

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 246
3131554

BETWEEN SPIRAX SARCO LIMITED
Applicant
AND SCOTT HEWITT
Respondent

Member of Authority: Peter van Keulen
Representatives: Peter Kiely, counsel for the Applicant
Henry Holderness, counsel for the Respondent
Investigation Meeting: 19, 20 and 21 May 2021
Submissions Received: 27 May 2021 and 2 June 2021 from the Applicant
27 May 2021 and 2 June 2021 from the Respondent
Date of Determination: 10 June 2021

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] On 9 December 2020 Scott Hewitt resigned from his role as a Mechanical Service Technician with Spirax Sarco Limited (Spirax). Mr Hewitt's employment with Spirax ended on 21 January 2021; following this Mr Hewitt commenced new employment with TLV Pty. Limited (TLV), a competitor of Spirax.

[2] Spirax claims that by working for TLV Mr Hewitt breached a restraint of trade provision in the employment agreement between Mr Hewitt and Spirax dated 12 September

2017 (the IEA). Spirax also claims Mr Hewitt breached other provisions in the IEA. This includes breaching obligations relating to confidential information as he sent himself various emails containing confidential information, and breaching obligations in relation to non-solicitation and non-dealing as he has contacted various customers of Spirax as an employee of TLV seeking to solicit work from them or to undertake work.

[3] Spirax lodged a claim in the Authority seeking various orders and remedies for those alleged breaches. In relation to the alleged breach of the restraint of trade provision, Spirax sought an interim injunction preventing Mr Hewitt from working for TLV pending the determination of its substantive claim. I granted the interim injunction sought on 10 March 2021.¹

[4] After the interim injunction was granted I then investigated Spirax's substantive claims against Mr Hewitt.

[5] The allegations that comprise Spirax's substantive claim against Mr Hewitt are that he has breached:

- (a) Clause 4.1.6 of the IEA, relating to compliance with Spirax policies, procedures and rules.
- (b) Clause 22 of the IEA dealing with confidential information.
- (c) The implied duty of confidentiality.
- (d) The implied duty of fidelity.
- (e) Clause 23.1 of the IEA dealing with non-competition.
- (f) Clause 23.2 of the IEA dealing with non-dealing with Spirax customers.

[6] Based on these alleged breaches Spirax seeks the following:

- (a) A permanent injunction preventing Mr Hewitt from working for TLV before 22 July 2021.

¹ *Spirax Sarco Limited v Hewitt* [2021] NZERA 98.

(b) Compliance orders requiring Mr Hewitt to comply with clause 22, clause 23.1 and clause 23.2 of the IEA.

(c) Penalties for the alleged breaches of the IEA.

[7] In the event that I decide that the restraint clauses of the IEA, clauses 23.1 and 23.2, are unenforceable as set out Spirax seeks orders modifying the restraints to make them enforceable and then an injunction and compliance orders based on the modified terms.

[8] Mr Hewitt's response to Spirax's claim is that:

(a) He has not breached any obligations of confidentiality.

(b) The non-compete, non-solicitation and non-dealing restraint provisions are not enforceable and therefore he is not in breach. And, specifically in relation to some of the particular allegations he claims he did not act as alleged so even if the clauses are enforceable he has not breached them.

[9] Mr Hewitt also lodged a counterclaim against Spirax alleging that it acted in a manner causing unjustified disadvantage to his employment when it unilaterally decided to stop him from working for Spirax once he had handed in his notice of resignation.

[10] In response to Mr Hewitt's personal grievance Spirax says its actions were justified as it simply enforced its contractual right to place Mr Hewitt on garden leave during his notice period.

Orders for non-publication

[11] Part of Spirax's claim against Mr Hewitt relates to allegations that he disclosed confidential information by sending 39 Spirax emails to his personal Hotmail email account. As part of the evidence considered in the investigation meeting the 39 emails were made available to me and counsel for Mr Hewitt; and in the course of the investigation meeting the emails were analysed, with witnesses questioned about them and submissions being made on the content and therefore nature of the information contained in them.

[12] Spirax says the emails contain commercial and business information which is confidential and it does not want this information to be accessible to anyone outside of Spirax. It asked for a non-publication order in respect of the 39 emails.

[13] Whilst Mr Hewitt disputes that the emails contain confidential information and this issue is to be determined by me as part of my investigation, he does not oppose a non-publication order being made.

[14] I am satisfied that the 39 emails contain business and commercial information that need not be disclosed or published outside of the investigation meeting and therefore a non-publication order is appropriate.

[15] Therefore, pursuant to clause 12 of schedule 2 of the Employment Relations Act 2000 (the Act), I prohibit from publication any of the information contained in the three emails Mr Hewitt sent from his Spirax email account to his personal Hotmail email account on 24 November 2020 and the 36 emails Mr Hewitt sent from his Spirax email account to his personal Hotmail email account on 30 November 2020.

