

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 365  
3061414

BETWEEN                      ZELANDE LIMITED  
Applicant

AND                              OLIVER MCCURDY  
Respondent

Member of Authority:        Jenni-Maree Trotman

Representatives:             Hannah Cleaver, advocate for the Applicant  
Simon Greening, counsel the Respondent

Investigation Meeting:      On the papers

Submissions Received:      14 June 2019 from the Applicant  
17 June 2019 from the Respondent

Date of Determination:      20 June 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     This matter came before me as Duty Member. Having reviewed the Statement of Problem I granted urgency.

[2]     Zelande Limited alleges that Oliver McCurdy breached the terms of his individual employment agreement (IEA), particularly the terms relating to confidentiality and restraint of trade. An urgent compliance order is sought as well as a penalty, damages and costs.

[3]     The claim is denied by Mr McCurdy. While he acknowledges his contractual obligations, and accepts he provided information to a third party, he denies the information was confidential.

## **The process**

[4] By consent the parties agreed that the Authority would address the issue of whether Mr McCurdy breached the confidentiality provisions of his IEA and, if so, whether a compliance order should be granted, on the papers. It was agreed that the issue of penalties and damages will be considered at a later time if necessary. Zelande withdrew its claim for breach of the restraint of trade provision.

[5] To assist with the agreed process, the Authority was provided with an affidavit from Mr McCurdy and Seth Fisher, Zelande's director. In addition, the parties each filed submissions.

[6] As permitted by 174E of the Employment Relations Act 2000 this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

## **The issues**

[7] The issues for investigation are:

- a. Did Mr McCurdy breach the confidentiality provisions of his individual employment agreement?
- b. If so, should the Authority make a compliance order?

## **Relevant background facts**

[8] Mr McCurdy was employed by Zelande from August 2016 to February 2019 as a beekeeper. The terms and conditions of his employment were contained in a written individual employment agreement (IEA) dated 29 July 2016.

[9] In February 2019 Mr McCurdy was made redundant. A significant reason for his redundancy was due to Zelande experiencing financial difficulties. These arose as a result of one of Zelande's customers, Te Tumu Miere Limited (in liquidation) (TTM), alleging Zelande had breached the contract between them and the ensuing legal battle in the High Court. I understand this dispute has nearly put Zelande out of business.

[10] Prior to Mr McCurdy leaving employment with Zelande the parties spoke about his obligations of confidentiality. Mr Fisher told him that he needed to keep Zelande's "Royal Jelly Production, our methods of beekeeping and the way we do things" confidential. He also addressed the legal dispute with TTM and talked about what sorts of things were confidential.

[11] He followed this conversation up with a text message on 20 March 2019 that reminded Mr McCurdy of his contractual obligations:

Hi Ollie

Hope everything is going ok.

I take this time to remind you that you are bound by your contract with Zelande Limited – your past employer, even after you leave. This includes, but not limited to, keep activities, processes, details, trade secrets, methodologies, plans, information confidential and commercially sensitive. We are committed to enforcing this confidentiality. This is a standard reminder we send to all ex employees to ensure there is no negative impact on our business.

I trust everything is working out ok.

Many thanks

Seth

[12] This text was followed by the following exchange:

Ollie: Hi Seth  
Thanks for that.  
I have been keeping my mouth shut  
Cheers  
Ollie

Seth: I knew you would. All good. Hope everything is ok. They are really keen to sink us. The main claim is warming up. They are really scared. Thx.

Ollie: Oh I see. I thought it was all over with now. What a major headache it has turned out to be for you. All the best with the battle. Cheers.

[13] In early to mid May 2019 Mr McCurdy engaged in at least two conversations with TTM's Liquidator and its lawyer. One of these calls lasted approximately 1.5 hours. During these conversations he provided information about Zelande's business that was relevant to the matters in dispute between TTM and Zelande. These calls, and email correspondence, resulted in an affidavit being prepared to support TTM in

the proceedings against Zelande in the High Court. Mr McCurdy was asked to execute this affidavit which he did.

[14] On 14 May 2019 Mr McCurdy swore a 12-page affidavit (the Affidavit). A copy of the Affidavit was placed before the Authority. It talks at length about about Zelande’s management of the TTM hives. I shall return to address the contents in more detail later in this determination.

### **Issue One: Did Mr McCurdy breach the confidentiality provisions of his IEA?**

#### *The claim*

[15] The Statement of Problem pleads that Mr McCurdy “breached a confidentiality clause in his employment agreement by providing a 12-page affidavit detailing every aspect of the Applicant’s business”. The clause relied upon is this:

#### **Confidential Information**

The Employee shall not, whether during employment or after termination for whatever reason, use, disclose or distribute to any person or company/entity, other than as necessary for the proper performance of their duties and responsibilities under this Agreement, or as required by law, any confidential information belonging to Zelande, including, but not limited to, information about Zelande’s business, clients, directors or Employees, pricing, customer lists, supplier pricing, data or trade secrets acquired by the Employee in the course of performing their services under this Agreement.

[16] Submissions filed on behalf of Mr McCurdy also rely upon the decision of *Faccenda Chicken v Fowler*.<sup>1</sup> In that case the English Court of Appeal stated that, in determining whether any item of information is protected after termination of employment, all circumstances need to be taken into account. It referred to four factors which were “helpful guidelines as opposed to strict tests”. Those factors are:

- (a) The nature of the employment. Thus employment in a capacity where ‘confidential’ material is habitually handled may impose a high obligation of confidentiality because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally.
- (b) The nature of the information itself. In our judgment the information will only be protected if it can properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret eo nomine... The restrictive

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<sup>1</sup> [1987] CH 117 at 137-138.

covenant cases demonstrate that a covenant will not be upheld on the basis of the status of the information which might be disclosed by the former employee if he is not restrained, unless it can be regarded as a trade secret or the equivalent of a trade secret: see, for example, *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, 710 per Lord Parker of *Waddington and Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472, 1484 per Megaw LJ ... It is clearly impossible to provide a list of matters which will qualify as trade secrets or their equivalent. Secret processes of manufacture provide obvious examples, but innumerable other pieces of information are capable of being trade secrets, though the secrecy of some information may be only short-lived. In addition, the fact that the circulation of certain information is restricted to a limited number of individuals may throw light on the status of the information and its degree of confidentiality.

- (c) Whether the employer impressed on the employee the confidentiality of the information. Thus, though an employer cannot prevent the use or disclosure merely by telling the employee that certain information is confidential, the attitude of the employer towards the information provides evidence which may assist in determining whether or not the information can properly be regarded as a trade secret. It is to be observed that in *E Worsley & Co Ltd v Cooper* [1939] 1 All ER 290, 307D, Morton J attached significance to the fact that no warning had been given to the defendant that 'the source from which the paper came was to be treated as confidential.
- (d) Whether the relevant information can be easily isolated from other information which the employee is free to use or disclose ... For our part we would not regard the separability of the information in question as being conclusive, but the fact that the alleged 'confidential' information is part of a package and that the remainder of the package is not confidential is likely to throw light on whether the information in question is really a trade secret.

[17] In terms of the factors in *Faccenda Chicken*, Zelande submits:

- (a) The nature of the information- the respondent provided highly confidential information to TTM regarding the applicant's methodologies in running it's business. From paragraph [5] of the affidavit 'Beehive management' through to paragraph [56] general comments, all information is confidential in respect of how the applicant operates.
- (b) The Employer impressed upon the employee the confidential nature of the information - The respondent was well aware of the ongoing legal dispute with TTM and reminded several times both verbally and in writing regarding ongoing confidentiality obligations. Refer to text messages annexed to the affidavit of Seth Fisher which specifically speak to this point.
- (c) Whether the relevant information is easily isolated from other information the employee is free to use - The employee was provided further detail regarding its operations with TTM due to the redundancy procedure it had to commence. This information would not be available to anyone outside the organisation and the applicant would be aware that it was not readily available.

[18] Submissions filed on behalf of Mr McCurdy deny that the information contained in the Affidavit is confidential in nature. He submits that the information falls into either the first or the second category defined in *Faccenda Chicken*. He provides further detail by reference to each paragraph alleged by Zelande to contain confidential information.

*The contents of the Affidavit*

[19] On 12 June 2019 the Authority requested Zelande to identify the parts of the Affidavit that it claimed breached the confidentiality provisions in Mr McCurdy's IEA. In response to that request Zelande filed submissions in which it maintained that paragraphs 5 to 56 of the Affidavit contained confidential information about its business.

