

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 98
3131554

BETWEEN SPIRAX SARCO LIMITED
Applicant

A N D SCOTT HEWITT
Respondent

Member of Authority: Peter van Keulen

Representatives: Peter Kiely and Hannah King, counsel for the Applicant
Jonathan Smith and Anna Whalan, counsel for the
Respondent

Investigation Meeting: 5 March 2021

Submissions Received: 5 March 2021 from the Applicant
5 March 2021 from the Respondent

Date of Determination: 10 March 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Spirax Sarco Limited claims that a former employee, Scott Hewitt, is breaching a restraint of trade provision in his employment agreement by working for TLV Pty, which is a competitor. Spirax also claims Mr Hewitt is breaching other provisions in his employment agreement and it has lodged a claim in the Authority seeking various orders and remedies for those alleged breaches.

[2] In relation to the alleged breach of the restraint of trade provision, Spirax seeks an interim injunction preventing Mr Hewitt from working for TLV pending the determination of its substantive claim.

[3] Mr Hewitt opposes the interim injunction sought on the basis that the restraint of trade is unreasonable and unenforceable.

[4] This determination deals with the application for an interim injunction.

The law

[5] Judge Inglis summarised the law applying to an application for an interim injunction in *Western Bay of Plenty District Council v Jarron McInnes*.¹ Her Honour referred to the Court of Appeal decision in *NZ Tax Refunds v Brooks Homes Ltd*² and stated:

[7] ... An applicant must establish that there is a serious question to be tried. Consideration must be given to the balance of convenience, and the impact on the parties of the granting of, and the refusal to grant, an order. The impact on third parties will also be relevant to the weighting exercise. Finally, the overall interests of justice are considered, standing back from the detail required by the earlier steps. While the power to make an order for interim reinstatement is a discretionary one, the assessment of whether there is a serious question to be tried is not. It requires judicial evaluation.

[8] ...

[9] Counsel for the plaintiff submitted that it was necessary for a party seeking interim relief to adduce sufficiently precise factual evidence to satisfy the Court that he/she had a real prospect of succeeding in their claim.³ However, as *Brooks Homes Ltd* makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous.⁴ The merits of the case (insofar as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and overall interests of justice.⁵

[6] So, the issues to be determined at this interim stage are:

¹ *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36.

² *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

³ Citing *Re Lord Cable (deceased) v Waters* [1976] 3 All ER 417 (Ch) at 431 in support.

⁴ At [12].

⁵ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

- (a) Is there a serious question to be tried that Mr Hewitt has breached the restraint of trade in the IEA and an order restraining him from working for TLV for up to six months should be made; and
- (b) Where does the balance of convenience lie pending a substantive investigation and a final determination on the alleged breach of the restraint of trade in the IEA; and
- (c) Where does the overall justice of this case lie from now until the completion of the substantive investigation and issuing of a final determination?

[7] In order to determine these issues, I have not heard any oral evidence as part of my investigation. The evidence I have considered was presented through sworn affidavits from Lukas Grech of Spirax, Mr Hewitt and Trevor Sievers a former employee of Spirax.

[8] As permitted by s174E of the Employment Relations Act 2000, my determination has not recorded all of the evidence and submissions given, but has stated relevant findings of fact and law that I am able to make at this interim stage so that I can express a conclusion on whether the interim order sought should be granted or declined.

Background

[9] Spirax is part of an international group of companies that manufacture, sell, supply and service steam and condensate and thermal energy solution products such as steam traps, isolation valves, control valves and engineered heat exchange packages.

[10] Spirax is a New Zealand company that operates nationally selling, installing and servicing these products. Spirax uses a direct-sales method where sales and servicing employees work with, or partner with, customers to help optimise the customer's processes through the use of Spirax products; to this end, Spirax employs various management, sales and servicing personnel.

[11] Spirax employed Mr Hewitt from 3 October 2017 in a Mechanical Service Technician role covering the whole of the South Island. Mr Hewitt's role involved him visiting customer sites to undertake maintenance, repair and servicing of Spirax products.

[12] Mr Hewitt was employed pursuant to the terms and conditions set in an employment agreement dated 12 September 2017 (the IEA).

[13] The IEA includes 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.

...

