Employment Court of New Zealand

Fuel Espresso v Hsieh WC 5/07 [2007] NZEmpC 17 (19 February 2007)

Last Updated: 25 May 2007

IN THE EMPLOYMENT COURT
WELLINGTON

WC 5/07
WRC 4/07

IN THE MATTER OF an application for an interim injunction

BETWEEN FUEL ESPRESSO LTD
Plaintiff

AND VICTOR (CHI-HUAN) HSIEH
Defendant

Hearing: 19 February 2007

(Heard at Wellington)

Appearances: Peter Cullen and Richard Roil, Counsel for the Plaintiff
R M Crotty and Catherine Harold, Counsel for the Defendant

Judgment: 19 February 2007

ORAL JUDGMENT OF JUDGE C M SHAW

[1] This is an application for an interim injunction brought by the plaintiff, Fuel Espresso Ltd (Fuel), against Victor Hsieh the defendant and former employee of Fuel who is alleged to have breached a restraint of trade clause in his employment agreement. The plaintiff seeks an interim order that the defendant ceases working for or operating a coffee cart named as Beangrinding situated outside the Telecom Centre in Tory Street, Wellington until on or after 7 April 2007 and also asks for costs and any other orders the Court may think fit.

[2] This matter was granted urgency and has been heard at short notice but with a full hearing and both parties represented by counsel.

The facts

[3] The evidence is in the form of two affidavits, one from Mr Ponnapa, who is the managing director of Fuel, the other from Mr Hsieh.

[4] Fuel is a business which operates small espresso bars throughout Wellington city. It employs baristas to make or sell the coffee which it has imported, roasted, ground, and then on-sells through these outlets.

[5] Mr Ponnapa says that the business is vulnerable to employees setting up in competition once they have learned the modus operandi through Fuel's training programme where they learn about ingredients, the way the company operates, and the like. The training programme was provided to the Court. It says that what sets the Fuel baristas apart from the competition is the level of skill, passion, dedication, and knowledge which is imparted through the training programme.

[6] Mr Hsieh was first employed on 7 November 2005 and came to be employed at Holland Street where Fuel has

its factory. His employment agreement is a reasonably standard agreement providing for all the usual matters including salary. The agreement set this at $11.70 an hour although evidence was provided that Mr Hsieh received a pay increase later on.

[7] Materially, clause 20 of the agreement is a restraint of trade provision:

As a Barista you will have access to how the Employer runs the business and provides a competitive product. In order to protect the business you may not for three months following the termination of your employment:

Work in a competing espresso bar/café or coffee company within a 100 metre radius of an [sic] *Fuel operation; and/or*

Set up a similar competing business within a 5-kilometre radius of an existing Fuel operation.

This restraint of trade shall apply to all of New Zealand and continue for three months from your last day of duty. You agree that this restraint is reasonable and necessary to protect the Fuel's business interests.

[8] Clause 33 of the agreement says that it is the entire agreement between Mr Hsieh and the employer.

[9] Clause 27 headed "*Acceptance of Employment*" confirms that Mr Hsieh has read and understood the conditions and has been able to obtain independent advice before signing the agreement.

[10] Mr Hsieh's affidavit describes how he was employed and worked for Fuel in his first job as a barista. Although he made coffee he wasn't involved in the area which required knowledge of roasting; that he resigned his job on 7 January 2007, giving a month's notice; and after his resignation he started working at Beangrinding. Mr Hsieh owns a company called Formosa Mansion Ltd which leases the coffee cart off Beangrinding Ltd for a licence fee of $2,800 plus GST a month. I was also told that Mr Hsieh works as the barista and his partner sells the coffee to customers.

[11] Mr Ponnapa believes that there are customers from Fuel who have now gone to Beangrinding. He says that on the basis of what he has seen and what he has been told by other people. Mr Hsieh says he doesn't believe he stole any customers.

[12] Importantly, the Beangrinding cart is 70 metres from the Holland Street premises of Fuel and therefore inside the area covered by the restraint of trade. The 3-month restraint has another 6 weeks to run before it expires.

The law

[13] In terms of the law which applies in an application for an interim injunction relating to a restraint of trade, I have to be satisfied that there is an arguable case as to the enforceability of the restraint of trade agreement and whether or not the balance of convenience favours one side or the other.

[14] The principal issue is whether or not the restraint of trade clause in the employment agreement is enforceable. Is there a serious question to be tried in respect of that point? There are three aspects to the enforceability as I see it arising in this case.