[16] This order is made to prevent any further disclosure or use of the information in the 39 emails by Mr Hewitt or any third parties, however this order does not prevent Spirax or any of its customers that any of the information in the 39 emails relate to, from using the information in their businesses.

How I will analyse the claims

[17] I will deal with Spirax's claim by considering it in two parts:

- (a) Has Mr Hewitt breached any contractual obligations as alleged? This involves identifying the nature and scope of the relevant contractual obligations, assessing if the obligations are enforceable and then deciding on the basis of the facts I establish if Mr Hewitt has breached the obligation.
- (b) If Mr Hewitt has breached any of his contractual obligations, what remedies should I order, considering an injunction, compliance orders and any penalties?

[18] I will consider Mr Hewitt's personal grievance in this way:

(a) What is the Spirax action complained of and did it occur?

(b) If Spirax did act as alleged, did the action cause a disadvantage to Mr Hewitt's employment?

(c) If the Spirax action did cause disadvantage to Mr Hewitt's employment was the action justified?

[19] Before I answer each of these questions I will set out my findings of fact based on the oral and documentary evidence from the investigation meeting.

Factual findings

Background

[20] Spirax is part of an international group of companies that manufacture, sell and service industrial and commercial steam systems. In New Zealand, Spirax is a sales company that operates nationally selling, installing and servicing steam systems; there is no manufacturing capacity in New Zealand. In terms of sales, the New Zealand market is a mature market in that there are not many new businesses being established that require steam systems. So most of the sales opportunities arise with existing customers or customers of Spirax's competitors.

[21] From Spirax's perspective it sees relationships with customers as a joint undertaking between the sales representative and the service technicians. This is a customer relationship which employs a direct-sales method where sales and servicing employees both work with customers identifying Spirax products and services which will optimise the customer's processes.

Mr Hewitt's role with Spirax

[22] Spirax employed Mr Hewitt from 3 October 2017 in a Mechanical Service Technician role covering the whole of the South Island.

[23] Mr Hewitt was employed pursuant to the terms and conditions set in the IEA, including the following provisions:

22. Confidential Information

22.1 In this clause, *confidential information* includes any trade secret or information of a confidential nature which is within or may come to the employee's knowledge during the course of employment concerning the organisation, methods, products or services, processes, business or finances of the employer, its customers or the administration and operation of the business. Confidential information includes any information that would cause harm to the employer if disclosed to the market or a competitor.

22.2 The employee agrees that during the employee's employment and after its termination (whatever the cause) the employee shall:

22.2.1 Not disclose any confidential information to any person other than an employee of the employer authorised to receive it;

22.2.2 Use the employee's best endeavours to prevent the disclosure or publication of any confidential information;

22.2.3 Not use any confidential information for the employee's own benefit, as distinct from the benefit of the employer;

22.2.4 Not use or attempt to use any confidential information in any manner which may injure or cause loss whether directly or indirectly to the employer;

22.2.5 Not turn the employee's personal knowledge of or influence over any customers, clients, suppliers or contractors of the employer to the employee's own benefit as distinct from the benefit of the employer.

22.3 The provisions of this clause shall cease to apply to information which enters the public domain other than directly or indirectly through the default of the employee.

...

25. Restraints of Trade

23.1 Non competition

For the purposes of protecting the employer in relation to the goodwill of its business the employee shall not, without first obtaining written consent of the employer, within 6 months of the termination of this agreement, work for a competitor of the employer, whether as an employee, contractor or otherwise, anywhere within New Zealand.

Non-solicitation of Employees

The employee shall not during the period of 1 year following the termination of the employee's employment, as principal or for any reason, induce to resign, solicit or entice or attempt to induce, solicit or entice from the employer or any related body corporate any director, manager, officer, employee, servant or contractor of or to the employer or any related body

corporate (whether or not that person would commit a breach of contract by reason of ceasing to serve or act for the employer or body corporate).

23.2 Non-dealing restriction

The Employee shall not for a period of 1 year following the termination of the employee's employment, as a principal or for another person, do work for, induce, solicit or entice or attempt to induce, solicit or entice from the employer or any related body corporate any client or organisation to which the employer has provided services in the year preceding termination of employment.

[24] Mr Hewitt's role involved him visiting customer sites to undertake maintenance, repair and servicing of Spirax products. In line with the direct-sales method Mr Hewitt would use his servicing, repair and maintenance work to identify opportunities for sales (both products and servicing) where those sales would enhance the customer's processes. Mr Hewitt would work with the sales representative on those opportunities and on similar opportunities identified by the sales staff.

Mr Hewitt is offered employment with TLV

[25] After three years of working for Spirax, in late October 2020, Mr Hewitt had a chance encounter with a TLV technical service engineer, who had previously worked for Spirax. Mr Hewitt says by this time he was considering moving from Spirax as the atmosphere had changed and he was interested in growing his experience in the industry and perhaps pursuing a more sales oriented role. So in discussion with the TLV engineer, the topic of Mr Hewitt's employment with Spirax and his thoughts about future prospects led to the engineer mentioning that there might be an opportunity at TLV for Mr Hewitt.

