

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 92
3006953

BETWEEN SIMPLY SECURITY
 LIMITED
 Applicant

AND JUDITH HALL
 Respondent

3007673

AND SIMPLY SECURITY
 LIMITED
 Applicant

AND JAYSTON HALL
 Respondent

Member of Authority: Andrew Dallas

Representatives: Timothy Trask, Advocate for the Applicant
 Robert Thompson and Chrissy Gordon, Advocates for
 the Respondents

Investigation Meeting: On the papers

Determination: 12 June 2017

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. The restraint of trade contained in Judith Hall’s employment agreement is unenforceable.**
- B. The restraint of trade contained Jayston Hall’s employment agreement is unenforceable**
- C. Costs are reserved**

Employment relationship problem

[1] Simply Security Limited (Simply) is a duly incorporated company carrying on business as a security company. Simply held a contract to provide security services at Eastgate Shopping Mall (Eastgate) in Linwood, Christchurch from 1 April 2015 until 31 March 2017. From 1 April 2017, security services at Eastgate were provided by Red Badge Security, said to be a direct competitor of Simply.

[2] Judith Hall and Jayston Hall, who for the purposes of narrative alone, are married, were employed by Simply as security guards. They performed their duties exclusively at Eastgate.

[3] Ms Hall was initially engaged as a casual but was subsequently engaged on and from 8 June 2016 as a permanent employee under an individual employment agreement. Mr Hall commenced his employment with Simply on 26 November 2016 as a permanent employee also under an individual employment agreement.

[4] Ms Hall and Mr Hall were paid \$19.25 per hour by Simply for the work they performed at Eastgate.

[5] Ms Hall and Mr Hall resigned their employment with Simply on 31 March 2017. Neither gave the requisite notice under their employment agreements. Mr Hall was required to give four weeks' notice and Ms Hall, two weeks. They subsequently commenced employment with Red Badge.

[6] Simply says Mr Hall and Ms Hall have breached the restraint of trade provisions, which were materially identical, contained in their employment agreements and sought variously an "immediate in-junction", "interim injunction" and a "permanent injunction".

[7] Ms Hall and Mr Hall said the restraint of trade provision contained in their employment agreements were unenforceable against them.

The Authority's investigation

[8] Having reviewed the statements of problem lodged by Simply, the Authority found them deficient in several respects. In addition, Simply had not lodged affidavits in support or given undertakings as to damages.

[9] At this point, the Authority took the unusual step of urging Simply to instruct or, at least, consult a lawyer about its proceedings. However, this was to no avail.

[10] After further directions were given to Simply, including a requirement to provide affidavits in support of its application by an authorised representative of Simply and undertakings, and despite ongoing misgivings by the Authority – for example, the affidavits lodged by Simply's business risk and commercial manager, Timothy Trask were addressed to the District Court at Wellington – the proceedings were eventually served on Ms Hall and Mr Hall.

[11] Given the community of interest between the proceedings, I consolidated the matters under powers set out in s 221 of the Employment Relations Act 2000 (the Act).

[12] The parties were directed to attend mediation. Ms Hall and Mr Hall were directed to provide statements in reply and affidavits responding to those of Mr Trask.

[13] The parties were advised that in the event that the matter did not settle at mediation, the Authority would determine it “on the papers” under s 174D of the Act.

[14] The matter did not settle in mediation. Given the deficiencies in Simply's proceedings, concerns about the undertakings and the subsequent challenge to these by Ms Hall and Mr Hall, the Authority decided that the best assistance it could give to the parties to resolve their employment relationship problem was to determine, as a preliminary issue, whether the restraint of trade provisions were enforceable. The parties did not object to this course.

[15] Mr Trask was directed to lodge affidavits replying to the affidavits provided by Ms Hall and Mr Hall and the parties were invited to lodge submissions. Mr Trask provided an “updated” affidavit but declined the opportunity to provide submissions. Submissions were received on behalf of Ms Hall and Mr Hall from their advocates, Robert Thompson and Chrissy Gordon

Issues

[16] The following are the issues for investigation and determination:

- (i) Is the restraint of trade contained in clause 29 of Ms Hall’s employment agreement enforceable by Simply against her? ;
- (ii) Is the restraint of trade contained in clause 29 of Mr Hall’s employment agreement enforceable by Simply against him? ;
- (iii) Should either party contribute to the costs of representation of the other party?

Background facts against which the tests are to be applied

[17] Ms Hall said in her affidavit evidence she was advised by Monique Burke, Eastgate centre manager that Simply had lost the security contract on 6 March 2017. She advised Mr Hall of this at or about this time.

