

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 15/07
WRC 8/07**

IN THE MATTER OF an application for an injunction

BETWEEN AUTO-MOVEMENTS (NZ) LTD
 Applicant

AND WAYNE RONALD EVELEIGH
 Respondent

Hearing: 11 May 2007
 (Heard at Wellington)

Appearances: G A Paine, Counsel for the Applicant
 D D Vincent and M W F Esera, Counsel for the Respondent

Judgment: 18 May 2007

JUDGMENT OF JUDGE C M SHAW

[1] Auto-Movements (NZ) Ltd (Auto-Movements) claims that Wayne Eveleigh, having left his employment at the end of 2006, has been acting in breach of clauses in his employment agreement relating to restraint of trade, non-solicitation, and breach of confidence. It seeks injunctive relief to prevent these breaches until the expiry of 6 months after the end of his employment.

[2] Mr Eveleigh denies that he is bound by these clauses because they expired after the end of a fixed term contract in 1999. In any event, he says the restraints are unreasonable and contrary to the Illegal Contracts Act 1970.

[3] The applicant initially attempted to file these proceedings with the Employment Relations Authority but, acting on a well-founded belief that the full

Court decision in *Axiom Rolle PRP Valuations Services Ltd v Kapadia*¹ meant that the Authority did not have jurisdiction to hear and determine applications for injunctions, the Authority declined jurisdiction. The proceedings were then filed in the Employment Court and progressed towards a hearing. Interim injunctions were made on 2 March 2007 by consent pending that hearing.

[4] On 5 April 2007 another full Court decision² was released which determined that the Employment Relations Authority did have jurisdiction. The question of whether the Employment Court had originating jurisdiction was left open.

[5] As the present proceedings had been commenced in the Employment Court only after the Employment Relations Authority had declined jurisdiction, I held that they could be treated as removed proceedings. Given the urgency of the matter and the interim consent orders that had been agreed to in the Court, the parties wished to continue with the Court proceedings rather than recommence them in the Authority.

The facts

[6] Evidence was given by way of affidavit. Only Mr Eveleigh was required for cross-examination.

[7] Mr Broughan is the managing director of Auto-Movements, a car transportation company which operates out of Auckland and Wellington. In September 1996 Auto-Movements purchased this business from Mr Eveleigh who had established it.

[8] The sale was accompanied by a restraint of trade. Although this was not produced in evidence it was quoted in the statement of claim and not denied. It restrained Mr Eveleigh for five years until September 2001 from being “*directly or indirectly engaged, interested or concerned whether on the Respondent’s own account or as a shareholder, Director or employee (other than as a driver) partner, agent, representative, consultant, lender of money, guarantor or in any other*

¹ (2006) 3 NZELR 390

² *Credit Consultants Debt Services NZ Ltd v Wilson* unreported, 5 April 2007, WC12A/07

capacity in any business or activity in New Zealand which was in direction [sic] competition with any business activity carried on by Auto-Movements (NZ) Ltd.”

[9] Mr Eveleigh stayed on with Auto-Movements after the sale to give vendor assistance. During that time he was paid \$1,000 a week but had no written employment contract. He left in mid 1997 to set up his own car importing business but in April 1998 returned to Auto-Movements which by then was in financial trouble.

[10] Mr Eveleigh was employed for a fixed term of 3 months from 14 April 1998 to try and turn the company's fortunes around. This time he had a formal written employment contract. Clause 2 of that agreement stated:

2.0 EMPLOYMENT STATUS

- *The employment status of the Employee is full time temporary (this contract is for a fixed period of three months, for assistance in improving the operating performance of the company. There is no right of renewal of this contract, nor is it intended to be renewed.*

[11] Apart from the standard terms of salary, statutory holidays, leave, and termination, the agreement contained the following clauses which are relied on in the present proceedings:

17.0 RESTRAINT OF TRADE

The Employee shall not at any time, during the term of this contract, or for the period of 6 months after the termination of this contract, carry on or be connected with, or employed, either directly or indirectly in the vehicle transportation industry within the North Island, without the express written consent of the employer, provided that such consent shall not be unreasonably withheld.

