New Zealand Employment Relations Authority Decisions

Lee v Air New Zealand Ltd AA 347/07 (Auckland) [2007] NZERA 834 (5 November 2007)

Last Updated: 23 November 2021

Attention is drawn to the non-publication orders at paragraphs [33] and [53].

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 347/07 5103880

BETWEEN	MICHELLE LEE Applicant
AND	AIR NEW ZEALAND LIMITED Respondent

Member of Authority: Alastair Dumbleton

Representatives: Doug Alderslade, Counsel for Applicant

Harry Waalkens QC, Counsel for Respondent Investigation Meeting: 2 November 2007

Determination: 5 November 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant Ms Michelle Lee asks the Authority for a declaration to resolve a dispute about the interpretation, application or operation of an employment agreement she entered into with the respondent, Air New Zealand Limited ("ANZ").

Restraint of trade provision

[2] The dispute is about an express provision in the agreement purporting to prevent Ms Lee, once her employment with ANZ ends, from becoming employed by or involved in any business which is in competition with ANZ. The restraint provision applies to New Zealand and Australia for a period of three months from the date of termination of employment.

[3] The relevant parts of the provision are as follows:

19. ***Non competition after employment***

19.1 In consideration of entering into this agreement, including the resultant benefits to you, you agree that for three months after termination of your employment (regardless of the reason it was terminated), you will not do any of the following without the written consent of the Chief Executive:

(a) be directly or indirectly involved in any capacity, whether as an employee, contractor, principal, agent, shareholder, self employed person or otherwise, in any business or activity which was in any way in competition with the Company or its related Companies at the time your employment terminated, or enters into competition with the Company or its related Companies in the three months following the date of termination. This applies anywhere in Australia or New Zealand. However, you are not prevented from holding shares listed on a recognised stock exchange as long as you do not hold more than 10% of the issued capital of any company;

Virgin Blue

[4] This dispute arose when Ms Lee resigned from ANZ, shortly after accepting employment in Australia with Virgin Blue Airlines Pty Ltd. Ms Lee gave her notice of resignation on 28 September 2007 and has agreed to start work for Virgin Blue in Brisbane on 5 November 2007.

[5] Virgin Blue is a competitor of ANZ. It flies within Australia and also internationally in South East Asia, the South Pacific and elsewhere. In August 2007 the airline announced that its offshoot company Pacific Blue would commence flying main trunk routes within New Zealand. Those operations are due to commence in a few days time, on 12 November 2007, offering competition to ANZ.

[6] When she resigned Ms Lee had been an employee of ANZ for about 3 years and had twice been promoted, most recently at the end of June 2007 to the permanent position of Marketing Manager Air NZ Brand. This was a senior management position, being only 2 levels below that of the CEO of the company, Mr Rob Fyfe. For a few months earlier this year she acted temporarily in a position immediately below his and had directly reported to him.

[7] It is clear that Ms Lee was highly regarded by ANZ and was likely to go even higher in her career with the company. Shortly before she resigned Mr Fyfe had affirmed and demonstrated the value the company placed in her and its strong wish to retain her. Mr Fyfe was aware then that Virgin Blue had offered Ms Lee employment.

[8] Ms Lee was first approached in late April 2007 by a head hunting agency retained by Virgin Blue. A few weeks later, after being interviewed by Virgin Blue executives, she was offered the position of General Manager, Marketing, based in Brisbane. By comparison with the position Ms Lee then held with ANZ, she regards the Virgin Blue position as a significantly more senior role in a much larger business. She describes the total remuneration offered as considerably higher than her ANZ pay and conditions at the time.

[9] She disclosed to ANZ her interest in Virgin Blue and the employment offer that had been made to her. After discussion with Mr Fyfe and her manager Mr Steve Bayliss she declined the offer. Straight afterwards she received further promotion and a commensurate increase in remuneration, with effect from the beginning of July 2007.

[10] Virgin Blue tried contacting Ms Lee again at the end of August. When she eventually responded she was again offered the position she had earlier declined. This time she accepted.

Insistence by ANZ on non competition

[11] Ms Lee gave ANZ notice of her resignation on 28 September 2007 and advised the company she would be working for Virgin Blue in Australia.

[12] Upon receiving her notice of resignation ANZ required Ms Lee to immediately vacate her office and remain at home, on “garden leave”, until the expiry of the 4 week notice period. In making those requirements ANZ invoked an express term of the employment agreement and no issue arises about the legality of the employer’s actions in this regard.

[13] A few days after giving her resignation Ms Lee received from ANZ a strongly worded letter advising of her obligations under the terms of employment she had with the company. One of those was clause 19, under which Ms Lee was advised that she

was not free to commence employment with Virgin Blue before 26 January 2008, being the date of expiry of the 3 month restraint period. Ms Lee was also advised that ANZ would use any legal means to ensure that she complied with all terms of employment that continued to apply after her termination. She was warned that she risked being sued for damages if she breached any of these contractual obligations.

[14] Ms Lee took legal advice and had her solicitors write to ANZ to give the company her assurance that she would observe the confidentiality obligations provided in the employment agreement and which were expressed to remain in effect after termination. In return for that assurance ANZ was asked to confirm that Ms Lee would not be prevented from commencing her new position with Virgin Blue after 26 October 2007, the date of expiry of her notice period.

[15] ANZ firmly rejected this approach and reiterated the earlier warning given that legal action would be taken by the company to protect its interests if there was any breach of the employment agreement. ANZ also rejected the suggestion that the restraint was unlawful in any way.

[16] Having accepted the position with Virgin Blue, Ms Lee confirmed a start date of 5 November 2007 in Brisbane. She began making arrangements to permanently relocate to Australia, which included putting up for sale her family home in Auckland and removing her children from their local school. Ms Lee's husband resigned his employment in Auckland and intends eventually to take a new job in Australia once the family is re-established there.

[17] These arrangements and their timing created a need for this dispute to be resolved urgently. Ms Lee's application to the Authority was lodged on 24 October 2007, while she was completing the term of notice. By then her solicitors had already made arrangements for a mediation date of 30 October and for an investigation meeting soon after, on 2 November, if mediation did not resolve the dispute.

[18] It deserves to be acknowledged that of necessity ANZ had very limited time to prepare for the investigation but managed to meet the timetable without attempting to have the meeting deferred. The Authority is grateful for the cooperation of the company witnesses and counsel, Mr Waalkens QC, which has enabled the matter to

be fully investigated and argued, leaving the Authority able to make a determination. Both parties wish to know where they stand as quickly as possible.

Restraint of trade provisions – legal principles

[19] The legal principles relating to the enforceability of restraint of trade provisions which are sometimes put in employment agreements are well settled. There are any number of cases from the Court of Appeal, High Court and Employment Court explaining them. One concise statement of the principles is to be found in *The Broadcasting Corporation of New Zealand v. Nielsen* [1988] NZHC 959; (1988) 2 NZELC 96,040, a decision of the High Court in a case not dissimilar to the present one.

[20] Mr Nielsen had been the programme director of the BCNZ's radio station 3ZB in Christchurch before resigning to take up an offer of employment with Radio Avon, a direct competitor in commercial radio broadcasting. The BCNZ sought an injunction to prevent him doing so and breaching an express restraint of trade provision. The scope of the restraint was 6 months and anywhere within 100 kilometres of Christchurch. Mr Nielsen's contract also had a separate express term requiring him, both during and after the employment, to maintain confidentiality in respect of "secrets" relating to the business or affairs of the BCNZ. In addition to clause 19, Ms Lee has a similar confidentiality provision in her employment agreement with ANZ, at clause 8.

[21] The High Court found that the restraint clause was justified in the circumstances and ordered Mr Nielsen for a period of 6 months not to undertake the particular employment he had accepted with Radio Avon. The restraint provision was held to be justified to give the BCNZ reasonable protection against disclosure of the confidential information to which Mr Nielsen had become privy while working for the corporation. The Court declined to order compliance with the separate confidentiality provisions, because Mr Nielsen had given an express undertaking not to disclose such information in breach of the provisions. That undertaking was accepted by the BCNZ.

[22] In his judgment, given in substantive proceedings, Hardie Boys J made the following general observations about the law governing restraint of trade provisions or covenants:

I turn now to the question of the enforceability of the covenant in restraint of trade. Such a covenant is prima facie unlawful, but

will be upheld to the context that the employer is able to establish that it is reasonably necessary for the protection of the proprietary interest which the law recognises that he has in what may be called his trade secrets and his trade connections: and provided further that the covenant is not unreasonable from the point of view of the employee and that it is not in conflict with appropriate considerations of public interest.

[23] His Honour noted that while the restraint of trade clause had been inserted to protect the employer after the employee's departure, obvious considerations required some protection of the employee's future interests as well.

[24] As to the nature of "trade secrets," Hardie Boys J found included among them was "information confidentially obtained," citing the leading English case of *Herbert Morris Ltd v. Saxelby* [1916] 1 AC 688, at 709.

Scope of restraint

[25] In assessing the reasonableness of a restraint provision, relevant factors include the scope of it. In this case, Ms Lee is to be restrained from being employed by any business in competition with ANZ within the area of Australasia and for a period of 3 months. If ANZ is justified in restraining Ms Lee at all, there is no real argument that this scope is too wide. Given the nature of the business ANZ is in, and given that it is a first level airline operator internationally as well as domestically, it seems reasonable for the restraint to extend at least to Australia. Even further afield might arguably have been justified. Assuming any restraint is reasonable, no serious challenge could be made to it operating for a period of only 3 months, which may have been fixed to reflect the pace at which airlines devise and act upon new plans and strategies for advancing their business in a highly competitive and fast changing market.

[26] Further principles to be applied require that the employer is to demonstrate the reasonableness of any restraint provisions. The reasonableness or otherwise of the provisions is to be assessed at the time the provisions became part of the employment agreement.

Consideration

[27] The law also requires consideration to be given by the employer in return for the employees restraint, and recently the Court of Appeal in *Fuel Expresso Limited v. Hsieh*, unreported, 9 March 2007, CA 88/07, discussed the nature of consideration in that context. The decision need not be considered further since from the outset counsel Mr Alderslade for Ms Lee, accepted that consideration was present in this case. Clause 19 expressly provides that Ms Lee agreed to the restraint in consideration of entry into the employment agreement and receiving the benefits resulting from it.

ANZ's confidential information known to Ms Lee

[28] Mr Alderslade accepted, although tentatively, that Ms Lee had information which would be regarded as confidential within the ambit of a restraint of trade provision. In my view it is clear from the evidence and inferences reasonably to be drawn from it, that in performing her position as marketing Manager Air NZ Brand, Ms Lee had access to and regularly received information that was highly confidential to ANZ. Performing a senior and key role within the company made this inevitable. Ms Lee herself in evidence did not pretend otherwise.

[29] Particularly noteworthy is the involvement Ms Lee had in strategic planning by ANZ to defend its business against incursion by new airlines into the domestic New Zealand market. Virgin Blue, which ANZ regards as being an aggressive competitor, was identified in those plans as highly likely to move into New Zealand to compete for airline business here.

[30] ANZ's prediction proved correct, as in August the start up of Pacific Blue in New Zealand from November, was announced. This is a development that naturally ANZ is deeply concerned about. Since becoming privy to those defensive plans while working for ANZ, Ms Lee has resigned and wishes to now start work immediately for Virgin Blue the parent company of Pacific Blue.

[31] Mr Bayliss who is the General Manager Marketing of ANZ and the person to whom Ms Lee reported, gave detailed evidence of other information including particular strategies, plans and ideas that Ms Lee had learned of in the course of performing her role. He regards such material as sensitive and confidential information that ANZ

protects zealously from becoming known by competitors before

planned release into the public domain. Mr Bayliss was not challenged on his claims made in evidence in respect of the involvement Ms Lee had had with the confidential information he detailed.

[32] I find from the evidence of Mr Bayliss that ANZ did have "trade secrets" in the form of highly sensitive confidential information. These became known to Ms Lee in the course of her work.

[33] By order of the Authority made under clause 10 of Schedule 2 of the Employment Relations Act 2000, the contents of the affidavit of Mr Bayliss sworn on 30 October 2007 are not to be disclosed or published in any way by any person.

[34] Although asked to by Ms Lee's solicitors, ANZ did not identify any other category of trade secret in addition to confidential information, for which protection was required by the restraint provisions of clause 19.

Is the restraint necessary in the circumstances?

[35] The case for Ms Lee is that the restraint provision is unnecessary and unreasonable in circumstances where, as she acknowledges, she is not only bound by the separate confidentiality provisions which remain in force beyond the term of employment, but will offer to strengthen the operation of those provisions. Ms Lee has provided evidence from her new employer Virgin Blue about restrictions it says will be observed by that company in giving work to her, to remove any risk of a breach by her of confidentiality.

[36] Mr Stefan Pichler, the Chief Commercial Officer of Virgin Blue Australia is aware of the disputed restraint provisions. He has sworn in an affidavit that Ms Lee will only have involvement in the Virgin Blue Australian domestic market and that she will not be involved in any New Zealand projects of the airline such as Pacific Blue, or its international operations Polynesian Blue and V Blue. Mr Pichler emphasises in his affidavit that these self imposed restrictions will last only for the 3 month duration of the restraint. Further, he confirms that he will not require Ms Lee to breach her on-going obligations in respect of confidentiality. Although Mr Pichler was not able to be examined, his evidence that the proposed restrictions would be applied and observed is accepted by the Authority.

[37] To give even further strength to those restrictions and to the confidentiality provisions, Ms Lee has offered to give an undertaking not to do anything that Mr Pichler has sworn Virgin Blue will not be asking her to do.

[38] In evidence ANZ accepted without hesitation that Ms Lee was genuine and sincere with regard to the undertakings she has offered. There is no doubt that her intentions are to comply with any undertakings she gives, and there is not the slightest suggestion to the contrary. It is a measure of her integrity that she has applied to the Authority for this declaration before commencement of employment with Virgin Blue, and her conduct in this regard was acknowledged to her by ANZ through Mr Waalkens QC.

[39] In *BCNZ v. Nielsen* (above), the High Court considered how best to protect the interest the employer had with regard to "information confidentially obtained" by the employee. The Court referred to the decision in *Littlewoods Organisation Ltd v. Harris* [1978] 1 All ER 1026 at 1033, where Lord Denning MR said the following:

It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not: and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade.

[40] In applying the law to Mr Nielsen the High Court found that because his position had given him access to confidential information belonging to the BCNZ, and because he had that confidential information in his possession, the BCNZ was entitled to obtain reasonable protection against disclosure of that information to a competitor. The Court found therefore that the covenant in restraint of trade was justified. This was notwithstanding that Mr Nielsen was bound by a separate confidentiality provision and that he had given an express undertaking to comply with it.

DB Breweries and other cases

[41] In submissions Mr Alderslade referred the Authority to the seemingly different approach taken in some cases by the Employment Court where dual restraint and confidentiality provisions are present in the employment agreement. One such case

is *DB Breweries v. Marshall* [1994] 1 ERNZ 98. In giving judgment the Court at p104 observed that what the employer DB Breweries was entitled to protect was encompassed in the express restrictions on confidentiality contained in the employment agreement. The Court held that where there is no evidence or even suggestion of a deliberate breach of the confidentiality provisions, it should not give effect to a restraint provision "merely to ensure there is no possibility of the confidentiality clause being intentionally breached."

[42] As with all the relevant legal authorities considered in this case there are differences of fact and degree between them and the circumstances of this case. For example, Mr Marshall was a sales representative in the Northland region for DB Breweries and was one of 80 sales staff employed by the company throughout New Zealand. Given his position and relative importance within the employer company, a restraint of 3 months New Zealand wide can more readily be seen as unreasonable by comparison to the restraint on Ms Lee and the position with ANZ she recently held.

[43] Some of the decisions referred to are not from substantive proceedings but were given following application made to a court for interim relief. They turn therefore on the way a court must apply the tests for granting interlocutory injunctions. Those tests have no application in this case, which requires a substantive determination of the dispute according to the full legal and evidential merits investigated by the Authority.

[44] The BCNZ v. Nielsen case referred to above was a decision from a substantive not interlocutory proceeding, as in the present case. Although the *Littlewoods* case considered by the High Court in it was a 1978 decision, it remains good law. It was cited with approval by the New South Wales Court of Appeal in the case Mr Waalkens QC supplied, *Kone Elevators Pty Ltd v. McNay*, unreported, 19 March 1997, CA 40113/97. In that decision the Court recognised future marketing plans, strategies and similar intellectual produce, as falling within the meaning of confidential information in this area of law.

[45] I consider the approach taken in *The BCNZ v. Nielsen* should also be taken in this case towards the disputed operation of clause 19 of the employment agreement between Ms Lee and ANZ. In the particular circumstances I consider that notwithstanding the confidentiality provisions and undertakings about complying with

those, to protect its recognised interests it is reasonable for clause 19 to apply to Ms Lee within the limitations as expressed in the provision.

[46] I accept that would be an unsatisfactory compromise for Virgin Blue to ring- fence Ms Lee in her new position, so that her work will only be in connection with the Australian domestic market. Some confidential information about ANZ is likely to have relevance to other airlines, no matter what part of the world they are operating in. As employment is a contract of personal service, there are obvious difficulties for the Authority and ANZ in policing or superintending ring fencing arrangements and any undertakings that are given to comply with the confidentiality provisions. I accept that those solutions are not practicable in this case.

[47] I find that ANZ has demonstrated the reasonableness of clause 19, assessed as at the time the employment agreement containing the restraint was entered into. Although there had been no discussion specifically about clause 19, Ms Lee said she had been aware of the provision when she signed the contract after being given time to take advice on it. I find that the provision was tailored to her particular position rather than being a standard clause routinely put in all management contracts.

The Virgin Blue employment agreement

[48] Ms Lee was directed by the Authority to produce to it her letter of appointment from Virgin Blue and her Employment Agreement with that company. Most of the contents of these are irrelevant to a determination of this dispute, although they are not entirely so.

[49] Ms Lee clearly has considerable commercial acumen and can be taken to fully understand why any business must usually insist on the strict performance of contractual terms entered into. She has not been heard to say that ANZ is being hard hearted in its approach, even although its stance may leave her and her family without employment in Brisbane for 3 months. Ms Lee believes that her job with Virgin Blue will still be there for her to take up at the end of that period. The remuneration she will receive from that position upon commencement is of such magnitude that she is likely to be able to raise any finance necessary to tide her family over until she is released from the restraint. Her skills and experience will also make her highly employable in consulting work, even outside of the aviation industry. Presently Australia has significant shortages of workers in many fields.

[50] Although again not strictly relevant, at least of interest in her terms of employment with Virgin Blue is the presence of restraint of trade and confidentiality provisions she has agreed to. After termination, by deed she will also continue to be bound by obligations of confidentiality. If she resigns from Virgin Blue she may be required to stay at home on "Gardening Leave" for 4 months before her employment terminates under the contract. After that time is up she will be required not to compete or be involved in competition for a further 4 months. Effectively she could be kept out of competition or involvement in competition for as long as 8 months. There is therefore some irony in her seeking to have the ANZ restraint declared unenforceable, as Mr Alderslade noticed.

[51] Ms Lee has expressly agreed in her Virgin Blue agreement that the restraint of trade provisions in it are "fair and reasonable." In giving her agreement Ms Lee was in a very strong bargaining position to be able to negotiate any provisions that she thought might better protect her interests. She was persistently head hunted for this position, from stable well paid employment with ANZ where she had high career prospects and where she said she had been happy.

[52] What is of relevance in the agreement is the acknowledgement given by Ms Lee that "irreparable damage" would be caused to the business of Virgin Blue if confidential information was disclosed to competitors. This supports the evidence of Mr Bayliss as to how critical a matter it is for an airline to maintain confidentiality in respect of the sort of information he described Ms Lee as being privy to.

[53] The Virgin Blue letter of appointment and also the contents of the employment agreement between the company and Ms Lee are not to be published or disclosed in any way by any person (other than Ms Lee or Virgin Blue). The Authority makes the order to this effect pursuant to clause 10 of Schedule 2 of the Employment Relations Act.

Determination

[54] To resolve this dispute, for the reasons given above the Authority declares that clause 19.1(a), **Non competition after employment**, applies to Ms Lee. It operates for 3 months after termination of her employment with ANZ and prevents her from becoming an employee of Virgin Blue in Australia or New Zealand. As well as employment, within its expressed scope the provision prevents her from becoming

involved in any other capacity with any business competing with ANZ. There is no dispute that sub-clauses (b), (c) and (d) of clause 19.1 also continue to apply to Ms Lee.

[55] Accordingly, Ms Lee cannot lawfully commence the performance of her position with Virgin Blue in Brisbane until 26 January 2008.

Costs

[56] If there is any question of costs that the parties are unable to resolve themselves, written application may be made to the Authority for an order.

A Dumbleton

Member of the Employment Relations Authority