23. 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, manger, 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 form 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.

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

[15] Spirax wrote to Mr Hewitt on 9 December 2020 advising him that TLV is a direct competitor of Spirax and pursuant to clause 23.1 of the IEA he could not work for TLV before 21 July 2021. Spirax reminded Mr Hewitt of his non-solicitation, non-dealing and confidentiality obligations and then it advised him that from 10 December 2020 until 21 January 2021 Mr Hewitt was not required to attend work, he would not need to access Spirax's systems and he was to refrain from contacting any Spirax customers.

[16] Following this, in line with its normal practice when an employee leaves to go to a competitor, Spirax ran a check on Mr Hewitt's email account to assess if any emails had been sent from Mr Hewitt's work email to personal email addresses. The search on Mr Hewitt's email account revealed that 39 emails had been sent to Mr Hewitt's personal email account. These emails were found in the archive deleted items indicating that Mr Hewitt had sent the emails to his personal email address then deleted them out of the sent folder and subsequently deleted them out of the deleted items folder.

[17] The emails were sent during work hours on 24 and 25 November 2020, two weeks prior to Mr Hewitt's resignation. Spirax says the emails contained customer contact lists, various customer details and their business information, other commercial information and internal Spirax documents.

[18] Spirax then wrote to Mr Hewitt on 14 December 2020 advising him of this discovery and asking 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 6 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.

[19] What then followed was an exchange of correspondence between Mr Hewitt and Spirax and then both of their respective solicitors about the emails and information Mr Hewitt had sent to himself and the requested undertakings:

(a) From Mr Hewitt's perspective he says the emails were sent for various reasons including to restore his personal contacts he had recently lost in a phone upgrade, because he wanted copies of work he had undertaken during lockdown or work that was the first 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.

(b) From Spirax's perspective it says the explanations for sending the emails that contained confidential information were not satisfactory and it was not satisfied that Mr Hewitt had not already used the information or would use it. Spirax's concerns were amplified by four things: the failure to give the requested undertakings; a further discovery it made that Mr Hewitt already had a mobile phone provided by TLV; that Mr Hewitt was not being cooperative with it despite still being employed; and that Mr Hewitt appeared to be reluctant to attend mediation, which it had requested.

[20] On 21 January 2021, Spirax discovered that two customers had given their business to TLV. And, a contact person at both customers told Spirax 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.

[21] Spirax says it has also recently discovered that Mr Hewitt attended another Spirax customer's site on 10 February 2021, signing in as a TLV employee.

A serious question to be tried

[22] Whether there is a serious question to be tried, that there has been a breach of the restraint of trade provision in the IEA, involves assessing:

- (a) Whether the restraint of trade is a valid restraint, the prima facie position being that restraints of trade are contrary to public law and not enforceable; and
- (b) if the restraint of trade is valid, whether, by working for TLV, Mr Hewitt is in fact in breach of that restraint of trade.

[23] Based on *Western Bay of Plenty District Council and Brooks Homes*, the threshold for a serious question is that the claim is not frivolous or vexatious. A decision on this aspect is not an exercise of discretion rather it must be based on a judicial assessment of the evidence, albeit untested, and the submissions advanced.

Is the restraint of trade enforceable?

[24] In order to override the prima facie position rendering a restraint of trade unenforceable an applicant needs to show that it has a legitimate proprietary interest and that the restraint no wider than is reasonably necessary to protect that interest.⁶

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

[26] In terms of confidential information, the Courts have recognised that this is a proprietary interest and have in fact expressly stated that a restrictive covenant may be necessary, in addition to any confidentiality obligations, in order to protect the inadvertent disclosure of confidential information in the course of further employment.⁷

[27] In this case based on the affidavit evidence I am satisfied that there is a serious question to be tried that Spirax has confidential information and this is a proprietary interest capable of being protected by a restraint of trade provision.

⁶ *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153 at paragraph 23.

⁷ *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252; and *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97.

[28] I am also satisfied that there is evidence that Mr Hewitt may have breached the obligations he owes to Spirax regarding that confidential information, there may have been ongoing or further breaches of the obligations Mr Hewitt owes regarding confidential information, and that Mr Hewitt may have breached his non-dealing obligations. Taking these points into account and considering the known factors that Mr Hewitt has chosen to work for a competitor simply relying on the assertion that the restraint of trade provision is not enforceable and has refused to give undertakings there is a serious question to be tried that a restraint of trade is necessary, in addition to the other obligations Mr Hewitt owes, to protect Spirax's confidential information.

[29] The same legal and factual analysis applies for intellectual property and customer relationships.⁸ These are proprietary interests that Spirax has that are capable of being protected by a restraint of trade provision.

[30] So, the next question is, is this restraint of trade no wider than is necessary to protect these Spirax proprietary interests? The Employment Court, in *Air New Zealand v Kerr*⁹ confirmed that the answer to this question requires consideration of the duration of the restraint, its scope and geographical limits.

[31] Turning to the length of the restraint of trade, the protection sought by enforcing the restraint of trade relates primarily to protecting the Spirax customer base from unfair competition, where unfair competition might arise because Mr Hewitt has knowledge about Spirax customers - including specific business needs, systems and/or products used and pricing - and access to customers, that would not otherwise be readily available to a competitor.

[32] This is because Mr Hewitt not only had access to customers, he had access to confidential information, he has knowledge of Spirax intellectual property and other business sensitive information about its products and has customer relationships that he personally established when attending to customer work. In this regard I think there is a serious question to be tried that Mr Hewitt needs to be kept away from customers in an operational and competition sense for six months.

⁸ *Stephen Green v Transpacific Industries Group (NZ) Limited* [2011] NZEmpC 6.

⁹ *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153.

[33] I also believe it is arguable - and therefore significantly exceeding the frivolous or vexatious threshold - that this six-month period reflects a reasonable period of time for Spirax to hire a replacement employee, induct and train that person and then have him/her build a working relationship with Spirax customers and thus be able to negate any advantage that Mr Hewitt might have.

[34] The other aspect of reasonableness to consider is the geographical scope; in this case the restraint of trade means Mr Hewitt cannot work for a competitor anywhere in New Zealand. The problem with this geographical scope is that Mr Hewitt was employed to work only in the South Island although there is evidence that he did, on occasion, work for customers in Auckland.

[35] Spirax says a national restraint is necessary because most of Spirax customers are national so Mr Hewitt could still take advantage of the information and contacts he has if based in the North Island because there will be customers there he had contact with and/or has information about albeit from working with that customer in a South Island site. I accept that this meets the serious question to be tried threshold as it is not frivolous or vexatious to argue a national restraint is required in these circumstances.

[36] So, there is a serious question to be tried as to the enforceability of the restraint of trade provision in the IEA.

Breach of restraint

[37] Mr Hewitt is now working for TLV. TLV is a competitor of Spirax. And this is being done within six months of the termination of Mr Hewitt's employment with TLV. So there is a serious question to be tried in respect of Mr Hewitt's alleged breach of the restraint of trade in the IEA.

Conclusion

[38] In conclusion then I find there is a serious question to be tried.

The balance of convenience

[39] Assessing the balance of convenience requires consideration of the impact on each party if the interim order is granted or not. This involves assessing the impact of granting the

interim order on Mr Hewitt and the impact of not granting the interim order on Spirax. I must consider the impacts and determine if either outweighs the other.

[40] I must also consider what happens if the interim position is reversed in any substantive determination. Relevant to this assessment is the question of whether the impact on a party is harm that can be adequately compensated by damages. And the strengths of the relative cases are also relevant.

[41] So I am required to assess the impact on the parties of granting or not granting the interim order, having regard to whether damages would be an adequate remedy if the interim position is reversed and the relative strengths of each party's case.

[42] If the order is granted there will be some hardship to Mr Hewitt, as he will not be able to work for TLV at all for a period of time – which could be the balance of the six month period or it may be earlier if I am able to determine the substantive claim before 21 July 2021 and decide against granting a permanent injunction.

[43] However, there was limited evidence of any hardship or loss for Mr Hewitt, if he cannot work for TLV in the interim period; Mr Hewitt refers to possible bankruptcy and losing his family home if he cannot pay the mortgage but he does not explain how or why this would occur.

[44] In this regard, I accept that if Mr Hewitt is unable to work for TLV until 21 July 2021 he may not have any income at all during this period of time. However, in order to be satisfied that this would cause the kind of significant hardship he suggests I would need to be satisfied that he is unlikely to be able to find interim or temporary work to meet any outgoings and that his outgoings would not be met by other income including his wife's work and any savings or investments. I also keep in mind that the period of restraint left is four and a half months and there is no evidence that the restraint would cause Mr Hewitt to permanently lose his job with TLV.

[45] If Mr Hewitt is restrained from working for TLV until 21 July 2021 but I subsequently determine that working for TLV is not a breach of the IEA, then it appears that damages will be adequate compensation in terms of the lost income and potentially any damage caused if outgoings are not met.

[46] Conversely, if I do not grant the interim order there does appear to be potential loss and harm to Spirax caused by Mr Hewitt working for TLV. Given the evidence and the strength of Spirax's claim against Mr Hewitt that he has breached other obligations in his IEA including using confidential information and/or dealing with or soliciting customers, I believe there is a real risk Spirax customers may transfer to TLV because of Mr Hewitt.

[47] If I do not restrain Mr Hewitt but subsequently determine it is appropriate to do so or decide there has been a breach of obligations during his continued employment, causing loss by customers shifting business to TLV, then damages will be difficult to assess. And as counsel for Spirax has submitted, there is no evidence provided that shows Mr Hewitt could meet any order for damages if one was made.

[48] In terms of the balance of convenience, this is weighted in favour of Spirax.

The overall justice

[49] The overall justice assessment is essentially a check on the position that has been reached after my analysis of the serious question to be tried and the balance of convenience¹⁰.

[50] My starting point is that there is a serious question to be tried and the balance of convenience favours granting Spirax the order it seeks.

[51] In terms of the overall justice I believe Mr Hewitt's actions are relevant. In this regard:

- (a) He sent himself a number of emails containing Spirax documents and information, including contact cards for a significant number of Spirax contacts, before he resigned to join a competitor.
- (b) He attempted to explain why he sent these emails but his explanations were unsatisfactory and then inconsistent.
- (c) Rather than assuring Spirax that he did not intend to breach any of the obligations that he did accept he owed by providing some undertakings or by mediating with it at the first opportunity he obfuscated and obstructed any meaningful discussion and resolution.

¹⁰ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

- (d) He then simply relied on his position that the restraint provision is not enforceable and started work with TLV after 21 January 2021, rather than engaging in meaningful discussion about resolution with Spirax or in the alternative seeking an order from the Authority as to the enforceability of the restraint – leaving the onus on Spirax to take steps to protect its position.
- (e) There is evidence that he may have been involved in soliciting customers away from Spirax, or at least dealing with Spirax customers in breach of his non-dealing obligations.¹¹

[52] Overall it seems to me that:

- (a) There is a strong case that Mr Hewitt has breached the IEA.
- (b) Mr Hewitt's actions mean Spirax's concern that he will use his position at TLV to influence Spirax customers to move to TLV, in breach of the IEA, is a credible one.
- (c) The party's positions are very similar to the positions in *Fuel Espresso Ltd v Hsieh*¹² where the Court of Appeal concluded at [21]:

... The restraint is plainly reasonable. Agreements are made to be kept. Mr Hsieh was employed and trained but left in the face of a clear contractual provision preventing him from doing what he has done. In the absence of an interim injunction, any relief to Fuel will, in the time-honoured phrase, be nugatory. This is a clear case for an interlocutory injunction.

[53] Based on this, when I stand back and look at this case, the overall justice supports granting the interim order sought by Spirax.

Conclusion

[54] I am satisfied that Spirax has a serious question to be tried in respect of the enforcement of clause 19 of the IEA. The balance of convenience and overall justice of this case supports an interim order being made in the terms sought by Spirax.

¹¹ In respect of this evidence I do note that it is untested and Mr Hewitt denies being involved with the two Spirax customers who moved their business to TLV.

¹² *Fuel Espresso Ltd v Hsieh* [2007] NZCA 58.

Determination

[55] Scott Hewitt is not to work for TLV Pty until after 21 July 2021.

[56] This order is to remain in place until the earlier of 21 July 2021, the date on which a substantive determination is issued by the Authority in this claim or the parties agree some variation.

Costs

[57] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority