given that there are credibility issues between Messrs Hislop, (Jason) Roebuck and Kelsey. This involves what Mr Hislop has done for CTL and any impact on FTL's business in the 150 kilometres.

[25] There is a serious issue to be answered and this has been added to by Mr Hislop's decision to defend the matter on the basis of what he alleges was unfair bargaining. They are matters that need to be tested because of the credibility issues and the examples relied upon by Messrs Roebuck and Kelsey. The arguments around the duration and the geographic zone are usual aspects of any challenge on a restraint and as such should not need any alteration until such time as they are fully tested. In this case the 12 months duration will be fully argued later. At least given the timing involved between now and the full hearing there will be three months at least applied to the restraint and non solicitation.

[26] FTL has alleged that Mr Hislop's conduct and behaviour has been deliberate and malicious in regard to his attitude towards FTL and must also be considered along with the deposed evidence from FTL that is built on opinions, speculation, hearsay and assumptions. There is no direct evidence other than a very deeply held view by Messrs (Jason) Roebuck and Kelsey about Mr Hislop's motives, supported by the information they say they have about him. This may or may not be the case, but will require more evidence than that currently available. Also not all the information has been fully disclosed by Mr Kelsey about what he says he knows and I presume he will be able to produce the details at the full hearing. The latter two men have been able to indicate the risk and that there is work that flows and overlaps into the 150 kilometre zone that may be able to be enforced under the restraint. I am satisfied that FTL is seeking to reasonably protect its legitimate interests given the seniority held by

Mr Hislop when he was employed at FTL, his length of service and the proprietary interest that FTL is seeking to protect and for which consideration was paid. At the very least such a restraint if successfully enforceable applies then the minimum duration will be arguably at least 3 months, although FTL wants it to apply for the full 12 months.

[27] The overall justice in this case lies with FTL and its application for interim relief.

### **Summary and orders of the Authority**

[28] It does not mean that Mr Hislop has to cease work with CTL in Reporoa (because he is outside the 150 kilometres), but he is not entitled to engage in business impacting on FTL's business in the 150 kilometres under the restraint and non-solicitation clauses. Mr Hislop is also bound by the confidentiality arrangements under his employment agreement with FTL. Since he has offered to provide such undertakings to FTL then it does seem appropriate that the undertakings be formalised in the Authority. I order Mr Hislop to comply with the restraint/non solicitation and confidentiality clauses in the first variation of employment as he has offered. This order is to apply until such time the parties can reach agreement on any variation and or the Authority orders otherwise upon hearing from both parties.

[29] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority