Employment Court of New Zealand

Green v Transpacific Industries Group (NZ) Limited [2011] NZEmpC 6 (3 February 2011)

Last Updated: 21 February 2011

IN THE EMPLOYMENT COURT

AUCKLAND

[2011] NZEmpC 6
ARC 5/11

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN STEPHEN GREEN

Plaintiff

AND TRANSPACIFIC INDUSTRIES GROUP

(NZ) LIMITED

Defendant

Hearing: 1 February 2011

(Heard at Auckland)

Counsel: Richard Harrison, counsel for plaintiff

Geoff Bevan and Jessie Greer, counsel for defendant

Judgment: 3 February 2011

JUDGMENT OF CHIEF JUDGE G L COLGAN

[11 The question for urgent decision on this challenge from a determination of

the Employment Relations Authority[1] is whether the plaintiff should be restrained by interlocutory injunction from working in the North Island of New Zealand for a competitor of his former employer, the defendant Transpacific Industries Group (NZ) Limited (Transpacific).

[2] The Employment Relations Authority investigated Transpacific's application

for an interlocutory injunction restraining Stephen Green from working for a competitor and issued its determination on 24 December 2010 granting Transpacific the injunctive relief it sought. There is no reference in the Authority's determination as to when and how its substantive investigation of the proceedings in that forum is to be undertaken apart from a brief reference that the interlocutory injunction will expire on the earlier of 10 March 2011 or the issuing of the Authority's final determination. This is a challenge by hearing de novo but only to the Authority's determination of the claim to interlocutory relief. The reality of the position is that whatever this Court or the Authority decides, the contractual restraint upon Mr Green will expire about five weeks hence, on 10 March 2011. So reality dictates that this is likely to be the de facto substantive decision about the rights of the parties.

[3] In these circumstances, the Court granted an urgent hearing of the challenge on the affidavit evidence which had been filed in the Authority together with some further affidavit evidence of relevant events that had occurred

since 22 December 2010.

[4] The need for a decision of this challenge is as urgent as was the need for its hearing. I therefore intend to deal with the relevant issues relatively briefly in this judgment so that the parties, and Mr Green's new employer, know where they stand for the future. I acknowledge the comprehensive arguments presented by counsel for the parties that I have considered but will, for the most part, not refer to. This is not a case for academic exposition of principle.

[5] There are three questions to be decided. First, whether the defendant has an arguable case for enforcement of the restraint if and when that question is tried, and also an arguable case for a permanent (as opposed to an interlocutory) injunction restraining the plaintiff from competitive economic activity until the expiry of the restraint.

[6] If so, the second question for the Court is where the balance of convenience may lie until the substantive proceedings can be heard and decided. In the circumstances of this case that is a somewhat artificial consideration because, in effect, the restraint will expire before either the Authority or the Court can determine its substantive merits. Nevertheless, the Court must still decide whether it will be more just to grant an injunction restraining Mr Green from working for his new employer in the event that the contractual restraint is set aside or so modified that it would not have been enforceable in practice, or, on the other hand, whether it will be more just that Mr Green should be permitted to take up employment with his new employer now when that may later be found to be have been unlawful. The question of alternative remedies available to the company is a subset of the balance of convenience.

[7] Finally, because the remedy of interlocutory injunction is discretionary, the Court should stand back from the minutiae of the first two tests and determine where the overall justice of the case lies until trial. Again, for reasons just set out, that is an artificiality in some respects but the Court should nevertheless take into account any further considerations such as delay, bad faith conduct of either of the parties, and other discretionary factors which may disqualify the defendant from the relief it obtained in the Authority.

[8] Transpacific is a large company operating throughout Australia and New Zealand in the field of waste and environmental services. Its New Zealand solid waste entity is known as Transpacific Waste Management (TWM) which accounts for a significant share of Transpacific's revenue and profit. Transpacific is a major (perhaps the major) operator in the sector and owns and operates most if not all elements in the waste disposal chain. Most other companies in the field are significantly smaller and less comprehensive operators. There is intense competition between operators in the collection and disposal of solid waste. As it was put long ago, succinctly (and in an inimitable northern English accent): "Where there's muck, there's brass".

[9] Mr Green commenced employment with Transpacific as its Auckland Business Development Manager as recently as mid April 2010. He reported to the company's Auckland Sales Manager, Gary Richardson. Mr Green had an individual employment agreement which made a number of provisions relevant to this case. These included a requirement that Transpacific's confidential information must be preserved and not disclosed, both during and after the period of his employment. The contract also set out what was described as a "COVENANT NOT TO COMPETE" as follows:

7.1 You acknowledge that the services that you are to perform for us may be of a special, unique, unusual, extraordinary and intellectual character.

You appreciate that we may 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 you shall not work for a Competitor either directly or indirectly for that period of time (plus any period not worked out), and in that area, as set out in Schedule C after the termination of this Employment Agreement.

7.2 During the term of your employment with us and for the periods and areas set out in Schedule C following the termination of employment you shall not (except on behalf of or with the prior written consent of the Employer, which will not unreasonably be withheld), either directly or indirectly on your behalf or on behalf of others:

- Solicit, divert, appropriate to or accept on behalf of any competing business; or
- Attempt to solicit, divert, appropriate to or accept on behalf of any competing business;

any business from a customer or actively sought prospective customer of the Employer with whom you have dealt, whose dealing with us you have supervised or about whom you have acquired confidential information in the course of employment.

7.3 During the term of your employment by us, and at any time following the termination of employment, you shall not (except with our prior written consent) either directly or indirectly, on your behalf or on behalf of others, solicit, divert or hire, or attempt to solicit, divert or hire any person employed by us.

7.4 You acknowledge that the above restrictions are reasonable for the following reasons:

7.4.1 The periods, and areas, specified are appropriate to the

nature and/or seniority of your position with us.

7.4.2 In respect of Clause 7.1, your knowledge and skills are

easily transferable to positions with companies that do not compete with us.

7.5 Since we may suffer immediate and irreparable injury if you breach the above restrictions, we reserve the right to seek injunctive relief against you, besides our other legal rights.

7.6 The restriction in Clause 7.1 does not prohibit you from holding up to 5% of a publicly traded company that is a Competitor.

7.7 You must not after the end of your employment with us represent yourself as being in any way connected with or interested in the Employer, unless expressly authorised by us to do so.

> [11] The agreement also defined a competitor and contained prohibitions on solicitation of business or other staff of the defendant. There is no issue about these matters in this case.
>
> [12] Mr Green's employment agreement also allowed him to "cancel" it as follows:

21.1 You may cancel this Employment Agreement, with or without cause, upon providing the period of written notice to us as specified in Schedule C [one month], or in lieu thereof the equivalent period of salary shall be forfeited or paid by you.

21.2 On receiving notice of termination we may, at our sole discretion, elect to pay the equivalent salary in lieu of notice for all or any remaining part of the notice period specified in Schedule C.

21.3 At our discretion we may suspend you from the performance of all or any of your duties or for such periods and on such terms as we consider expedient, including a term that you are excluded from all or any of our premises, and/or that we will not assign you any duties or provide you with any work, and/or that you will have no contact with any of our suppliers, distributors, customers or employees.

> [13] After informing Transpacific on 12 November 2010 that he had been offered a position with a competitor that was "too good to pass up", Mr Green sent his one month's notice of resignation by e-mail on 16 November 2010. At a subsequent meeting with company representatives Mr Green confirmed that he was proposing to work for a smaller company in the same field, Smart Environmental Limited (SEL) as its Northern Area Manager. Mr Green acknowledged that he was aware of the restraint provisions in his employment agreement with Transpacific and was told that the three month restraint would commence at the end of the period of notice that he had given and so would apply until 16 March 2010. Mr Green was placed on what is referred to colloquially as gardening leave for the period of his notice and told that although he would not generally be required to work within that time, he needed to be available to the company if required. An agreed hand-over process for his work was settled and the restraint provisions in his agreement discussed with him. Mr Green expressed his dissatisfaction that Transpacific had not paid him commission to which he asserted he was entitled. it appeared to Transpacific in late November that in fact Mr Green may have begun work for SEL and he subsequently confirmed this. Mr Green began officially with SEL on 10 January 2010.

[14] Transpacific's solicitors attempted to resolve these issues by the giving by Mr Green of undertakings but those which Mr Green was subsequently prepared to give did not satisfy the defendant's concerns. By e-mail dated 10 December 2010 Mr Green, having obtained legal advice, purported to cancel his employment agreement summarily. He alleged that he was entitled to do so because Transpacific had fundamentally breached the agreement by failing to allow him to participate in a performance based commission or incentive compensation scheme and that it had placed him on gardening leave without any entitlement in law to do so. In those circumstances Mr Green asserted that his cancellation negated the effect of the employment agreement including the restraint provisions.

[15] On 14 December 2010 Transpacific advised Mr Green that it did not accept that he had grounds to effect a cancellation but, nonetheless, accepted that the employment agreement had been cancelled in circumstances where it claimed Mr Green was required to provide one month's notice of cancellation. It said that, having failed to do so, Mr Green was required to forfeit his salary from the start of his original notice period on 16 November 2011.

[16] On 16 December 2010 Mr Green undertook formally that he would not:

1. work within the "Auckland Metropolitan" area;
2. solicit or accept any business from any clients of Transpacific;
3. solicit or accept any business from any prospective clients of Transpacific (identified in a list prepared during the handover process); or
4. solicit, divert or hire (or attempt to do so) any employee of Transpacific.

[17] On 21 December 2010 Transpacific rejected these undertakings and issued its proceedings in the Authority. As already noted, the Authority granted Transpacific the interim injunctive relief it sought.

Arguable case

[18] I deal first with the plaintiff's broad contention that there can be no arguable case of liability for breach of the restraint because, as a result of the company's fundamental breach or breaches of the agreement, the restraints ceased to have effect. Assuming the underlying legal proposition to be correct for the purpose of this argument (although that in itself is very arguable), the question can be more easily disposed of by examining the merits of the allegations of fundamental breach.

[19] First, the plaintiff says that the defendant breached fundamentally by failing or refusing to put in place a performance based commission scheme and by failing or refusing to pay him this form of remuneration. The parties' employment agreement certainly contemplates either that there was in existence such an arrangement when Mr Green began his employment, or at least that this would be developed by Transpacific so that there would be a commission element to his remuneration package in addition to his base salary.

[20] It is not in dispute that there was no such arrangement in place nor that Transpacific had not implemented this by the time of Mr Green's resignation. The defendant eventually acknowledged Mr Green's expressed dissatisfactions with that position by paying him unilaterally what it considered was an appropriate quarterly bonus payment of the sort it said he might have expected to have received if it had put in place the scheme contemplated by the employment agreement. Although it is simply impossible to determine whether the quarterly payment of approximately $5,000 before tax might have represented a commission based bonus payment had this been a settled arrangement, Transpacific does appear to have been remiss in both failing to put in place the scheme it was contractually obliged to, and in communicating adequately with Mr Green about the position. But if those were breaches by the defendant, it is difficult to categorise them as sufficiently fundamental to be repudiatory of the employment agreement entitling Mr Green to cancel it without notice. His argument to this effect was not a strong one.

[21] The second allegation of repudiation relates to the placement of Mr Green on gardening leave for the period of his notice of termination of employment. He claims that this was not permitted by the employment agreement and the employer's failure or refusal to provide him with work during the period of his notice was a breach of sufficient fundamentality to amount to a repudiation entitling him to cancel the agreement without notice and, thereby, to avoid application of any of the restraints.

[22] In this instance, also, whilst Transpacific may be seen to have contributed to a lack of clarity in that situation, I do not consider that Mr Green has an arguable case that Transpacific was not entitled to place him on gardening leave during the period of his notice of resignation. That is for the following reasons.

[23] The employment agreement does not use the common terminology of "resignation" or even "termination" by the employee but, rather, refers to this as the employee's ability to "cancel" the employment agreement. Further, the relevant clauses appear to merge into one power the ability of the employer to suspend the employee for alleged serious misconduct during a period of investigation and determination of this, and what occurred in this case, the "suspension" of Mr Green on gardening leave as a result of his notice of resignation. Although Mr Bevan defended this terminology as economical use of language by Transpacific, it is not difficult to see how this departure from almost universally standard and understood language contributed to a misunderstanding of the position by Mr Green.

[24] However, I agree with Mr Bevan that when one reads the relevant clauses of the agreement carefully, there really can be no strong argument for the plaintiff that there was no power to assign Mr Green to what is known colloquially as gardening leave for the period of his notice. Not only is that a relatively common practice in circumstances such as Mr Green's, but the agreement very arguably contemplated and permitted this. It follows that there is only a very weak arguable case of breach by the employer in this regard and of fundamental breach entitling the plaintiff to treat the agreement as repudiated.

[25] For the foregoing reasons I conclude, as did the Employment Relations Authority, that Mr Green has no effective arguable case that the restraint provisions of the employment agreement were all rendered ineffectual by the employer's actions.

[26] I now move to the grounds for the claim to injunctive relief. I have concluded that Transpacific has a sufficient arguable case for breach of el 7.2 of the employment agreement but no arguable case of liability by Mr Green for breach of el 7.1. In this latter regard I respectfully disagree with a part of the conclusion of the Employment Relations Authority.