[26] This chance encounter then evolved into an employment opportunity for Mr Hewitt. He was asked to submit a CV to TLV and then he attended an interview conducted by Zoom. This interview took place on or around 19 November 2020. One week later on 26 November 2020 TLV offered Mr Hewitt a role, sending him an offer letter, a draft employment agreement and a copy of the TLV handbook.

Mr Hewitt sends emails from his Spirax email account to his personal email account

[27] On 24 November 2020 Mr Hewitt emailed himself three emails from his Spirax email account to his personal Hotmail email account. Each of these emails had contact cards attached (680, 92 and 167 contact cards attached respectively) – the contact cards comprising mainly contact details for Spirax customers.

[28] On 30 November 2020 Mr Hewitt emailed himself 36 emails, some with attachments, from his Spirax email account to his personal Hotmail email account. These emails and the attachments contained various business and commercial information including information about Spirax products and services and information relating to Mr Hewitt's employment with Spirax.

Mr Hewitt accepts the TLV offer and resigns from Spirax

[29] After he received the TLV offer of employment, Mr Hewitt obtained legal advice on his ability to take up the offer given the restraint of trade clauses in the IEA.

[30] On 2 December 2020 Mr Hewitt signed the employment agreement from TLV and advised TLV he was accepting the offer of employment.

[31] Mr Hewitt gave Spirax his notice of resignation on 9 December 2020, advising that his last day of work would be 21 January 2021. In his letter of resignation Mr Hewitt advised that he had accepted a role as a Sales and Services Engineer with TLV.

Spirax's response to Mr Hewitt's resignation

[32] On 9 December 2020 Spirax wrote to Mr Hewitt advising him that as TLV is a direct competitor of Spirax pursuant to clause 23.1 of the IEA he could not work for TLV before 21 July 2021. Spirax also reminded Mr Hewitt of his non-solicitation, non-dealing and confidentiality obligations set out in the IEA.

[33] Having received Mr Hewitt's resignation Spirax decided it did not require Mr Hewitt to come to work during his notice period. So Spirax advised Mr Hewitt that from 10

December 2020 until 21 January 2021 he was not required to attend work, that he was not to access Spirax's systems and that he was to not to contact any Spirax customers.

[34] Spirax then ran a check on Mr Hewitt's email account to see if any emails had been sent from Mr Hewitt's work email to personal email addresses. Spirax found that Mr Hewitt had sent the emails referred to above from his Spirax email account to his personal Hotmail email account.

[35] Spirax found these emails in the archive deleted items, which indicates that after sending the emails Mr Hewitt had deleted them out of the sent folder and subsequently deleted them out of the deleted items folder.

Various exchanges between Mr Hewitt and Spirax over his obligations

[36] Spirax wrote to Mr Hewitt on 14 December 2020 advising him that it had discovered that he had sent 39 emails to his personal email address. Spirax asked him to explain the reason for sending each of the emails to his personal email. Spirax also asked him to provide it with an undertaking that he would not work for a competitor for six months, that he had returned or deleted all Spirax information in his possession, that he had not copied any Spirax documents or confidential information, and that he would honour his duties, including his contractual duties, owed to Spirax.

[37] Mr Hewitt responded to Spirax explaining that the emails were sent for various reasons including to restore his personal contacts he had lost in a recent mobile phone change, because he wanted copies of work he had undertaken during lock down, because the information related to a business case he had worked on, and because the information was personal or publicly available. He advised that he had deleted some of the emails in response to Spirax's letter but he did not give the undertakings requested.

[38] Spirax did not accept Mr Hewitt's explanations for sending the emails and it was not satisfied that Mr Hewitt had not already used the information or would use it. Spirax's was further concerned by Mr Hewitt's failure to give the requested undertakings, that he was not being cooperative with it despite still being employed and that he appeared to be reluctant to attend mediation, which it had requested.

[39] Ultimately the exchange of correspondence between Spirax and Mr Hewitt did not resolve the issues between them, which led to the claims being lodged in the Authority.

Mr Hewitt's dealings with Spirax customers

[40] In late 2020 South Pacific Meats (SPM) Awarua and Open Country Dairy, two Spirax customers, transferred their business to TLV. Spirax says, a contact person at SPM Awarua told it that he had had video calls with Mr Hewitt as a representative of TLV. Mr Hewitt denies being involved in any calls as a TLV representative with these two customers and the other persons alleged to have been involved in the call also deny this.

[41] I am not satisfied that Mr Hewitt had contact with SPM Awarua or Open Country Dairy about transferring work to TLV. And there is no other evidence that supports any alleged breach of the IEA by Mr Hewitt soliciting work from Spirax customers.

[42] However there is evidence that Mr Hewitt contacted and dealt with Spirax customers. I accept this did occur and this includes Mr Hewitt contacting and/or dealing with Kelford Engineering, AMT Mechanical, Hexion and Oceania.

