Employment Court of New Zealand

Terson Industries Limited v Loder WC10/09 [2009] NZEmpC 36; (2009) 6 NZELR 345 (30 April 2009)

Last Updated: 11 May 2009

IN THE EMPLOYMENT COURT

WELLINGTONWC 10/09WRC 17/08

IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN TERSON INDUSTRIES LIMITED
Plaintiff

AND AARON LODER
Defendant

Hearing: 13 February 2009
(Heard on the papers)

Judgment: 30 April 2009

JUDGMENT OF JUDGE C M SHAW

[1] The plaintiff has challenged a determination of the Employment Relations Authority concerning the construction of a clause in Mr Loder's employment agreement. The issue is whether Terson Industries Ltd (TIL) is liable to Mr Loder for any payments under that clause and, if so, to what extent. The plaintiff also challenges the costs awarded by the Authority against it.

Agreed facts

[2] Mr D Frampton, the sole director of TIL, represented his company in the Authority and in the Court. He and Ms J Angus Burney, for Mr Loder, agreed that the matter could be dealt with on the papers and prepared an agreed bundle and an agreed statement of facts which read as follows:

1. *The Plaintiff is a trading company called "Terson Industries Ltd" and D. R. Frampton is the company's sole director and signatory to the Defendant's employment agreements.*
2. *The Defendant, Mr Loder, was employed by the Plaintiff as Account Manager from 17 February 2003 until 18 August 2007 under two employment agreements.*
3. *The Defendant's initial terms of employment for the period up to 28 February 2005 (and beyond as provided for under clauses 4.1 to 4.4 and further amended by a later employment agreement) were set out in an individual employment agreement [Exhibit B – "the First Agreement"].*
4. *The First Agreement was shown to end on 31 February 2005 which was a date that did not exist, however, elsewhere in such agreement, 28 February 2005 was shown.*
5. *On the 4 May 2005 the Defendant signed off new terms of employment for the period 1 March 2005 up to 28 February 2007 (and beyond as provided for in clauses 4.1 to 4.4 and additionally under* "Annexure 1 continued"*) as set out in an individual employment agreement [Exhibit C – "the Second Agreement"].*
6. *During the negotiation period 28 February 2005 until 4 May 2005 the Defendant continued to be paid at a quantum level consistent with the First Agreement, albeit the Second Agreement was back dated to commence from 1st March 2005.*
7. *The First Agreement provided for payment of a* "VEHICLE ALLOWANCE" *shown to be for* "...a gross sum of $10,000 pa (or

part thereof to exclude any periods of Leave) at the gross rate of $833.33 per calendar month for the term of this agreement up to 28th February 2005...".

8. *Such Allowance was paid* "To assist the Employee meet part of his total vehicle costs..."
9. *The payment of such Allowance was* "....contingent upon the Employee working the full term of employment up to 28th February 2005 and not being in breach of TIL's Non Competition with TIL covenants....".
10. *The nature of this Vehicle Allowance and the related contingencies are set out in the First Agreement,* Schedule 1 *(page 5 of the rear blue section) headed up* Special conditions (b).
11. *The Second Agreement provided for payment of a* "NO COMPETITION PREMIUM ("NCP")". *The NCP was to be paid as* "...a premium sum of $10,000 gross per annum separate and additional to all other remuneration up to and including, but not beyond, 28th February 2007."
12. *The NCP was paid by equal monthly instalments @ $833.33 gross per month until 28th February 2007. Unlike the Vehicle Allowance in the First Agreement, there was no provision for reduced payment during periods of Leave.*
13. *The NCP had contingencies attached to its payment and the nature of the NCP and such contingencies are set out in the Second Agreement,* "Annexure 1 continued..." *(Exhibit c, page 10) headed up* "NO COMPETITION PREMIUM ("NCP")".
14. *Following negotiations between the Plaintiff and the Defendant that extended beyond 28 February 2007, the parties were unable to reach a third agreement on new terms and conditions.*
15. *The Defendant was not paid the NCP after 28 February 2007.*
16. *The Defendant resigned on 18 April 2007 and gave three months notice.*
17. *Clause 20.1 of the Second Agreement (and clauses 4.3 and 4.4 which are relevant where a possible new agreement has been the subject of negotiations) stipulates a minimum of 4 weeks notice of termination, however, there is an exception shown under* "Annexure 1 continued" *(page 10 of the rear blue section) which is a contingency attached to payment of the NCP that requires the Employee to* "provide a special extended resignation notice period of 4 months....".
18. *The Plaintiff wrote to the Defendant pointing out only three month's notice had been given. The Plaintiff also reminded the Defendant that the NCP was refundable to the Plaintiff in the absence of providing the stipulated four-month extended notice period that was a condition attached to the NCP.*

[3] In response the defendant worked 4 months' notice but was not paid the NCP after 28 February 2007.
[4] The defendant brought a claim to the Employment Relations Authority to recover payment of the NCP and costs. In response TIL counter-claimed for $2,500 on the basis that the defendant had breached his fiduciary duties. That claim was withdrawn at the Employment Relations Authority investigation meeting.

Authority determinations

[5] In its substantive determination[1] the Authority found that it was unreasonable for the plaintiff to require 4 months' notice of termination but not pay the allowance during the duration of that term. It held that Mr Frampton could not have his cake and eat it too.
[6] The Authority ordered the plaintiff to pay the defendant $5,000 being the rounded up amount of six monthly payments of $833.33 gross.
[7] In its costs determination[2] the Authority noted that the defendant succeeded with his entire claim and the plaintiff had properly abandoned its counter-claim. It ordered TIL to pay Mr Loder $3,000 as a contribution to his legal costs.
[8] TIL has challenged both determinations. The challenge is non de novo. The plaintiff's grounds for the challenge are:

1. The determination of the Authority is wrong in fact (and in some instances in law) in its reasons for determining that the NCP should be paid beyond the express end date of *"..up to and including, but not beyond, 28th February 2007."*
2. In the alternative, if the NCP is determined by the Employment Court to remain applicable beyond 28 February 2007, the basis of calculation used in the determination of the Authority is either incorrect or unreasonable in all the circumstances.
3. The ordered costs are excessive if not intentionally punitive, in view of the short hearing.

The employment agreement

[9] The relevant fixed term agreement was dated 4 May 2005 and expired on 28 February 2007. The reason given in the agreement for the fixed term was:

...because the Account Manager role may need to change and the company wishes to be able to negotiate its requirement from scratch (including the make up of remuneration, nature of role and human resource requirements.[3]

[10] The Authority found, and I agree, that these reasons do not meet the requirements of s66 of the Employment Relations Act 2000 ("the Act") which requires that the employer must have genuine reasons based on reasonable grounds for specifying that employment of an employee must end in the manner specified.
[11] It is not a genuine reason under s66(3)(a) if the employer specifies a fixed term agreement to exclude or limit

the rights of an employee under the Act. The stated reason for the fixed term was so the employer could respond to the type of issues that employers regularly face in the operation of a business. Such issues are properly dealt with by negotiations between the parties for a variation to an employment agreement or by the processes of restructuring and redundancy rather than terminating the employment.

[12] I also note that the employment agreement contains some clauses which on their face may breach s65(2)(b)(i) of the Act in that they are contrary to law. These clauses include the purported power for TIL to obtain injunctive relief against the employee without having to prove the inadequacy of available remedies at law and further requiring the employee to agree not to plead adequacy of available remedies or any other similar defence.

[13] A contract which purports to exclude the right of one or both of the parties to the contract to submit questions of law to the courts has long been held to be contrary to public policy and consequently void under common law.

[4] The Illegal Contracts Act 1970 upholds that common law position and makes void and ineffective any contractual provision that is illegal in law or equity. The Australian case of *Novamaze Pty Ltd v Cut Price Deli Pty Ltd*[5] sets out the public policy reasons for this rule:

At the core of this head of public policy is the notion that the citizen is entitled to have recourse to the court for an adjudication on his legal rights. A contractual agreement to deny a person that "inalienable right" contravenes this public policy and is void.

[14] Another clause in the agreement states that where the employee exercises or enforces (whether lawfully allowed or otherwise) any departure from the express terms and conditions and intent of the agreement, the employee acknowledges TIL's right to impose any of the provisions in the agreement to compensate TIL for such a departure. The purported ability for TIL to seek compensation appears, in effect, to be a disincentive to the employee to exercise their legal rights, and may also be illegal.[6]

[15] Although I hold concerns that these clauses of the employment agreement may be contrary to law, it is unnecessary for the purposes of these proceedings to finally decide these points, and in the absence of argument I do not do so. However, what these clauses show is that the agreement as a whole is unusually prescriptive.

[16] That being said, for the purposes of this case it is agreed that Mr Loder's employment extended past the expiry date and the only issue is whether the NCP clause was extended as well.