[15] First whether the terms of the restraint of trade clause are enforceable. In my view on this interim basis the terms of the restraint of trade clause would be enforceable. I do not consider that they are too wide. Although they refer to the clause applying to all of New Zealand, they are actually confined to all of New Zealand but only where there is a Fuel operation. So a person leaving the employment of Fuel is only prevented from working in a competing business within a small radius of 100 metres from Fuel or setting up a competing business within 5 kilometres of that Fuel operation. It does not otherwise prevent a person working as a barista anywhere else in the whole of New Zealand and in that respect I accept the submissions of Mr Cullen.

[16] The second question is whether it is arguable that Fuel has a proprietary interest to be protected. It was argued by Mr Crotty that Fuel is trying to simply protect its business from competition and that there is no real separate proprietary interest that could be properly and justifiably protected in this case. Mr Cullen argued with some force that there was such an interest in the skill provided by Fuel's training. He also relied on the employees' influence over Fuel customers in a small area where customers are coming to get their coffee from one place and another place opens up very close by. There is an arguable case that the interest in those customers could be taken by the competing business. This arguably gives Fuel a proprietary interest to protect.

[17] The third issue and I think decisive one is the question of consideration. It is the law that consideration is a prerequisite for an enforceable restraint of trade. In *M A Watson Electrical Ltd v Kelling*[1], a decision of the High Court, Smellie J set out the applicable law in relation to consideration. Valuable and legal consideration is required for an agreement in a restraint of trade. This consideration can either be set out expressly, in other words an amount of dollars is expressly being paid to buy the restraint of trade from the employee, or it can be by extrinsic evidence, or, thirdly, it can be reasonably inferred from the agreement. There is no reference whatsoever in the employment contract to an express consideration to be paid for the restraint of trade. There was no extrinsic evidence about it. So the question arises as to whether or not I can reasonably

imply consideration for the restraint of trade and I have to say that there is none that I can see.

[18] Mr Hsieh was not paid the minimum wage but was on a basic wage for a café bar employee. Nothing at all in his agreement shows that he was paid any more than anybody else and it may be that in the Fuel operation all the employees get the same rates of pay and all are supposed to be covered by the restraint of trade but the law is that if you are going to require an employee to be restrained there must be some extra payment for that. The safest way is to make an express provision or to put something in the agreement which acknowledges that the restraint of trade is reflected in the rate of pay. Unfortunately in this case that was not done.

[19] That being so, I am unable to draw an inference that there was consideration for the clause. That means that the restraint of trade cannot be enforced and that, I am afraid, means that there is no arguable case on that point.

[20] That brings the application to a close because if a restraint of trade cannot be enforced there can be no injunction to support it. That being said, I have to say that I regret that Mr Hsieh went off and did as he did in the face of a very clear and reasonable expression of a restraint of trade.

[21] The last point would be the balance of convenience and I have to say that, notwithstanding what I have said, there is a very fine balance in this one. There was no evidence really on either side to assist the Court very much on this. There is a belief by Mr Ponnapa that he has maybe lost some customers, there is a rejection of that from Mr Hsieh, but really the balance of convenience is a very finely balanced one indeed.

[22] In the end this comes down to a simple question of law. There was no consideration either expressed or which could reasonably be inferred to support the restraint of trade so it cannot be enforced and the application for the interim injunction must be dismissed.

Costs

[23] Following my decision I have heard counsel on the question of costs. Mr Crotty correctly submits that a correct approach would be to follow the High Court scale, in which case on a 2(b) scale costs would be assessed in the sum of $3,200 plus disbursements, perhaps with a discount he suggests $2,500.

[24] Mr Cullen points to the discretionary nature of awarding costs and suggests that the conduct of the defendant who made no response to legal approaches when Mr Ponnapa became first concerned about this matter meant that the plaintiff was put to the cost and the expense of coming to Court because there was no alternative. He suggests that costs should lie where they fall.

[25] Again, a difficult matter to weigh in the balance. The legal right is with the defendant and he is entitled to that. I think that although I was tempted to let costs lie where they fall he is legally correct and is entitled to some contribution. The costs reflect the fact that he did not make any response when he was approached at a time when maybe this matter could have been sorted out without recourse to the Court hearing so I will take that into account.

[26] The defendant is entitled to his disbursements and, in addition, costs in the sum of $1,000 will be payable by the plaintiff.

C M Shaw
JUDGE

Judgment signed at 12pm on 21 February 2007

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[1] [1993] 1 ERNZ 9