Has Mr Hewitt breached any contractual obligations as alleged?

Confidential information

[43] Mr Hewitt's obligation relating to confidential information is set out at clause 22 of the IEA. It is a comprehensive and clear provision imposing an obligation on Mr Hewitt to keep information such as Spirax and customer methods, products or services, processes, business or finances, confidential and not use or disclose such information outside of work related activities.

[44] Spirax says Mr Hewitt also owes it additional obligations relating to confidentiality being the implied duty of confidentiality and the obligation in the Spirax code of conduct requiring employees to maintain and observe the strictest secrecy in respect of Spirax activities.

[45] Counsel for Mr Hewitt submits that these two additional obligations are narrower than clause 22 of the IEA and therefore must simply be seen as being subsumed by clause 22. I accept this proposition and will not analyse these two additional obligations rather I will focus on clause 22.

[46] There is no dispute between Spirax and Mr Hewitt that clause 22 of the IEA is enforceable, the issue appears to be whether Spirax has confidential information and, if it does, whether Mr Hewitt breached clause 22.

[47] Whether Mr Hewitt breached the obligation of confidentiality turns on whether the 39 emails Mr Hewitt sent from his Spirax email account to his personal Hotmail email on 24 and 30 November 2020 contained confidential information, as defined or specified in clause 22 of the IEA. And if the emails did contain confidential information whether by sending the emails to himself Mr Hewitt breached clause 22.

[48] Counsel for Mr Hewitt presented a compelling and convincing argument in relation to the content of the 39 emails both in terms of the questions he asked Spirax and his submissions. I was persuaded by his argument but ultimately my assessment on this issue was informed by three key components:

- (a) Whilst the customer contact details attached to the first three emails could be obtained from customers themselves, that information was not publicly available and the customer contacts would need to consent to the information being provided to someone outside of Spirax. And, the contact details were collected by Spirax for the purpose of furthering its customer relationship i.e. it was for Spirax's benefit not an employee of a competitor. For these reasons Spirax customer contact details are confidential information.
- (b) Some of the remaining 36 emails and attachments contained technical information about Spirax products, particularly related to servicing which included technical drawings, that is not available in the public domain.
- (c) Some of the information in the 36 emails and attachments comprised customers' product details, service and maintenance history and pricing. This

information could be available from sources other than Spirax, however some of the detail would not have been readily available in the public domain and I am not persuaded that this would be easily disclosed by the customers. In the hands of Spirax that information is confidential.

[49] So, I conclude that the 39 emails Mr Hewitt sent to himself did contain information that was confidential to Spirax.

[50] I am also satisfied that by sending the 39 emails to his Hotmail email account Mr Hewitt did breach the obligation of confidentiality he had under the IEA.

[51] I do not accept that because Mr Hewitt sent the confidential information to his personal email address he has done nothing wrong. By sending the confidential information outside of Spirax's network to himself personally Mr Hewitt has breached clause 22.2 of the IEA as he has:

- (a) Disclosed confidential information to an employee not authorised to receive it – in the circumstances whilst he was still an employee Spirax would not authorise the disclosure of this information to him as a departing employee, evidenced by the steps it took as soon as it became aware of the disclosure by Mr Hewitt.
- (b) Not used his best endeavours to prevent the disclosure of confidential information.
- (c) Used confidential information for his own benefit – that being to have the information available to access outside of Spirax for his own purposes.

Implied duty of fidelity

[52] The implied duty of fidelity requires Mr Hewitt not to act in a way that undermines the relationship of trust and confidence between himself and Spirax.

[53] There is no evidence that Mr Hewitt tried to solicit any business from Spirax whilst he was employed nor is there any evidence that he undermined or disparaged Spirax. I have

already determined that Mr Hewitt breached obligations of confidentiality but I am not satisfied that I should also treat this as a separate breach of the duty of fidelity.

[54] In the circumstances I am not satisfied that Mr Hewitt has breached the implied duty of fidelity.

Restraint of trade - non-compete

[55] Clauses 23.1 and 23.2 of the IEA sets out restraint of trade provisions; clause 23.1 prevents Mr Hewitt from working for a competitor of Spirax anywhere in New Zealand for six months from the end of his employment.

[56] The starting position for enforcing clause 23.1 of the IEA is that, as a restraint of trade provision, it is unenforceable. To overcome this Spirax needs to show that it has a legitimate proprietary interest that the restraint protects and that the restraint is no wider than is reasonably necessary to protect that interest.²

[57] The proprietary interests Spirax seeks to protect are its confidential information, intellectual property and customer relationships.

[58] The Courts have recognised that confidential information is a proprietary interest and have expressly stated that a restrictive covenant may be necessary, in addition to any confidentiality obligations, to protect the disclosure of confidential information in the course of further employment.³ The same legal analysis applies for intellectual property and customer relationships.⁴

[59] I conclude that Spirax has proprietary interests that are capable of being protected by the restraint of trade provisions in the IEA. In particular Spirax has business sensitive information relating to the manufacture, sale and servicing of its own products – these products are unique and differ from competitor products in design, manufacture, operation, servicing and maintenance requirements. This means much of this information is confidential and proprietary, with intellectual property rights attaching.