[20] A review of the Affidavit establishes that most of the paragraphs from paragraph 10 through to 56 contain information about Zelande's business and particularly its management of the TTM hives. For example:

- a. Paragraph 10 addressed the period when Zelande commenced management of TTM's hives, the number of TTM hives it cared for, and Mr McCurdy's involvement with the hives.
- b. Paragraph 11 identified the staff responsible for working on the TTM hives and their roles.
- c. Paragraphs 12, 13, 14, 15 and 16 provided details as to how the TTM hives were and were not maintained and inspected up to September 2018, including the method of mite control being used on these hives.
- d. Paragraphs 19 through to 30 provide specific details of the swarm control undertaken by Zelande on TTM hives during October and November 2018. Detail was provided as to the method used by Zelande, the treatment administered, and provided particulars of instructions given by Zelande to Mr McCurdy and other staff members regarding the TTM hives. Mr McCurdy also addressed his observations of the hives during this period and expressed his opinion as to the adequacy of the treatment being provided by Zelande to treat hives infected with the Varroa Mite.

- e. Paragraphs 31 through to 34 provided specific details of the maintenance of the TTM hives in December 2018 and particulars of instructions provided by Zelande to Mr McCurdy and other staff members.
- f. Paragraphs 35 through to 39 provided specific details of the maintenance of the TTM hives during January 2019. This included the number of beekeepers working on the TTM hives, the methodology used by Zelande, and particulars of instructions provided to Mr McCurdy and other staff members.
- g. Paragraphs 40 through to 48 provided information as to Mr McCurdy's observations of the TTM hives, including the health of those hives and their numbers, during February 2019. It also addressed the instructions provided to him and other staff members regarding splitting hives.
- h. Paragraphs 50 to 55 provided information on the equipment used by Zelande for the TTM hives from October 2017 through until the liquidators took possession. This included information regarding the condition of the equipment used and instructions provided by Zelande to switch equipment that had been used for TTM hives.
- i. Paragraph 56 records the methodology used by Zelande to record sites visited, tasks completed, the number of live and dead hives, and relevant observations about the hives.

[21] I am satisfied the information disclosed in the Affidavit is largely, on balance, in the realm of confidential information. The nature of the information about Zelande's business was, in all the circumstances, of a highly confidential nature. It contained extensive information on Zelande's methodology and processes both generally and in terms of TTM's hives.

[22] I was not persuaded by the submissions made on behalf of Mr McCurdy that the information disclosed in the Affidavit was not "secretive in nature" and/or Zelande failed to make it clear to Mr McCurdy that the information was confidential in nature. No evidence was before me to support these submissions. Rather, the uncontested evidence of Mr Fisher was to the effect that the information disclosed by Mr McCurdy was very sensitive in the bee industry as Zelande's operation is different to a lot of other beekeepers. He deposed that its disclosure provided TTM with an

adverse advantage in the High Court proceedings and a general advantage as a competitor. In addition, Mr Fisher deposed that the confidentiality of information relating to the TTM hives was impressed on Mr McCurdy both during the redundancy process and in text messages following his termination.

[23] I find Mr McCurdy breached the confidentiality provision in his IEA.

### **Issue Two: Compliance Order**

[24] Mr McCurdy's breaches of the confidentiality clause contained in his IEA cannot be permitted to continue. A compliance order under s 137 (2) is necessary.

[25] From the date of this determination, I order Mr McCurdy to comply with his IEA by not directly or indirectly using, disclosing or distributing any confidential information belonging to Zelande.

### **Outcome**

[26] The overall outcome that I have reached is:

- a. Mr McCurdy breached the confidentiality provision in his IEA.
- b. From the date of this determination, Mr McCurdy is ordered to comply with his IEA by not directly or indirectly using, disclosing or distributing any confidential information belonging to Zelande.
- c. The issue of a penalty for Mr McCurdy's breach of his IEA is reserved. The Applicant is to advise the Authority within 14 days of the date of this determination whether or not it wishes to progress this issue. If so, a telephone conference will be convened to address timetabling for the hearing of this aspect of Zelande's claim.
- d. Costs are reserved.

Jenni-Maree Trotman  
Member of the Employment Relations Authority