18.0 NON-SOLICITATION

The employee shall not at any time during the term of this employment or for a period of 12 months after the termination of this employment, either on the employee's own account or for any other person, firm, or company, solicit, endeavour to entice away from of [sic] discourage being employed by the Employer any other person, firm or company who at any time during the continuance of this contract have been an employee or client (actual or prospective) of the Employer.

19.0 CONFIDENTIALITY

All information as to the affairs of the Employer, its client [sic] and other people having dealings with the Employer is strictly confidential. Under no circumstances will the Employee disclose the affairs of the Employer or its clients or discuss same with any person (including members of the

Employee's family) other than in the normal course of the Employee's duties. This applies during the period of employment and at any time thereafter. This condition is regarded most seriously and any breach will be grounds for immediate dismissal without notice.

[12] A remuneration and benefits schedule attached to the contract set his rate of pay and bonuses and contained two special conditions:

3. ***OTHER SPECIAL CONDITIONS:***

The Employee will be permitted to use the building leased by Auto Movements to store a limited number of motor vehicles for his own private business, free of charge.

The Employee will also be permitted to conduct his own personal business during work hours, when the work of managing Auto Movements (NZ) Ltd has been taken care of.

[13] During this contract Mr Eveleigh worked to get back the customers that Auto-Movements had lost over the period he had been away from the business.

[14] Just before the expiry of the 3 months of the fixed term contract Mr Broughan asked Mr Eveleigh to stay on with the company as its transport manager in the Seaview depot. Following that conversation, Mr Eveleigh was given a business card with transport manager written on it. Mr Broughan did not offer him a new employment contract and Mr Eveleigh did not ask for one.

[15] Mr Eveleigh's employment then continued as Auto-Movements' transport manager for approximately 8 years. He said that in April 1998 he had no intention of entering into any agreement restraining him from running his own business after September 2001 when the 5-year restraint expired. Mr Broughan gave no evidence about this at all.

[16] In December 2006 Mr Eveleigh gave notice that he was leaving Auto-Movements on 31 December. He was paid on 31 December 2006 which was his last day at work when he was farewelled although he received two further payslips on 7 and 14 January 2007 which recorded his annual leave entitlements. Mr Paine submitted that these two payments meant his employment did not end until 14 January 2007. I find that the extra payments made after termination were to meet holiday pay obligations which arose up to 31 December 2006 but not beyond. His employment ended on 31 December 2006.

[17] In early 2007 Mr Broughan formed the belief that Mr Eveleigh was competing directly with Auto-Movements. He hired a private investigator who followed and observed Mr Eveleigh on 14 February 2007. The investigator saw the respondent in the company of Warren Johnston, visiting a car yard, picking up a car transporter, and collecting a car for delivery to El Cheapo Cars. The car transporters observed by the private investigator were registered in the name of Action Car Deliveries Ltd. Mr Johnston is a director of that company and gave evidence that he had raised a loan against his home to start Action Car Deliveries Ltd.

[18] Mr Broughan had information from third parties which satisfied him that Mr Eveleigh was in the business of car transportation and as a result brought these proceedings.

[19] After he left Auto-Movements, Mr Eveleigh bought a tractor unit on 26 January 2007 and ordered a trailer unit to be built. He intends to operate those at some time in the future when they are complete but has done nothing with them to date.

[20] Mr Eveleigh does not deny that he assisted Mr Johnston in his car transportation business for about 10 days in February 2007. He denies being paid and said he was just helping out a friend. Mr Johnston confirms that in his affidavit. Mr Eveleigh's principal case is, however, that he is not bound by any restraint of trade clauses as his employment contract with those restrictions in it expired 6 months in the case of restraint of trade and 12 months for the non-solicitation clause after the end of his fixed term agreement in 1998.

[21] The applicant has not pleaded or given evidence of what if any proprietary interest is in need of ongoing protection by a restraint of trade.

[22] It alleges that since he left his employment Mr Eveleigh has purported to operate in companies or business ventures in direct competition with it and is carrying motor vehicles in direct competition with it.

