Determination Number: AA 227/05
File Number: AEA 919/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Teliss International Limited (Applicant)
AND	Grant Spence (Respondent)
REPRESENTATIVES	James Carney for applicant Clement Daniels for respondent
MEMBER OF AUTHORITY	Y S Oldfield
CONSIDERATION OF PAPERS	17 June 2005
DATE OF DETERMINATION	21 June 2005

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY ISSUE

Employment Relationship Problem

[1] Teliss International Limited ("Teliss") is a New Zealand company which assists an international customer base with new telecommunications technologies. Teliss employed Mr Spence as a business analyst from April 2003 until February 2004 during which time he put together a tender for a contract with a company ("CSG") which was carrying out work in Namibia for Telecom Namibia. The tender was not successful and the contract went to a British company, Redwood Systems Limited. Mr Spence then resigned his employment and went to Namibia to work for Redwood Systems Ltd ("Redwood.") Teliss International Ltd says that this was a breach of the restraint of trade provisions in the employment agreement it had with Mr Spence.

[2] The statement of problem indicated that the employment agreement was expressed to be subject to the laws of New Zealand and that the employment was in this country although Mr Spence also spent some in Namibia in the course of preparing the tender. I concluded that the Authority had jurisdiction over the matter and granted leave to the applicant to serve Mr Spence outside the jurisdiction. In due course service was effected. Pursuant to Regulation 19B (1) Mr Spence has now requested the Authority to decline to hear and determine the matter. This determination deals with this request as a preliminary matter.

Preliminary issue: should the Authority hear and determine this matter?

[3] The question for determination is whether the grounds set out in Regulation 19B (1) have been met. These are as follows:

"19B Authority may decline jurisdiction-

(1) The Authority may decline to hear and determine proceedings in which there is an overseas party if it is satisfied that-

a. It is more appropriate for the matter to be resolved in a place outside New Zealand; and

b. The applicant will have a fair opportunity in the place to make the applicant's case; and

c. The applicant will receive proper justice in the place; and

d. The respondent will suffer disadvantage if the proceedings are heard in New Zealand.

(2) This regulation does not limit any rule of law."

[4] Through his solicitor in Namibia Mr Spence has given the following reasons in support of his request:

- *"He is domiciled in Namibia since February 2004 and has no intention of returning to New Zealand within the foreseeable future. He would be disadvantaged and prejudiced if the matter should be heard in New Zealand since he would incur unnecessary travelling expenses and his personal and professional life would suffer as a result of an indefinite absence from Namibia;*
- *The Applicant does not have prospects of success in this matter due to the unfair and unreasonable restraint of trade clause in its employment contracts ;*
- *Our client believes that it is more appropriate for the matter to be decided in Namibia and that the Applicant will not be unfairly disadvantaged since the law of contract and employment laws of Namibia and New Zealand are fairly similar;*
- *The Applicant will receive proper justice and fairness should the matter be heard in Namibia."*

[5] I am satisfied that ground (d) has been made out and that Mr Spence will suffer disadvantage if the proceedings are heard in New Zealand. To be required to return here would cause him considerable inconvenience and expense.

[6] However, for me to decline to hear and determine the matter, all four grounds must be met. For the following reasons, I am not satisfied that grounds (a) (b) and (c) of Regulation 19B (1) have been made out.

[7] The law of New Zealand applies pursuant to Clause 8 (9) of the employment agreement, which provides:

"This agreement shall be construed in accordance with the law for the time being in force in New Zealand (or another country if so designated by the Employer). The Courts having jurisdiction in New Zealand or such other country if so designated shall be the only Courts competent to hear and decide any action in respect of this Agreement, whether at the suit of the Employer or the Employee."

[8] In light of this express agreement by the parties it is of it is of no relevance whether the employment and contract law of Namibia is similar to that of New Zealand, and is more appropriate for the matter to be heard here.

[9] In addition, the assertion that the applicant would receive proper justice and fairness should the matter be heard in Namibia was not supported by any information about what access the applicant might have to a relevant decision making body in Namibia.

[10] I cannot decline to hear and determine the matter.

Proposed Investigation Process

[11] However, I have also taken note of Mr Daniels submission that the Applicant has limited prospects of success because of the unfair and unreasonable nature of the restraint clauses. The relevant clauses are clauses 14 and 17. Clause 14 reads as follows:

"Restraint

The employee shall not accept employment either directly or indirectly from a customer of the Employer or any related or subsidiary party of the Employer's customer or CSG International Limited or any of its related or subsidiary companies or CSG Systems International Limited or any of its related or subsidiary companies in New Zealand or any other country for a period of two years from the termination of this agreement without the prior written agreement of the Employer."

[12] In addition, clause 17 (3) states:

"Termination

The employer will not without the prior written consent of the Employer, accept employment with any person/organisation whether on a permanent, temporary, contractual or any other basis where the introduction to such person/organisation has resulted as a consequence of any assignment, contact or other introduction, made by the employer. This restriction remains in force for a period of 9 months from the date of termination of this Agreement.

[13] No particulars have been given of the consideration for the restraint.

[14] The applicant argues that Mr Spence's employment with Redwood is indirectly with CSG because Redwood has a contractual relationship with CSG. Hence the applicant says Mr Spence is in breach of clause 17. The applicant has not given particulars of the alleged breach of clause 14.

[15] The applicant seeks the greater of an account of profits, representing the gain made by Mr Spence for the period that he was in breach of the restraint, or the losses incurred by Teliss arising as a consequence of the breach. It is also claimed that Mr Spence has breached his obligations of good faith, fidelity and confidence but no particulars have been provided as to when or how this occurred. I note that in the absence of particulars (and given that the tender was lost before Mr Spence went to work for Redwood) the statement of problem does not show how Mr Spence's employment with Redwood caused the applicant loss at all.

[16] Without better particulars to clarify the basis of the applicant's claims, there is considerable merit in Mr Daniels submission that the Applicant has limited prospects of success, since:

- restraint clauses which are to operate after the termination of the engagement are prima facie void for unreasonableness;
- restraints for periods as extensive as that in Clause 17 are rarely upheld without modification, and here, one year and four months of the two year term have already passed;
- there are no particulars of consideration for the restraint;
- there is no indication of how Mr Spence's actions caused Teliss loss.

[17] I have therefore decided that the best way for me to deal with this matter is to minimise costs to the respondent by commencing my investigation on papers. Although it is the Authority's usual practice to discuss and agree a timetable with representatives, I have already experienced technical difficulties in conducting a teleconference with Namibia and for this reason I have decided to proceed to set a timetable for the investigation process as follows.

[18] The applicant has until 8 July to provide to the Authority its evidence by affidavit as well as copies of documentary evidence in support of its claim. These materials must include details of those matters, identified above, for which particulars have not been supplied.

[19] **These materials must be served on Mr Daniels in Namibia on behalf of Mr Spence as soon as possible after 8 July. Upon receipt of these materials Mr Daniels will have a period of 21 days in which to respond by way of affidavit evidence and copies of supporting documents.**

[20] The Authority will then consider the papers and assess (in consultation with Counsel) whether it will be necessary to question witnesses by videoconference. The process will conclude with written submissions by timetable to be set once the gathering of evidence is complete.

Y S Oldfield
Member of Employment Relations Authority