[17] Clause 4.3 of the agreement provided that any negotiations for a new agreement after the expiry date should not constitute a waiver of the expiry date but if TIL agreed the employee could continue to provide services whilst negotiations were in progress, subject to the terms of the agreement, until the negotiations were concluded or the employee ceased to provide services. Clause 4.4. provided that either party to the agreement could terminate the agreement either during or after those negotiations by providing 4 weeks' notice:

> *4.4 For the avoidance of doubt, either of the parties may terminate the agreement in accordance with 20.1 during negotiations under clause 4.3, or once those negotiations have concluded.*

[18] Either party could terminate the agreement in accordance with clause 20 (on 4 weeks' notice) or clause 21 (for misconduct) during negotiations or once negotiations were concluded.

[19] The agreement also incorporates a no competition premium clause. It has another notice provision:

NO COMPETITION PREMIUM ("NCP"): *TIL shall pay the Employee a premium sum of $10,000 gross per annum separate and additional to all other remuneration up to and including, but not beyond, 28th February 2007. Such payment shall be made in consideration that the Employee will both; a): not breach TIL's no competition and confidentiality requirements as set out in this agreement, and; b): provide a* ***special extended resignation notice period of 4 months*** *plus any period equivalent to any non-worked part of December or January where such notice period encompasses such non-worked period. In the event TIL finds the Employee has breached requirements a) or b) above: such NCP entitlement shall immediately cease and the Employee shall immediately repay TIL any NCP monies received – less any sum that TIL has at the time reclaimed in accordance with procedure set out in Schedule 1. M (c).* (My emphasis)

[20] Schedule 1. M. (c) to the agreement purports to authorise the deduction of sums owed by the employee to TIL under the NCP. Annexure 1 contains an explanation for this:

Explanation: *TIL wishes to assist the Employee reach his full potential through divulging TIL business methodologies and aim for a stable branch environment. A breach of a) or b) above could allow the Employee to fairly or unfairly compete with TIL or destabilise the branch to the detriment of TIL and TIL's loyal employees. Accordingly, TIL requires all NCP amounts paid to the Employee be repaid to TIL in circumstances where the Employee is in breach of his contingent obligations set out in a) and b) above.*

1. Liability of the plaintiff to pay the NCP to the defendant after 28 February 2007 until the end of the employment relationship

Construction of the employment agreement

[21] In a dispute about the interpretation and operation of an employment agreement, pursuant to s129 of the Act,

the Court applies normal contractual principles of interpretation but will also take into account the special features of employment relationships and the statutory regime of the Act. The following principles apply to the construction of an employment agreement:

- The Court must take an objective approach to interpretation.
- The starting point is the words written in the agreement but the Court is not limited to giving the words a purely literal meaning. The Court looks to find the meaning which the agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. [7]
- Previous negotiations of the parties[8] and their declarations of subjective intent[9] are not admissible in interpreting the agreement.
- There is a difference between the meaning of the words in a grammatical sense and the meaning of the document being what the parties using those words against the relevant background would reasonably have been understood to mean.
- The modern approach to contractual interpretation has been described as *"a more commonsense purposive approach."*[10]
- Finally, the clear meaning of the words must prevail and extrinsic facts cannot make the words mean something they are incapable of meaning.

Interpretation of the NCP clause

[22] The starting point is the plain meaning of the words of the clause. As Mr Frampton pointed out in his submissions the clause has a specified expiry date of 28 February 2007 and therefore on the face of it the NCP was never intended to be paid after that stated end date of 28 February 2007. However, the NCP exists in the context of a detailed employment agreement and a wider employment relationship.
[23] The NCP clause was part of a fixed term agreement intended by the parties to expire on 28 February 2007, the same date as that given for the expiry of the payment of the NCP. However, the employment relationship did not conclude on 28 February 2007 as initially intended but continued until 18 August 2007.
[24] Clause 4.3 contemplates what was to happen if negotiations for a new agreement continued beyond the expiry of the fixed term agreement. The general rule that negotiations will not constitute a waiver of the expiry date is subject to an exception. TIL's agreement that the employee may continue to provide services constitutes a waiver of the expiry date.
[25] On the agreed facts the behaviour of the parties was consistent with the waiver of the expiry date of the fixed term agreement. The parties acted consistently with the clauses in the substantive agreement rather than the clauses governing the negotiation period.
[26] Although in accordance with clause 4.4 Mr Loder was entitled to terminate the agreement by providing 4 weeks' notice, in fact he provided a much greater notice period of 3 months. In response, Mr Frampton informed him that the NCP was refundable to TIL if Mr Loder did not provide the stipulated 4 months' notice. Mr Loder subsequently worked out a 4-month notice period.
[27] Mr Frampton's insistence on the 4 months' notice period was inconsistent with clause 4.4. The agreed statement of facts states that the parties said that the 4 months' notice period was an exception to the 4 weeks' notice period provided in clause 4.4. If that was the case clause 4.4 became entirely redundant. In my view, where negotiations continue beyond the expiry date of the agreement clause 4.4 applies.
[28] The 4 months' notice period provided in the NCP clause only applied in limited circumstances such as where the employee wished to terminate the agreement more than 4 months prior to the expiry date of the agreement. For example, if Mr Loder had wished to terminate the agreement well before the expiry date he would have been required to give 4 months' notice or risk having to refund the NCP payments he had already received. Apart from this situation, a notice period is inconsistent with the concept of a fixed term agreement. When an employer and employee enter into a fixed term agreement, both parties are on notice of when that fixed term agreement is to end. It is unnecessary for an employee to provide notice of an event that has been agreed to between the parties, and of which both parties are aware is to occur.
[29] Previous case law has dealt with the situation where the employment relationship has not concluded on the expiry date stated in a fixed term agreement but has been allowed to 'drift on'. *In Varney v Tasman Regional Sports Trust*[11], the plaintiff was employed under a fixed term agreement for a period of 48 weeks. The plaintiff's employment continued after the stated expiry date without any new agreement being entered into between the parties.
[30] In this situation, Chief Judge Goddard found that after the expiry date the employment was on the same terms but indeterminate in nature and if the employment was to be of a fixed term nature then it was necessary for the employer to comply with s66 of the Act. In reality, where employment is allowed to 'drift on' it is unlikely that an employer would be able to comply with the requirements under s66 to state in writing the reasons for the fixed term and how or when the employment is to end.
[31] Varney was applied in *Electrotech Controls Ltd v Rarere.*[12] In that case it was held that the employer had

waived the automatic expiry term by continuing to employ and pay the employee and the employee had acquiesced to the waiver by continuing to work and receive payment. Although the employer would have been entitled to insist on the expiry term, it did not and the employee was entitled to assume that the expiry would not be insisted on. The employment relationship was governed by the terms of the last formal agreement.
[32] Applying *Varney* and *Electrotech* to the present case I conclude that after the expiry date of 28 February 2007 the employment relationship between the parties ceased to be fixed term and became indeterminate in duration. The employment relationship was governed by the terms and conditions of the last formal agreement between the parties, which was the fixed term agreement for the period 1 March 2005 to 28 February 2007.
[33] Those terms and conditions included the NCP clause. Although the NCP clause had a stated expiry of 28 February 2007 this cannot be read sensibly in light of the fact that the employment relationship continued beyond that date and all terms and conditions rolled over. Both parties continued to perform their obligations under that clause.
[34] I accept the defendant's submission that it would not be fair or reasonable, nor in equity and good conscience, for the plaintiff to exercise selectively part of the NCP clause by tying the defendant to the resignation provision but not give effect to the remuneration aspect. The plaintiff cannot expect to enforce the 4-month notice period yet avoid its obligations under the bargain. As the Authority quite aptly put it *"Mr Frampton can't have his cake and eat it too."*
[35] The plaintiff argued that the NCP had been paid in respect of contingent obligations yet to be performed and it was the defendant who ultimately decided when to begin carrying out the obligations. I find that the payment of the NCP by the plaintiff was in consideration of the defendant not breaching TIL's no competition and confidentiality requirements and providing a special extended notice period. Some of the obligations were yet to be performed when NCP payments were made. For example, the obligations pursuant to the restraint of trade could only be performed once the agreement ended. However, other obligations were performed throughout the agreement while the NCP was being paid, such as the confidentiality requirements.
[36] In the plaintiff's submission, the 4-month notice period could have commenced any time before or after 28 February 2007. For the reasons discussed above, the defendant would not have been required to give notice before 28 February 2007 unless it was more than 4 months prior to the expiry date.
[37] In conclusion, for the reasons outlined above, I hold that the NCP was payable for the period after 28 February 2007 until the end of the employment relationship on 18 August 2007.

