

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 344
5564275

BETWEEN SILVER LINE GROUP LIMITED
Applicant

A N D PHILIP SPOONER
Respondent

Member of Authority: T G Tetitaha

Representatives: D Kilpatrick, Counsel for the Applicant
N Gray, Counsel for the Respondent

Date of oral determination: 11 October 2016

Date of written
determination: 12 October 2016

**ORAL DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Silver Line Group Limited (Silver Line) alleges Phillip Spooner breached terms of his employment agreement that applied post-employment.

[2] The parties have agreed to seek an oral determination about a factual dispute. This dispute is around the circumstances of Mr Spooner signing his individual employment agreement. Mr Spooner alleges he did not sign the agreement and/or was under duress to sign and therefore Silverline ought not to be able to enforce it against him.

[3] Following some discussion this morning, it was agreed to have a short focused hearing about this factual dispute and an oral determination thereafter. At the end of the oral determination, the parties want an opportunity to meet with another Authority Member for the purposes of discussing settlement.

Relevant Facts

[4] Mr Spooner was employed as a Sales Manager in 2008 by the respondent's predecessor. His customer base at the material time extended from the top half of the North Island, from Northland to Auckland then down to the Bay of Plenty and Waikato area.

[5] In or around 1 April 2014 Mr Spooner's employer's business was sold to Silver Line.

[6] Before settlement of the sale of the business, Silver Line directors, Greg Boakes and Simon Boakes, met with the existing staff to offer them employment. Mr Spooner was provided with a draft employment agreement on or about 20 March 2014.

[7] Mr Spooner then arranged to meet with Greg Boakes and Simon Boakes on 27 March 2014. He was seeking modification, including in particular deletion of clauses 16 and 26 of the employment agreement. Clause 16 restricted his use of confidential information. Clause 26 restrained his post-employment activities by way of a non-competition clause for six months and a non-solicitation clause which applied for twelve months.

[8] It is accepted Mr Spooner signed the last page of Schedule 3 to the employment agreement on 27 March 2014.

[9] It is disputed whether Mr Spooner signed the acknowledgement page of the employment agreement and Schedule 1. The acknowledgement page acknowledges that Mr Spooner has read and understood the whole agreement and agreed to be bound by it. Schedule 1 set out his position description.

[10] There is also a dispute about the behaviour and discussions that occurred between the Boakes and Mr Spooner on 27 March 2014.

[11] Mr Spooner resigned his employment in July 2014 to go overseas with his wife. He later returned to Hastings, New Zealand and incorporated a company known as I-Deel Limited in October 2014. The company was a competitor of Silver Line.

[12] Around this period of time Silver Line received information from customers and suppliers that Mr Spooner had been soliciting work and had set up in competition using Ideal Limited.

Credibility

[13] There is a substantial conflict of evidence between these parties. This requires me to make findings of credibility about the evidence I have read, seen and heard from the parties today.

[14] Credibility can be assessed on two bases - the witness personally and the story this witness tells me. Factors that are relevant to credibility include demeanour, inconsistencies and contradictions of all kinds, prevarication, reasons to lie and concessions made where due any perception by the witness of a risk to their credibility in giving that evidence.

[15] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. I ask myself, is this evidence absurd or is there other evidence making that conclusion inevitable?

Did Mr Spooner sign the agreement?

[16] There is no expert handwriting evidence produced by either party. I have had to rely upon my sighting of the original employment agreement produced at hearing and Mr Spooners oral evidence.

[17] Under examination Mr Spooner conceded the signature below that Schedule 1 looked like his and the handwritten date also looked like his handwriting. In respect of the acknowledgement page, Mr Spooner conceded the handwritten date looked like it was his handwriting, but denied that was his signature.

[18] The signature on the agreement that Mr Spooner accepted was his was in a blue pen. From my perusal of the original agreement, it appears that the same pen was used to sign the acknowledgment and Schedule 1 pages. Mr Spooner accepted the same pen may have been used on two of the pages, but did not accept he signed the acknowledgement page at the end of the main body of the employment agreement.

[19] Simon Boakes states he did not receive the signed employment agreement until 1-2 days later. There is no evidence they or anyone else signed the agreement in

lieu of Mr Spooner. The evidence points to it being more likely Mr Spooner signed all three pages including the date on the acknowledgement page of 28 March 2014.

[20] In my view, there is sufficient evidence to conclude it was Mr Spooner's signature on the acknowledgement page and Schedule 1 to the employment agreement.

Was Mr Spooner subjected to duress?

[21] Mr Spooner also alleges duress around the signing of the contract. He seeks a declaration setting aside clauses 16 and 26 of the employment agreement. The duress arose from the alleged behaviour of Greg and Simon Boakes on 27 March 2014.

[22] Mr Spooner alleges they did not wish to negotiate at all. Greg Boakes left the room shouting "*just sign the contract*". Simon Boakes apologised and said "*if you don't agree with it don't sign it but you must sign the provision or you won't get paid*". Mr Spooner also alleges duress because he was given no opportunity to get legal advice.

[23] This appears to be a type of unfair bargaining claim. Mr Spooner seems to be alleging Silver Line knew or ought to have known he was induced to enter into the agreement by oppressive means, undue influence or duress under s68(2)(c) of the Employment Relations Act 2000. The onus is upon Mr Spooner to prove there was duress.

What did Simon Boakes say?

[24] I accept the evidence that Simon and Greg Boakes required protection for the goodwill Silver Line had purchased. It seems logical to me that they would seek restraints of trade with their employees to protect that goodwill. It also seems equally unlikely that they would dispense with those restraints, having spent so much money to purchase the business.

[25] Mr Spooner was a senior sales manager. He had established client and supplier relationships over a significant period of time with his former employer. It is that goodwill Silver Line would have wished to protect by the restraints. Simon Boakes was aware from previous businesses they'd operated of the importance of employee restraints to protect their customer relationships.

[26] I am not convinced on the balance of probabilities that Simon Boakes would only have required the signing of Schedule 3. This is especially if the effect was for Mr Spooner not to be bound by the remainder of the agreement. I do not accept Simon Boakes said *“if you don’t agree with it don’t sign it but you must sign the provision or you won’t get paid”*.

What about the behaviour of Greg Boakes?

[27] Even if Greg Boakes left the 27 March meeting shouted *“just sign the contract”* this does not equate to duress. The contract was not signed at that time. Mr Spooner returned the contract sometime after 28 March 2016, the last date on the acknowledgement.

[28] Mr Spooner could not have been under any duress from the Boakes at the time he signed. Any duress finished when the meeting with the Boakes ended. Mr Spooner then took 1-2 days to think about it, sign and return the contract to Simon Boakes.

[29] It was accepted Silver Line had agreed to make some modifications to Schedule 1 including an increased salary and provision of a BMW car for Mr Spooner. I accept Mr Kilpatrick’s submission the Boake’s behaviour in that context was to show Silver Line refused to make any further modifications. This was not duress. Rather, it was the end of the bargaining.

Was Mr Spooner deprived of his right to seek legal advice?

[30] It is accepted Mr Spooner was given the contract on 20 March. There was sufficient time to seek legal advice before signing.

[31] The opportunity to seek legal advice does not restart because parties disagree over clauses in a contract. An employee has a duty of good faith to be active and constructive. Mr Spooner should have sought more time for legal advice if that was required before signing the agreement.

[32] Mr Spooner conceded he never asked for more time to seek legal advice. In my view he could not have been deprived of a right he never sought to enforce.

Determination

[33] There is a finding that Phillip Spooner signed the employment agreement upon the acknowledgement page and Schedule 1. It is accepted he signed the employment agreement at Schedule 3. Costs are reserved.

Addendum

[34] Following the oral determination the parties met with Member Campbell. They were able to resolve this application. I confirm the application is to be withdrawn. Parties are to meet their own costs.

T G Tetitaha
Member of the Employment Relations Authority