Employment Court of New Zealand

PGG Wrightson Limited v Jary CC 14/08 [2008] NZEmpC 95 (10 October 2008)

Last Updated: 23 October 2008

IN THE EMPLOYMENT COURT

CHRISTCHURCHCC 14/08CRC 20/08

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

AND

IN THE MATTER OF preliminary issues raised by the parties

BETWEEN PGG WRIGHTSON LIMITED
Plaintiff

AND BRENT ROBIN JARY
Defendant

Hearing: 5 August 2008

(Heard at Christchurch)

Court: Chief Judge GL Colgan Judge CM Shaw Judge AA Couch

Appearances: D P Robinson, Counsel for Plaintiff
K G Reid and J Costigan, Counsel for Defendant

Judgment: 10 October 2008

JUDGMENT OF THE FULL COURT

[1] Where an individual employment agreement contains a restraint of trade, can the benefit of that restraint be assigned by the employer to a third party and enforced by that third party against the employee? That is the essence of a preliminary question submitted by the parties to this proceeding and to which the Court responds in this judgment.

The facts

[2] For the purposes of this preliminary issue, the parties provided the Court with a brief statement of agreed facts and three documents. The essential facts are as follows.
[3] Mr Jary was employed by Woodhams Wool Store Limited ("Woodhams") from 1981 until 5 June 2008.
[4] Mr Jary and Woodhams were parties to an individual employment agreement dated 9 December 2002. Clause 42 of that agreement was a non-solicitation provision expressed to be effective until 6 months after the termination of Mr Jary's employment. The operative part of clause 43 of the agreement was as follows:

43. Restraint of Trade

43.1

Employees shall not at any time during the term of this agreement and for a period of twelve months after the termination of employment with the Employer establish, purchase, or obtain an interest in, either directly or indirectly any business in relation in any way to the Employer within a radius of 50 kilometres, without the express written consent of the Employer, provided that such consent shall not be unreasonably withheld.

[5] In May 2008 Woodhams entered into an agreement to sell the whole of its business to PGG Wrightson Limited ("PGG Wrightson"). The effect of the agreement was to transfer the business as a going concern. A specific sum was paid for *"goodwill"* which included: *"the benefit of all warranties and covenants, that the Vendor has against any person relating to the Business..."*.
[6] The agreement for sale of the business also included a provision requiring PGG Wrightson to offer employment to most of the employees of Woodhams. PGG Wrightson offered Mr Jary employment but he did not accept it. Woodhams then dismissed Mr Jary on grounds of redundancy on 5 June 2008.
[7] Mr Jary was not involved in the negotiation or settlement of the sale by Woodhams of its business.

Issues

[8] Arising out of these limited facts, the parties agreed to ask the Court to answer the following questions:

(a) On the agreed facts of this matter, was the benefit of the covenant in restraint of trade contained in the individual employment agreement assignable to the purchaser of the business and enforceable by that purchaser when the vendor of the business had made the employee bound by the restraint redundant?

(b) If it is enforceable at the suit of the assignee, does the Employment Court have jurisdiction?

Is the benefit of the covenant assignable?

[9] Mr Robinson and Mr Reid each sought to persuade us that there are essential principles which can be applied generally in cases where a third party relies on the assignment of the benefit of a covenant in restraint of trade contained in an employment agreement.
[10] The conclusion Mr Robinson urged us to reach was that any benefit which is part of the goodwill of a business will be assignable unless there is an express agreement to the contrary.
[11] In Mr Reid's submission, the starting point should be that no right or benefit arising out of an employment agreement is assignable unless it can be established that the parties to the agreement intended it to be assignable.
[12] In support of these positions, both counsel provided us with thoughtful submissions and referred us to a number of decided cases. Mr Robinson relied substantially on *Williams v Masters* (1912) 31 NZLR 1148 and *Gardner v Cooper* High Court, Auckland, CP 1360/90, 24 October 1990, a decision of Heron J. Mr Reid relied principally on the decision of Holland J in *Post Haste Couriers Ltd v Casey* High Court, Invercargill, CP 83/89, 24 October 1989.
[13] We have considered these and the several other decided cases cited to us. We have also had regard to the numerous texts which deal with the subject of assignment and to academic articles as well as many of the decided cases referred to in that literature.
[14] Having regard to all of these authorities, we are unable to discern a common thread of sufficient strength and clarity to be stated as a principle of general application to the issue in this case.
[15] Because of their nature, the cases relied on by counsel were of limited value. While *Williams v Masters* contained discussion of principles, the case was decided on another point and what Chapman J said on the issue which concerns us here must be regarded as *obiter dicta*. We are also conscious that employment law has developed considerably in the period of nearly 100 years since that case was decided. A major difficulty with *Gardner v Cooper* is that it was dealing only with an application for interim relief and Heron J made it clear that he was concerned only to establish whether there was a serious issue to be tried. What emerges most clearly from the *Post Haste Couriers* decision is that it turned on the particular facts of the case rather than any general principle.
[16] The wide range of other decided cases deal with covenants in restraint of trade arising out of many different relationships including those of employer and employee, vendor and purchaser and independent contractors. They also deal with the assignment of differing interests including the whole of a contract, the benefit of the restraint provision only and goodwill. Many cases involve applications for interim relief. In each of the various permutations arising out of these differing parameters, the outcomes vary. The only truly common factor is that

the decisions depend significantly on the particular facts of each case. On the limited facts available to us, therefore, we are unable to reach any useful decision on the principal issue in this case.
[17] Mr Robinson made brief submissions to us on the significance of the fact that Mr Jary had been dismissed for redundancy. He drew a distinction between cases involving the enforcement of a restraint of trade against an employee who had been wrongfully dismissed and this case, in which no complaint is made about the justification for the dismissal. That may well be an important distinction but its significance to this case can only be determined in light of all the facts.
[18] For these reasons, we decline to answer the first question.