[18] On 30 March 2017, Ms Hall said she was approached by Red Badge who offered her and Mr Hall jobs performing the same work at Eastgate. Ms Hall said she did not accept the offer at that time.

[19] On their account, Ms Hall and Mr Hall were not told by Simply that it had lost the contract until 31 March 2017 when Mr Trask rang Ms Hall. She said that while Mr Trask advised there was no work available for them, Simply wished to retain her and Mr Hall as employees.

[20] While not directly challenging this account, in his affidavit evidence Mr Trask said that he did not discuss redundancy with Ms Hall and said Simply, which is headquartered in Wellington, had a presence in Christchurch with a plan for continued growth.

[21] Ms Hall said she was panicked by this phone call believing both she and Mr Hall would be out of work. Ms Hall said she then told Mr Trask about the Red Badge job offers and that she and Mr Hall would be accepting them.

[22] In response Ms Hall said Mr Trask became aggressive and mentioned the restraint of trade clause in her employment agreement.

[23] Ms Hall and Mr Hall then resigned from Simply with immediate effect and accepted jobs with Red Badge based at Eastgate. Ms Hall said her final pay, including her holiday pay, was withheld by Simply. Mr Hall said he had a week's pay withheld by Simply. No counter-claims were brought by either Ms Hall or Mr Hall in respect of these matters.

[24] Mr Trask in his affidavit said Simply employed Ms Hall and Mr Hall in good faith and their abrupt departure meant that it could not secure its "sensitive confidential intellectual property". No particulars were provided as to what this was.

[25] Mr Trask also alleged that Ms Burke was "instrumental" in securing the services of Ms Hall and Mr Hall for Red Badge. He also appeared to suggest that Eastgate was in breach of its agreement with Simply. Eastgate or Red Badge were not party to these proceedings and if they were, this would have raised significant jurisdictional issues.

The restraint of trade clause

[26] The restraint of trade clause was set in clause 29 of Ms Hall and Mr Hall's employment agreements. This clause relevantly provided:

Clause 29 Restraint of Trade

29.1 The employee shall not, during the term of this agreement, in any way that may conflict with the business of the employer, undertake any other business or profession or be, or become, an employee or agent of any other person or persons without the written permission of the employer such permission not be unreasonably withheld.

29.2 The employee must declare any interest on any business of any kind in which the Employee may potentially be in conflict or in competition with the business of the employer, Further, employees may not, whilst in the employ of the employer, invest personal

monies, obtain an interest in or establish any other business that may be deemed to be in competition with the employer or its principals, without the written permission of the employer.

29.3 The employee shall not, with the employer's written consent, directly or indirectly carry on, be engaged, concerned or interested in or otherwise associated with any business in competition with any business carried on by the employer within a radius of 10 kilometres for a period of 6 months from the day of the termination of this agreement, the employer's consent not to be unreasonably withheld. For clarification this includes being directly employed by any of the employer's clients doing the same or similar duties as the employer provides to the client.

[27] In addition, Ms Hall and Mr Hall's employment agreement also contained following provision in schedule 3:

Special conditions

The employee agrees not to be employed by a competitor or client of either the employer or its subsidiaries for a period of at least 6 months from the date the employee last works for the employer.

Evaluation

[28] As a general principle restraint of trade provisions are prima facie unlawful and unenforceable unless they can be justified as reasonably necessary to protect the proprietary interest of the employer and are in the public interest.¹ The reasonableness of the restraint is to be assessed at the time the agreement was entered into.²

[29] Beyond these statements of legal principle, the Court in *Air New Zealand Limited v Kerr*³ outlined, at a practical level, the approach to be taken when examining restraint of trade provisions. This is:

[23] The approach to restraint covenants is for this Court to determine what the clause means when properly construed and then to consider whether the employer or former employee has established a legitimate proprietary interest requiring protection ... If such an interest is established, then the issue arises as to whether the restraint provision is shown to be not wider than is reasonably necessary.

¹ See, for example, *Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 NZLR 731 (CA) and *Transpacific Industries (New Zealand) Limited v Harris* [2013] NZEmpC 97

² *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 (CA)

³ [2013] NZEmpC 153

[24] The reasonableness must be established by the party that seeks to enforce the provision, it is then up to the party resisting enforcement to establish that the restraint is contrary to the public interest.⁴

[30] Before the Authority could consider any issue of modification under the Illegal Contracts Act 1970 it would first need to determine whether it is arguable the restraint was reasonable as between the parties and in the public interest. The Authority can only in very limited circumstances under the Act vary an individual employment agreement.

Construing the clause

[31] The principles of contractual interpretation are well established. The leading decision is that of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.⁵ These principles also apply in the employment jurisdiction to the interpretation of employment agreements, including the construal of restraint of trade provisions.⁶

[32] Clause 29 is very general. There is no link between the clause and the special conditions contained in schedule 3, which also purports to be a restraint. Having said that, there is no inherent contradiction between the two clauses in that they both seek to restrain a former employee from working for a competitor or client of Simply for a period of six months, but the special conditions clause does not contain a geographic restriction – within a radius of 10 kilometres in clause 29 – on its operation. Neither clause identifies what proprietary interest Simply is seeking to protect. In addition, there is no link between the clauses and the remuneration clause contained in the agreement, which may go to the issue of appropriate consideration.

[33] Advocate for the Halls described the clause as a “generic template” and suggested “little to no thought or consideration applied when both parties entered into the agreement”. Mr Trask did not provide any submissions on the suggested effect or operation of the clause.

⁴ Ibid at [23] – [24]

⁵ [2010] 2 NZLR 444 (SC).

⁶ See, *Silver Fern Farms Limited v New Zealand Meat Workers and Related Trades Unions* [2010] ERNZ 317 (CA) and *Air New Zealand Limited v Kerr* [2013] NZEmpC 153 at [25].

[34] It was clear from the evidence, and the position adopted by Simply, that sub-clauses 29.1 and 29.2 do not apply in the circumstances. Consequently the focus must be on sub-clause 29.3 and, to the extent necessary, the “special conditions” provision in Schedule 3.

Proprietary interest

[35] Simply said Eastgate was an important client and the contract between the two was worth several hundred thousand dollars. However, that contract had been lost by Simply at the point Ms and Mr Hall resigned their employment. Even if a proprietary interest is established, it is not clear in such circumstances how a “radius of 10 kilometres” would be calculated.

[36] Mr Trask said the speed with which Ms Hunt and Mr Hunt left the employ of Simply meant it could not secure its “sensitive confidential intellectual property”. As stated above, Mr Trask did not particularise what this was. In any event, his assertion was strongly resisted by Ms Hall and Mr Hall.

[37] Ms Hall and Mr Hall’s evidence was they were working in relatively low paid jobs with Simply which required them to conduct security patrols of particular areas at Eastgate, report on certain behaviours and occasionally intervene.

[38] Ms Hall said she played no role in Simply losing the security contract. She said she was aware Simply had already been put on notice about doing a poor job by Eastgate. Ms Hall said she was not involved in the awarding of the contract to Red Badge and had no knowledge of Simply’s business or cost structures. She said she had no access to any information which could be regarded as “confidential” and, indeed, did not even have daily contact with Simply during her employment.

[39] Mr Hall said while he knew Simply’s contract was up for renewal, he had no input into the selection process or in deciding who won the contract. Mr Hall also said his job was to provide security and he had no need or desire to know more than what was required for him to perform his duties as a security guard.

[40] It was recognised in *Broadcasting Corporation of New Zealand v Nielson*⁷, that an employer's interest in maintaining trade connections does not entitle protection against every employee who deals with customers, but only against those who because of the nature of the employment are likely to have personal knowledge or influence over customers and hence where they place their custom to an extent that it is within their power to entice them away.

[41] In my view, Ms Hall and Mr Hall were doing nothing more than seeking to secure their economic future by accepting employment with Red Badge after Simply lost the contract with Eastgate, upon which they were reliant for work and, so it follows, income.

[42] I conclude there is no strength in the affidavit evidence that Simply has any proprietary interest in Ms Hall and Mr Hall's relationship with its former client Eastgate. Further there is no strength in Mr Trask's evidence that Ms Hall and Mr Hall had access other confidential information which could give rise to a proprietary interest.

Conclusion

[43] Having found Simply had no proprietary interest, it is not necessary to consider whether the clauses contained in Ms Hall and Mr Hall's employment agreements are reasonable.

[44] For the above reasons, I find the restraint of trade contained in clause 29 and the special conditions clause of schedule 3 in Ms Hall's employment agreements is unenforceable. I further find the restraint of trade contained in clause 29 and the special conditions clause of schedule 3 in Mr Hall's employment agreements is unenforceable.

⁷ (1988) 2 NZELC 96

Costs

[45] Costs are reserved. The parties are encouraged to resolve the issue of costs between themselves. If unable to do so, either or both parties may apply to the Authority for a timetable for exchange of memoranda on costs. If asked to do so, the parties can expect the Authority will assess the issue of costs from the starting point of a daily tariff of \$4500, adjusted upwards or downwards for relevant factors.⁸

Andrew Dallas
Member of the Employment Relations Authority

⁸*PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] - [108].