² *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153 at paragraph 23.

³ *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252; and *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97.

⁴ *Stephen Green v Transpacific Industries Group (NZ) Limited* [2011] NZEmpC 6.

[60] Spirax also has goodwill in, and confidential information relating to, its customer relationships; relationships it has built up through regular contact, sales and servicing and maintenance work. This information spans contact details, knowledge of the steam systems installed and operated by the customers, pricing, servicing schedules and audits and repairs and maintenance carried out by Spirax.

[61] The next question is, is this restraint of trade no wider than is necessary to protect Spirax's proprietary interests? The Employment Court, in *Air New Zealand v Kerr*⁵ confirmed that the answer to this question requires consideration of the duration of the restraint, its scope and geographical limits.

[62] In this case the question is whether a six month national restriction is no more than is necessary.

[63] Spirax says the six month non-compete period reflects a reasonable period of time for it to hire a replacement employee, induct and train that person and then have him/her build a working relationship with its customers and thus be able to negate any advantage that Mr Hewitt might have. This is based on an assessment of the cycle of customer contact made by Spirax employees, both sales and service employees.

[64] Spirax says a national restriction is required because many Spirax customers are national. It says that despite being based in the South Island Mr Hewitt could take advantage of customer information and contacts he has from working in the South Island and use this in the North Island with national customer sites there. And Spirax says, that although Mr Hewitt was employed to work only in the South Island he did work for customers in Auckland. So, Spirax is saying Mr Hewitt has confidential information relating to national customers and customer relationships with national customers that need to be protected.

[65] It is also the case that confidential information and intellectual property that is not customer specific can be used nationally – that is, confidential information and intellectual property rights related to design, installation, pricing and servicing and maintenance of Spirax

⁵ *Air New Zealand Ltd v Kerr* above n 2.

products could be used by Mr Hewitt with Spirax customers despite Mr Hewitt not having worked for those customers.

[66] In submissions, both counsel referred me to cases that supported their position on the non-compete clause being enforceable or not - for example cases where six month restraints have been enforced and cases where six month restraints have not been enforced. The reality is this is not straight forward and my view is a six month national restriction is at the limits of what is reasonable.

[67] I have decided the non-compete provision in clause 23.1 of the IEA is reasonable and can be enforced. This is because:

- (a) The specific and technical nature of the industry that Spirax operates in creates clear confidential information and intellectual property rights that it is entitled to protect, information that can only effectively be protected by a non-compete.
- (b) The market in New Zealand for providing the type of products and servicing work undertaken by Spirax is mature and limited; a large amount of work and knowledge goes into creating and preserving customer relationships that Spirax is also entitled to protect through a non-compete.
- (c) Given the types of customers, the sales model adopted and the cycle of contact Spirax has with its customers, and in the context of the two points above, a six month period applied nationally is reasonably necessary to protect Spirax's proprietary interests.

[68] Mr Hewitt started working for TLV after 21 January 2021 and within six months of the termination of his employment. TLV is a competitor of Spirax. This is a breach of clause 23.1 of the IEA.

Restraint of trade - non-solicitation of Spirax employees

[69] In addition to not competing with Spirax for six months, clause 23.1 also provides that for one year from the end of his employment Mr Hewitt shall not solicit any director, manager, officer, employee, servant or contractor of Spirax or any related body corporate.

[70] Spirax seeks to enforce this part of clause 23.1 of the IEA by obtaining a compliance order. The analysis I applied to the non-compete part of clause 23.1 applies here – that is, Spirax needs to show the clause is no wider than is reasonably necessary to protect a proprietary interest.

[71] I have already determined that Spirax has proprietary interests capable of being protected by a restraint of trade.

[72] In this case I am not persuaded that the provision is no wider than is reasonably necessary as both the time frame and the geographic scope seem excessive:

- (a) There is no apparent reason to extend the restriction period for non-solicitation to one year and it is difficult to see how one year is necessary.
- (b) The clause prevents Mr Hewitt from soliciting any officer, employee or contractor of Spirax or a related entity – given that Spirax is an international organisation this potentially applies to an employee working in the head office of the global group of companies based in the United Kingdom or a contractor engaged in a manufacturing site in Argentina.

[73] What this clause needs to make it no wider than is necessary and therefore enforceable, might be to restrict it to six months and limit it to any director, manager, officer, employee, servant or contractor of Spirax based in New Zealand that Mr Hewitt dealt with whilst employed or some other limitation.

[74] Either way, it is my view that whatever is required in terms of modification to the clause to make it enforceable goes beyond what I can do to modify a restraint.⁶

⁶ *Transpacific Industries (New Zealand) Ltd v Harris*, above n 3.

[75] I conclude that the non-solicitation of employees provision in clause 23.1 of the IEA is not reasonable and therefore not enforceable and I decline to amend it to restrict its application to make it reasonable and enforceable.

[76] In relation to the non-solicitation of employees provision in clause 23.1 there is no allegation by Spirax that Mr Hewitt has breached this. However, for completeness I note that as there is no enforceable contractual obligation relating to non-solicitation there can be no breach by Mr Hewitt.

Restraint of trade - non-solicitation of, and non-dealing with, Spirax customers

[77] Clause 23.2 of the IEA provides that for one year from the termination of his employment, Mr Hewitt cannot solicit work from or deal with any customer of Spirax, that Spirax has dealt with in the 12 months prior to the termination of his employment.

[78] Again the same considerations apply in respect of restraints of trade clauses generally, and as I am satisfied that Spirax has proprietary interests it can protect, I need to be satisfied that the restraint is no wider than is reasonably necessary.

[79] The issue I have with clause 23.2 is there does not appear to be any credible reason for extending the non-dealing with customers to one year when the non-compete is only six months. If six months is all that is required to protect the confidential information, intellectual property and customer relationship through Mr Hewitt working for a competitor, based on the cycle of customer contact, then that must be sufficient for non-dealing.

[80] On this basis I find the restriction in clause 23.2 is unenforceable as it is wider than is reasonably necessary due to it lasting one year.

[81] I am however prepared to modify clause 23.2 to make it reasonable by reducing the time frame to six months.

[82] I conclude that the non-dealing provision in clause 23.2 of the IEA is unreasonable as currently drafted. I order that the clause be modified to reduce the term of the restriction to six months from the termination of Mr Hewitt's employment; on this basis I conclude the clause is reasonable and enforceable.

[83] Mr Hewitt did contact and deal with four Spirax customers (Kelford Engineering, AMT Mechanical, Hexion and Oceania) within six months of the end of his employment. I accept that much of this contact was provisional to update the customers on him being the contact person at TLV and then updating them on his ability to engage with them pending the outcome of the Spirax claim.

What remedies should I order for any breaches by Mr Hewitt?

[84] I have concluded that Mr Hewitt has breached his obligations of confidentiality, non-competition and non-dealing. In respect of these breaches Spirax seeks an injunction in relation to the non-competition restraint, compliance in relation to the confidentiality and non-dealing obligations and penalties for each breach.

Injunction

[85] Given my finding that clause 23.1 as it relates to non-competition is enforceable and given that I have already granted an interim injunction it is appropriate for me to make an order for a permanent injunction.

[86] Spirax seeks to have the injunction preventing Mr Hewitt from working for TLV in place until 22 July 2021 as it says this reflects the six month period provided for in clause 23.1 of the IEA.

[87] However Mr Hewitt was placed on garden leave by Spirax from 10 December 2020 i.e. Spirax told Mr Hewitt he was not required to work his notice period. Based on the Employment Court decision in *Air New Zealand v Kerr*, I need to reflect any time spent on garden leave into the term of the restraint.⁷ If I reduce the six month period by the time Mr Hewitt spent on garden leave (one month and 12 days) the non-compete obligation applies until 10 June 2021 (inclusive).

[88] On this basis therefore I will grant a permanent injunction preventing Mr Hewitt from being employed by TLV until after 10 June 2021.

⁷ *Air New Zealand v Kerr*, above n 2.

Compliance orders

[89] As Mr Hewitt has breached clause 22 and clause 23.1 of the IEA it is appropriate that I order compliance; in terms of clause 23.1 compliance is on the basis of the modified provision as set out above with the term further reduced to reflect the time Mr Hewitt spent on garden leave.

Penalties for breaches of the IEA

[90] There are two areas that assist me with the exercise of quantifying penalties; section 133A of the Act, which sets out relevant considerations and *Borsboom v Preet PVT Limited*,⁸ where the Employment Court set out a four-step approach to fixing penalties - whilst this decision relates to multiple breaches of minimum standards it is still relevant to the assessment of other breaches for which penalties can be imposed.

[91] In *A Labour Inspector v Matangi Berry Farm Limited*⁹ Judge Corkill applied an approach to penalty setting which assessed the factors in section 133A of the Act and then applied those and other considerations using the four step process in *Preet* to quantify the penalty. This is the approach I will use; first I will consider the statutory requirements and then I will use that information to assess quantum based on the four steps in *Preet*.

The object stated in s 3 of the Act

[92] The objects of the Act include building productive employment relationships through the promotion of good faith. Mr Hewitt failed to show aspects of good faith in the manner in which he sent himself the 39 emails and then failed to constructively engage with Spirax over the restraint provisions, electing to start work with TLV and contact Spirax customers without negotiating over the restraints or seeking an order from the Authority about the enforceability.

⁸ *Borsboom v Preet PVT Limited* [2016] NZEmpC 143.

⁹ *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 43.