Jurisdiction

[19] This matter comes before the Court as a challenge to a determination of the Employment Relations Authority. The jurisdiction of the Court to decide the matter therefore depends on whether the Authority had original jurisdiction to determine it.
[20] The jurisdiction of the Authority is primarily defined in s161 of the Employment Relations Act 2000 ("the Act"). The relevant parts of that section are:

161 Jurisdiction

(1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—

...

(r) any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):

[21] The term *"employment relationship problem"* is defined in s5:

employment relationship problem *includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment*

[22] The covenant in restraint of trade at issue in this case was a term of an employment agreement. The benefit of that covenant can therefore properly be said to arise out of and be related to the employment relationship between Mr Jary and Woodhams. The plaintiff in this case, however, is not Woodhams but PGG Wrightson which does not have an employment relationship with Mr Jary. That raises the question whether the claim by PGG Wrightson can be said to arise out of or be related to the employment relationship between Mr Jary and Woodhams.
[23] Historically, the words "relating to" in this jurisdiction have been given a wide meaning – see for example the decisions of this Court in *Medic Corporation Ltd v Barrett* [1992] 3 ERNZ 523 and *Waikato Rugby Union (Inc) v New Zealand Rugby Football Union (Inc)* [2002] 1 ERNZ 752 and the decision of the Court of Appeal in *Conference of the Methodist Church of New Zealand v Gray* [1996] NZCA 407; [1996] 1 ERNZ 48. In *B D M Grange Ltd v Parker* [2005] NZHC 515; [2005] ERNZ 343, however, a full Court of the High Court expressed the view in paragraph [66] of the decision that:

..."relating to" in the definition of "employment relationship problem" must be read in a limited way to mean any cause of action, the essential character of which is to be found entirely within the employment relationship itself.

[24] While we do not necessarily agree with this formulation, it seems to us that the circumstances of this case are such that the plaintiff's claim does "relate to" the employment relationship between Mr Jary and Woodhams, even in the narrow sense suggested by the High Court. A general principle applicable to the assignment of proprietary rights is that the assignee cannot exercise a greater right than that which would otherwise have been exercisable by the assignor. Thus, the extent to which PGG Wrightson can enforce the benefit of the covenant against Mr Jary in reliance on the assignment will be limited to the extent to which Woodhams could have done so but for the assignment. Woodhams' rights arose out of the employment agreement and were therefore part of the employment relationship. It follows that, to use the words of the High Court in the *B D M Grange* case, the essential character of the claim by PGG Wrightson is to be found in the employment relationship which previously existed between Mr Jary and Woodhams.
[25] We conclude that the Authority had jurisdiction to determine this matter and that, as a consequence, the Court has jurisdiction to decide the challenge to the Authority's determination.

Part 6A of the Employment Relations Act 2000

[26] In relation to the first question, Mr Reid advanced an argument based on Part 6A of the Employment Relations Act 2000. His primary submission was that the effect of Subpart 3 of Part 6A was to *"change the climate of*

employment law generally" as it affected the rights and obligations of persons involved in the restructuring of a business and that this change favoured Mr Jary's case. We do not accept that submission. While it appears that Subpart 3 of Part 6A of the Act did apply to the sale by Woodhams of its business and the subsequent dismissal of Mr Jary on grounds of redundancy, the consequences which flow from that are specifically defined in the Act. There is no indication in the Act that Part 6A was intended to modify other aspects of the common law, such as those at issue in this case, and we see no reason for such an effect to be inferred.

[27] Mr Reid also made a submission based on the specific provisions of Subpart 3 of Part 6A of the Act. He noted that the individual employment agreement between Mr Jary and Woodhams did not contain an employee protection provision as required by s69OJ of the Act. Mr Reid submitted that the consequence of this is that *"any attempt to transfer all or any part of (for example the restraint of trade provision) the IEA without such a provision cannot be valid."* We do not accept that submission for two reasons. To the extent that Subpart 3 of Part 6A is concerned with terms and conditions of employment, it does so in the context of employees who choose to transfer to a new employer. Mr Jary chose not to transfer to PGG Wrightson, the new employer in this case. Secondly, PGG Wrightson's claim is based on an assignment of the obligations it is alleged Mr Jary owed under his existing employment agreement with Woodhams. It is therefore unconnected with the consequences of the restructuring which made Subpart 3 of Part 6A applicable.

Conclusions

[28] In summary, we have reached the following conclusions:

On the limited facts agreed by the parties, we decline to express a view whether PGG Wrightson is entitled to enforce the covenant in restraint of trade against Mr Jary.

The Employment Relations Authority had jurisdiction to determine this matter and the Employment Court has jurisdiction to decide the challenge currently before it.

Part 6A of the Employment Relations Act 2000 has no application to the matter currently before the Court.

Future of this case

[29] This matter will now be assigned to a single Judge for the hearing of evidence and a substantive decision. The Registrar will arrange a telephone conference with counsel as soon as possible to determine the parameters of that hearing.

Comment

[30] We acknowledge the efforts made by counsel in preparing and presenting their submissions to us on the preliminary issues. Counsel will no doubt wish to draw on those submissions for the purposes of the substantive hearing but may also wish to refine them in light of the evidence. With that in mind, we have therefore refrained from referring in detail in this judgment to the submissions made in respect of the first point.

Costs

[31] Costs relating to the matter to date are reserved.

Judge A A Couch

for the full Court

Judgment signed at 8.30am on 10 October 2008