[23] Mr Broughan says in his affidavit that Auto-Movements is struggling due to the competition that is at present in the marketplace.

The issues

[24] In this case the question of whether there is an existing restraint of trade and other restrictive covenants against Mr Eveleigh is a preliminary and potentially determinative issue. Only if that is established do issues of enforceability arise including whether the terms of the restraint were reasonable, and whether in fact it had been breached.

Is the respondent bound by a restraint of trade?

[25] The starting point is the employment contract of 14 April 1998. The applicant says that, although it had a fixed term of 3 months, in fact it continued in place with both parties agreeing to be bound by its terms and conditions until such time as the respondent left the employ of the applicant. Mr Paine pointed to the continuing employment and payment of Mr Eveleigh's salary after the end of the 3 months as evidence of this and submitted that there was no discussion between the parties which Mr Eveleigh would have found untenable or that suggested that the terms and conditions of employment had changed from those in the fixed term contract.

[26] The only evidence before the Court about the restrictive conditions are the written terms of the 1998 contract and Mr Eveleigh's evidence about his ongoing employment including the way he was engaged at the end of the 3 months. Mr Broughan's affidavit did not refer either to the circumstances under which the contract was entered into or about what happened when its term expired.

[27] The best evidence is the contract itself. It is unequivocal as to the reason for Mr Eveleigh's employment and its terms. It expressly says that there was no right of renewal of the contract and that it was not intended to be renewed. In the absence of any evidence to the contrary, the words of the contract governs the relationship between the parties.

[28] Mr Eveleigh's evidence supports the fixed term nature of the contract. His account of his conversation with Mr Broughan at about that time suggests that Mr Broughan was aware of this as well.

[29] The next question is, what were the terms of the further employment relationship with Auto-Movements at the end of the fixed term?

[30] Again, the only evidence is that of Mr Eveleigh who supported his belief that he had been given a new position of transport manager by producing his business card with that title on it. Mr Broughan made no reference to the expiry of the fixed term nor of Mr Eveleigh's role as transport manager in either his affidavit or statement of claim.

[31] I find that although Mr Eveleigh's employment continued with Auto-Movements it was intended to be and it was in fact in a different capacity from the position he took on under the fixed term. From being a temporary employee engaged to improve the operating performance of the company, he became transport manager. There is no evidence to find, as Mr Paine urged, that Mr Eveleigh and Mr Broughan expressly agreed that his employment status had not changed.

[32] Mr Vincent cited decisions of the Employment Court where employment continued beyond the expiry of a fixed term in the contract³. These were cases where dismissals followed an extended period of employment beyond the original fixed term and the issue was whether the fixed term enabled the employer to dismiss without reasonable notice. Goddard CJ held⁴ that a fixed term contract ceases to be such if the employment continues beyond the term unless it is replaced by another fixed term contract voluntarily made with the freely given informed consent of both parties.

[33] If a fixed term of a contract cannot be extended other than by agreement of the parties, no doubt because it does not reflect the intent of the parties, neither can terms such as a restraint of trade be extended without the parties specifically turning

³ *Varney v Tasman Regional Sports Trust* unreported, Goddard CJ, 23 July 2004 CC 15/04; *O'Neill v Victoria University of Wellington* unreported, Goddard CJ, 11 December 1996, WEC 82/96

⁴ *O'Neill v Victoria University of Wellington*

their minds to the extension. I find that there was no agreement between Mr Broughan and Mr Eveleigh that the restraint of trade and other restrictive clauses would continue into the new employment. The requirement for agreement is especially necessary because contractual provisions in restraint of trade are *prima facie* void.

[34] This is not a case like *Marine Helicopters Ltd v Stevenson*⁵ where, although the employee was employed under an oral contract, a draft contract had been attached to his letter of appointment but not been signed by the employee. However, those documents were found to be written evidence of what had been agreed. They included a restraint of trade. In this case the new employment had no written documentation from which an agreement could be inferred.

[35] Mr Paine also submitted that in the absence of a written contract the restraint of trade should be implied into the continued employment relationship. It is possible to imply terms when the Court finds that the parties must have intended that term to form part of the contract but as the Privy Council has held⁶ the term must be reasonable and equitable; necessary to give business efficacy to the contract; be so obvious that it goes without saying; must be capable of clear expression; and must not contradict any express terms of the contract.

[36] On the facts in this case, even if the past behaviour of the parties in agreeing to restraints of trade in two previous contracts were to be taken as evidence of a particular course of conduct governing a relationship, this is not sufficient to meet the conditions for implication of terms.

[37] In the context of commercial transactions it has been held in an interim injunction application that restraint of trade clauses are standard and may be implied. In *United Pukekohe Ltd v Grantley*⁷ Baragwanath J said that although the law is reluctant to give effect to restrictive covenant clauses it will more willingly sustain the transaction in the case of a sale of a business. In that case implication was

⁵ [1996] 1 ERNZ 472

⁶ *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 16 ALR 363 at 376

⁷ [1996] 3 NZLR 762

necessary to reflect the parties' common intention and defeat one party receiving an undeserved windfall.

[38] The position in relation to employment agreements has long been distinguished from commercial constraints for reasons of differing bargaining positions. There is also a need for an employer to show a proprietary interest that needs protecting beyond the duration of the period of employment. Only if an employer can establish that a restraint is necessary to protect trade connections or secrets or confidential information, is a restraint of trade justified. As the authors of Law of Contract in New Zealand⁸ have said, the possibility that an employee may be a competitor in the future is not a danger against which an employer is entitled to the law's protection.

[39] A restraint of trade clause is not an integral part of a contract of employment but a covenant governing the behaviour of the employee after the relationship has ended. It is certainly not so obvious it goes without saying. It requires consideration and express agreement to be enforceable and the reasonableness of its terms are open to close scrutiny.

[40] I find that:

1. Mr Eveleigh's April 1998 contract of employment ended at the expiry of its fixed term in accordance with clause 2 of the contract.
2. Mr Eveleigh's employment by Auto-Movements continued after the expiry of the fixed term but on a different footing. He took up a different position of transport manager although at the same salary. The new relationship was of indefinite duration and not a fixed term.
3. There was no discussion and no agreement between Mr Broughan and Mr Eveleigh about the restrictive covenants continuing beyond the expiry of the fixed term contract and no

⁸ Third Ed, Burrows, Finn & Todd, p 418

express incorporation of such a covenant into his new term of employment.

4. While it is possible and necessary to imply certain terms into a contract, there is a presumption against implying a restraint of trade into an employment agreement without clear evidence of agreement to do so because of the *prima facie* invalidity of such a restraint. In any event, there is no evidence in this case to justify such an implication.

[41] I conclude that when the fixed term April 1998 contract expired so did the restrictive covenants. There were no such covenants binding Mr Eveleigh during the rest of his employment by Auto-Movements apart from the pre-existing sale and purchase agreement. There is therefore no restraint of trade or non-solicitation clause which binds Mr Eveleigh since he left his employment.

[42] In the light of this finding it not necessary to consider in detail the fall-back arguments advanced on Mr Eveleigh's behalf by Mr Vincent about the reasonableness of the restraint of trade clause. However, if the restraint of trade clause were able to be implied into the oral employment agreement there is insufficient evidence to show what, if any, of the applicant's proprietary interests such as trade secrets or confidential information it is intended to protect.

[43] The only outstanding issue is whether, as alleged in the statement of claim, Mr Eveleigh has breached the confidentiality term in his contract of employment. Such a term is implicit in all contracts of employment. However, the statement of claim did not specify the way in which it was alleged such confidentiality had been breached and there was no evidence about this given to the Court. There is therefore no proof of any breach of the term of confidentiality.

[44] The applicant's applications for injunctions against the respondent are dismissed.

Costs

[45] Costs were reserved at the request of counsel. The parties are encouraged to reach agreement on costs but if they are unable to do so the respondent is to file a memorandum as to costs within 21 days of this decision. The applicant will have 14 days thereafter to respond.

C M Shaw
JUDGE

Judgment signed at 3.15pm on 18 May 2007