The nature and extent of the breaches

The nature of the confidentiality breach is significant; Mr Hewitt sent himself a significant amount of information including all of Spirax's contacts and proprietary information relating to Spirax products and servicing.

[93] The breaches of the restrictive covenants were blatant, but in fairness to Mr Hewitt, done with advice of this to Spirax and, it appears he acted as he did on the basis of advice he received.

The nature and extent of any loss or damage suffered

[94] There was no evidence of direct loss or damage suffered by Spirax resulting from Mr Hewitt's breaches, such as loss of business. However there has been the significant amount of time and resources it has expended in protecting its rights as well as the legal cost all of which will not be recoverable through this claim.

Were the breaches were intentional, inadvertent or negligent?

[95] I conclude that all of Mr Hewitt's breaches were intentional and in the face of Spirax opposition he continued to breach the restraint of trade provisions rather than compromise or seek to assess the enforceability of the provisions through an application to the Authority.

What steps have been taken in mitigation?

[96] Mr Hewitt did delete the confidential information when pressed by Spirax to do so, but he did not give the requested undertaking.

The circumstances of the breach and any vulnerability

[97] The breach of confidentiality was undertaken in two parts. The first breach relating to Spirax customer contacts was done at a time when Mr Hewitt knew of his possible resignation from Spirax and commencement at TLV. The second breach relating to business and proprietary information was done when Mr Hewitt knew he had an offer, and subject to advice, knew he was going to accept and therefore leave Spirax to start work with a competitor. This timing is significant.

[98] In terms of the breaches of the restraint provisions the circumstances have already been stated; Mr Hewitt did so blatantly and without negotiating or seeking clarification from the Authority but he did so on notice and apparently on the basis of advice he received.

Previous conduct

[99] There is nothing relevant in terms of previous conduct by Mr Hewitt.

Preet step 1 – Nature and number of breaches

[100] The first step is to consider whether any of the breaches should be globalised so that a single breach may reflect two or more of the breaches making up Spirax's claim. This is about reducing the number of breaches for penalty purposes so that the globalised breaches are representative of the overall conduct and the starting point for penalties is realistic.¹⁰

[101] In terms of globalising I have found the approach adopted by Judge Corkill in *A Labour Inspector v Matangi Berry Farm Limited*¹¹ to be instructive.

[102] In this case it is appropriate to globalise the breaches as one breach for each contractual obligation, so:

- (a) One breach of s 22 of the IEA in terms of the emails Mr Hewitt sent to his Hotmail email, containing confidential information.
- (b) One breach of s 23.1 of the IEA in terms of working for a TLV during the non-compete period of six months.
- (c) One breach of s 23.2 of the IEA in terms of contacting and dealing with customers of Spirax within 6 months of 9 December 2020.

[103] Based on this the starting point for assessing quantum of penalties to be imposed against Mr Hewitt is \$30,000.00.

¹⁰ *A Labour Inspector v Parihar* [2019] NZEmpC 145.

¹¹ *A Labour Inspector v Matangi Berry Farm Limited*, above n8.

Preet step 2 – Severity of breaches

[104] In addition to weighing up my consideration of the statutory considerations I must also consider the additional factors referred to in *Preet* of deterrence and culpability.

[105] Based on the following:

- (a) Mr Hewitt failed to exercise good faith in his dealings with Spirax over the breaches of the IEA.
- (b) Mr Hewitt's breaches were significant and blatant;
- (c) Mr Hewitt acted intentionally and then persisted in the face of Spirax opposition;
- (d) The circumstances of the breach of confidential information suggests, and I accept, there was an ulterior motive to forwarding the confidential information and this was only prevented by the fact Spirax discovered Mr Hewitt's breaches and he had to delete the information;
- (e) Spirax has suffered damage or loss in terms of the resources used to protect its position;
- (f) Mr Hewitt's culpability is high notwithstanding that he may have had some advice about the enforceability of the restraint provisions of the IEA; and
- (g) the need for deterrence,

I conclude that the breaches are significant and consider 70% of maximum is an appropriate starting point.

[106] I accept that Mr Hewitt did delete the emails containing confidential information so I will add in a further reduction of 5% of the maximum for this.

[107] So after considering the severity of the breaches and Mr Hewitt's mitigation my penalty assessment stands at 65% of the maximum amount being \$19,500.00.

Preet step 3 – Means and ability of the respondent to pay

[108] Whilst Mr Hewitt did not lead any evidence about his means I am prepared to allow a small reduction for the ability to pay, of a further 10%. This leaves my penalty assessment at 55% of the maximum being \$16,500.00.

Preet step 4 – Proportionality

[109] This step is about ensuring that the final amount of any penalty is proportional to the breaches and in line with other penalty amounts for similar breaches.

[110] In terms of penalties being imposed for similar breaches I have considered two Authority determinations and I am satisfied that a further, small reduction is required.

[111] I reduce the penalty by a further 10% reduction, down to 45% of the maximum being \$13,500.00.