2. **Was the Authority's calculation of the NCP incorrect or unreasonable?**

[38] The Authority ordered the plaintiff to pay the defendant the rounded up figure of $5,000. The Authority considered that the plaintiff owed the defendant the sum of $5,000 representing the rounded up payment of six monthly instalments of $833.33 gross.
[39] I do not agree with Mr Frampton that the Authority's assessment of the amount owing could be said to be unreasonable, however on a strictly mathematical calculation it is incorrect. The value of the NCP was $833.33 gross per month. The plaintiff is required to pay the NCP for the period from 1 March 2007 until 18 August 2007. To be exact, that is a period of 5 months and 18 days. Payment for the five full months is calculated by multiplying $833.33 by 5. That comes to $4,166.65. That leaves the final 18 days to calculate. Valued at $10,000 per annum, the value of the NCP per day was $27.40. Eighteen days is worth $493.20. Adding the two totals together ($4,166.65 + $493.20) gives a final total figure of $4,659.85 for 5 months and 18 days.
[40] Mr Frampton submitted that any payment found to be owing to the defendant should not include the period from 28 February 2007 until 28 April 2007, the date of the defendant's resignation letter. His reason was that continued employment of the defendant was beyond the control of the plaintiff as the defendant was concurrently looking for an alternative job while negotiating with the plaintiff and therefore the plaintiff was unable to mitigate any ongoing premium payment exposure. The plaintiff also submitted that the final 2-week period should not be included in the calculation because the defendant chose to work out the remainder of his notice period despite being offered a "'no-strings attached' early release" by the plaintiff.
[41] I find that the payment of the NCP is in consideration of the defendant performing the two stipulated conditions. The defendant performed those conditions and therefore there is no basis for making the deductions requested by the plaintiff.
[42] I order that the plaintiff pay the defendant the sum of $4,659.85.

3. **Were the costs awarded by the Authority excessive if not intentionally punitive?**

[43] The plaintiff submits that the costs awarded by the Authority should be reduced because of the short nature of the investigation meeting, said by the plaintiff to have taken 2 hours, and due to the fact that the defendant's legal costs were being subsidised by his union membership.
[44] The Authority ordered the plaintiff to pay the defendant costs of $3,000. $2,000 was allowed for the costs of the substantive investigation and $1,000 for work undertaken on the counter-claim that was withdrawn by the plaintiff at the investigation meeting. The Authority had regard to the usual principles concerning costs in the Authority, citing the decision of a full Employment Court in *PBO Ltd (Formerly Rush Security Ltd) v Da Cruz.*[13]

[45] The Court has recently observed that, given the passage of time since the *PBO Ltd* case, a tariff of $3,000 per day can be considered an appropriate starting point for costs awards in the Authority, rather than the upper end of the scale.[14]
[46] There is nothing wrong in principle with the costs decision by the Authority and no reason to change it.

Conclusion

[47] The plaintiff's challenge to the Authority's determination as to liability is dismissed. The plaintiff is liable to pay the defendant his entitlement to the NCP for the period 1 March 2007 to 18 August 2007.
[48] The challenge to the Authority's calculation of the amount payable for this period is allowed. Terson Industries Ltd is to pay Mr Loder the sum of $4,659.85.
[49] The challenge to the Authority's cost decision is dismissed.

Costs

[50] In the absence of agreement between the parties submissions as to costs by the defendant must be filed and served by Wednesday 6 May 2009. The plaintiff must file and serve its submissions by 4.00pm Tuesday 12 May 2009. This abridged timetable is necessary in view of my impending retirement from the Court.

CORAL SHAW

JUDGE

Judgment signed at 11.00am on 30 April 2009

---

[1] WA 55/08, 2 May 2008
[2] WA 55A/08, 20 May 2008
[3] Clause G of Schedule 1
[4] Burrows, Finn & Todd Law of Contract in New Zealand 3rd edn (2007) at pp 393-4
[5] (1995) 128 ALR 540, at pp 548-9 (FCA)
[6] *Novamaze* at p549
[7] *Mount Joy Farms Ltd v Kiwi South Island Co-operative Dairies Ltd* (Court of Appeal, CA297/00, 6 December 2001) at para 38, per Hammond J for the Court
[8] *Hansells (NZ) Ltd v Ma* [2007] ERNZ 637 at para [35]
[9] *Association of Staff in Tertiary Education Inc v Hampton, Chief Executive of the Bay of Plenty Polytechnic* [2002] NZEmpC 79; [2002] 1 ERNZ 491 at para [20]; *Godfrey Hirst New Zealand Ltd v National Distribution Union Inc* AC 62/04, 27 October 2004 at para [5]
[10] Burrows, Finn & Todd Law of Contract in New Zealand 3rd edn (2007) at p 161
[11] CC 15/04, 23 July 2004
[12] [2007] ERNZ 586
[13] [2005] NZEmpC 144; [2005] ERNZ 808
[14] *Johnson v Gilligan Business School Ltd* AC 14/09, 3 April 2009 at para [15]; *Chief Executive of the Department of Corrections v Tawhiwhirangi (No 2)* [2008] ERNZ 73 at para [7]