[27] Clause 7.1 set out earlier in this judgment purports to prohibit Mr Green from engaging in competitive economic activity with Transpacific both for the period of three months following the end of his employment and within the geographic area of the North Island of New Zealand. The effect of cl 7.1 is that all that the company is required to establish is the fact of competition in business. As it stands, cl 7.1 purports to prohibit competition by Mr Green even in respect of customers or potential customers who are or were not customers of Transpacific.

Whilst a restraint may be lawful to the extent that it protects reasonably a proprietary interest that the employer has, including in business with its customers, the law does not extend to prohibiting competition alone as el 7.1 purports to do. Clause 7.1, if it were valid, would prohibit Mr Green from engaging in economic activity (including being an employee of another waste disposal enterprise) if that entity competes for business with Transpacific irrespective of whether there was an actual or had ever been a previous commercial relationship between Transpacific and the potential customer of Mr Green or his new employer. The title to cl 7 of the employment agreement ("COVENANT NOT TO COMPETE") illustrates the misunderstanding of what the law allows and prohibits: competition per se is not able to prohibited. The preamble to that prohibition in el 7.1 also reinforces its flaw. It expresses Transpacific's concern that it might suffer "serious injury" if Mr Green were to use "the knowledge and skills acquired during your employment with us and apply [them] for the benefit of a competitor of ours". "[K]nowledge and skills acquired" are much broader than proprietary interests in recognised business assets including confidential information about business plans, pricing details, marketing strategies

and the like. Knowledge and skills acquired during employment cannot generally be prohibited from being exercised by a former employee. Skills, and indeed much knowledge, are not the property of the former employer. Clause 7.1 of the agreement is very arguably void in contravention of the public policies of competition in commerce and freedom to work.

[28] The defendant does, however, have a sufficiently arguable case of reasonableness of the restraints set out in cl 7.2 of the agreement addressing, as they do, the business of "a customer or actively sought prospective customer of the [defendant] with whom you have dealt, whose dealings you have supervised or about whom you have acquired confidential information in the course of employment". Those are proprietary interests that the employer is very arguably entitled to protect by a reasonable restraint.
[29] I accept, also, that the defendant now has an arguable case of breach by Mr Green of cl 7.2 in one particular instance that occurred after the Employment Relations Authority issued its determination and injunctive orders. In this sense the defendant's case is now stronger than that of many former employers in similar circumstances and than it was at the Authority's investigation on 22 December 2010. After having been prevented from doing so by injunction issued by the Authority, Mr Green breached both the contractual prohibition and the order by seeking to attract the business for SEL of a customer of Transpacific known to him to be such.
[30] Although not in respect of competitive activity in business as the Authority found, the defendant does have a strong arguable case of breach of cl 7.2 of the employment agreement by the defendant.
[31] I should deal here with the other main ground of challenge by the plaintiff which is to the geographic extent of the restraint. Although Mr Green accepts tacitly that the duration of the restraint (three months) cannot really be said to be unreasonable, he does contend that its geographic scope of the North Island is unreasonable. He says what he describes as the "Auckland metropolitan area" would be a reasonable scope. When asked to define in clear and enforceable terms what

this meant, Mr Harrison suggested it should mean the local authority boundaries of the new Auckland Council.

[32] The strongest argument for the plaintiff on this aspect of the case is that he was engaged as the defendant's "Auckland Business Development Manager". He says that it was unreasonable at the time the agreement was entered into that a restraint on competitive economic activity should extend beyond the Auckland area to the whole of the North Island. The defendant says that although the term "Auckland Business Development Manager" was used, this was a convenient but not necessarily accurate label for a position created especially for Mr Green but which, even from the outset, contemplated that he would undertake business development activities for Transpacific beyond the Auckland area, principally within the North Island but potentially and eventually throughout New Zealand. Upon reflection, the defendant wishes that it had broadened the geographic area of the restraint accordingly.
[33] I do not consider that Mr Green has such a strong case of unreasonableness of a restraint on competitive economic activity in areas of the North Island beyond Auckland, that it would be appropriate to modify this term on an interim injunctive basis. The evidence is that Mr Green did indeed undertake business development work outside Auckland even in the relatively short period of his employment with Transpacific. In that sense it may be said that the geographic definition of the restraint was reasonable at the time it was entered into. That is especially so given the relatively modest duration of the restraint at three months.
[34] For the forgoing reasons I conclude that the defendant has an arguable case of liability by the plaintiff for breach that would, if it went to trial, support permanent injunctive relief although of narrower scope than determined by the Employment Relations Authority,

Balance of convenience

[35] This favours the defendant (as also found by the Authority) for the following reasons.

[36] Contrary to the plaintiff's case, I do not accept that establishing liability for financial loss and quantifying this is an easy exercise. That is especially so in respect of the intangible but nevertheless real potential loss of custom or of business relationships in addition to loss of particular contracts. Where, as here, the defendant has a strongly

arguable case of breach, it is more just that the plaintiff should be restrained by injunction for the relatively short balance of the restraint than that the defendant should be required to prove its loss and damages at trial.
[37] Ultimately, this Court must take appropriate cognisance of the clear signal given by the Court of Appeal in *Fuel Espresso v Hsieh*[2] that not only are such provisions to be taken seriously by the parties that have entered into them expressly but that they are amenable to enforcement by injunction to the extent that they are reasonable and otherwise lawful. Gone are the days, if they ever existed, when an employee could confidently sign up to a restraint and then breach it in the bold expectation that "those things are not worth the paper they are written on".
[38] Mr Green is not prohibited from working for SEL as he contracted to do (and as SEL took him on) in the clear knowledge of the restraint and the defendant's preparedness to enforce it. The modification to the agreement that the Court is prepared to make also means that Mr Green was not prohibited from competing with Transpacific in all circumstances. He may compete with the defendant in the South Island in an even less restricted way. In about five weeks he will be able to compete with the defendant anywhere but again so long as he does not infringe the other enduring obligations of maintaining confidentiality set out in the agreement. All of these factors favour the grant of limited injunctive relief.

Overall justice

[39] There is no discretionary factor that should disqualify the defendant from the injunctive relief it seeks. There is, however, one aspect of the case that I consider warrants making injunctive relief conditional,
[40] Mr Green gave notice on 16 November 2010 of his intention to terminate his employment with Transpacific on 16 December 2010. He was placed on gardening leave with the intention that he would be paid for that period. Until 10 December 2010 Mr Green complied with his obligations to his former employer. It in turn paid him his remuneration in arrears to 30 November 2010. On 10 December 2010, however, Mr Green purported to cancel the employment agreement with effect from that date. His ability in law to do so is doubtful for the reasons I have set out previously. But so, too, is the defendant's entitlement in law to deny him to any remuneration for the period of his notice. Whilst Transpacific may be correct that Mr Green is not entitled to any remuneration for the period from 10 to 16 December 2010, I do not think the same can be said for the period from 16 November to 10 December 2010 either as a matter of contract under the agreement, or otherwise. Mr Green complains that he was not paid his remuneration (including holiday pay) after 30 November 2010. I consider he has a strongly arguable case for remuneration to 10 December 2010. Mr Green has calculated the amount owing to him for that period (including holiday pay) is $5,477,69 and this amount has not been disputed by the defendant which continues to rely on what it says is Mr Green's disentitling conduct as a matter of principle.
[41] In these circumstances the grant of interim interlocutory relief to the defendant will be conditional on its payment to Mr Green of that sum (less tax) and the Court's injunctive order will lie in court (that is, cannot be issued as an order under seal) until that payment has been made.

Result of challenge

[42] Pursuant to s 183(2) of the Employment Relations Act 2000 the Authority's determination is negated by this judgment on the challenge. In substitution for the Authority's interlocutory injunctive orders there will be a narrower injunction which will also be conditional upon payment to the plaintiff of specified remuneration.

[43] Both parties have been successful on this challenge and although I reserve costs and leave open the opportunity for either to apply for an order, I should signal that in these circumstances consideration will be given to leaving the parties to meet their own costs of representation on the challenge.

Orders of the Court

[44] In reliance upon the defendant's undertaking as to damages given to the Employment Relations Authority and conditional upon the defendant paying to the plaintiff the sum of $5,477.69 (less tax), being remuneration and holiday pay to 10 December 2010, the plaintiff is restrained pursuant to cl 7.2 of the parties' employment agreement for the period until 10 March 2011, either directly, or indirectly on his behalf or on behalf of others, within the North Island of New Zealand, and in particular but not exclusively as an employee of Smart Environmental Limited, from soliciting, diverting, appropriating to or accepting on behalf of any competing business, or attempting to solicit, divert, appropriate to or accept on behalf of any competing business, any business from a customer or actively sought prospective customer of the defendant with whom he had dealt, whose dealing with the defendant he had supervised or about whom he had acquired confidential information in the course of his employment.

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Judgment delivered at 11.30 am on Thursday 3 February 2011

[1] AA529/10.
[2] [2007] NZCA 58; [2007] ERNZ 60