[112] I therefore impose a penalty of \$13,500.00 against Mr Hewitt for his breaches of the IEA. This penalty is to be paid in full to Spirax to compensate it for the inconvenience it has suffered and resources it has expended in pursuing this matter.

Mr Hewitt's personal grievance

[113] Mr Hewitt claims that when he gave his notice of resignation to Spirax it unilaterally decided to suspend him or place him on garden leave. That is, Spirax decided that it did not want Mr Hewitt to work during his notice period but it was not prepared to pay him in lieu of working his notice and let him leave immediately. So, by suspending Mr Hewitt or placing him on garden leave Spirax was keeping him employed but not requiring him to work.

[114] Mr Hewitt says this decision was unjustified and as it caused a disadvantage to his employment and therefore he has a personal grievance for unjustified action causing disadvantage.

[115] Section 103(1)(b) of the Act sets out that an employee may have a personal grievance against their employer where that employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.

[116] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustified action causing disadvantage personal grievance are:

- (a) What does the employee say the employer did and did the employer act as alleged?
- (b) If so, did these actions cause any disadvantage to the employee's employment or a condition of employment?
- (c) If so, were the employer's actions justifiable?

What does Mr Hewitt complain of and did Spirax act in this way?

[117] Mr Hewitt's complaint is that Spirax made a unilateral decision to suspend him or place him on garden leave. Spirax accepts it placed Mr Hewitt on garden leave and the evidence shows this occurred; Spirax sent Mr Hewitt a letter on the evening of 9 December 2020 advising him that he was not required to attend work from 10 December 2020 and Spirax came to this decision without consulting with Mr Hewitt.

[118] There is one point of clarification to make. Spirax did not suspend Mr Hewitt, it placed him on garden leave. Suspension and garden leave are different concepts albeit with similar outcomes, in this case that Mr Hewitt was not required to attend work or access Spirax's systems or contact any customers.

Did Spirax placing Mr Hewitt on garden leave cause a disadvantage to his employment?

[119] By not allowing or requiring Mr Hewitt to attend work Spirax did cause a disadvantage to Mr Hewitt's employment.

Was Spirax's action of placing Mr Hewitt on garden leave, justified?

[120] The question of justification turns on two parts, was there a substantive basis to justify the decision and was it effected in a procedurally fair manner?

[121] Turning first to the process by which the decision was made to place Mr Hewitt on garden leave it is clear there was no consultation with him over it. In most circumstances justification requires an employer to provide an employee with information about a proposed action that might impact on their employment, followed by an opportunity to provide comments on it, with such comments or feedback being considered before a decision is made.

[122] However, an employer is not always required to tell an employee about a pending action with a view to the employee commenting on the proposal before a decision is made whether to effect that action or not. If there is some valid reason why the employee's view on a proposed action should not be sought before a decision is made then an employer cannot be said to have acted unfairly. This situation generally only arises in situations where an employee is removed from work because their presence there could cause some harm to the employer, its business or some action it is undertaking, such as investigating the employee's behaviour and taking time to consult over that removal might simply precipitate that harm occurring.

[123] In this case the analysis is that Spirax made the decision to remove Mr Hewitt from the workplace because it was concerned about him starting work with a competitor and using his presence at work during any notice period to benefit his new employer, ironically, by doing things such as taking confidential information or contacting customers to provide his new work details. And it made the decision without informing Mr Hewitt because the consultation would put him on notice of his removal from work and this might cause him to take such steps in advance of the decision being made.

[124] I accept this as being a valid reason for Spirax not consulting with Mr Hewitt over placing him on garden leave.

[125] In terms of substantive justification, Spirax has a contractual right to place Mr Hewitt on garden leave, set out at clause 24.5 of the IEA. And given that Mr Hewitt was moving to a competitor it had a basis for being concerned about his ongoing presence. In hindsight it appears its concerns were valid. But putting hindsight to one side, I am satisfied that the decision to place Mr Hewitt on garden leave was substantively justified.

[126] In all of the circumstances I find that Spirax's actions in placing Mr Hewitt on garden leave were justified.

[127] I dismiss Mr Hewitt's personal grievance for unjustified action causing disadvantage.

Conclusion

[128] Mr Hewitt has breached clauses 22, 23.1 and 23.2 of the IEA.

[129] I grant an injunction based on the non-compete provision in clause 23.1 of the IEA. Mr Hewitt is not to work for TLV until after 10 June 2021.

[130] From the date of this determination Mr Hewitt is ordered to comply with:

(a) Clause 22 of the IEA; and

(b) Clause 23.2 of the IEA until 10 June 2021 (inclusive).

[131] Mr Hewitt must pay a penalty of \$13,500.00 for his breaches of the IEA within 14 days of the date of this determination. All of this sum is to be paid to Spirax.

[132] Mr Hewitt's personal grievance for unjustified disadvantage is dismissed.

Costs

[133] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[134] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of

this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority