IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 479
5404082

BETWEEN	TINTS NEW ZEALAND LIMITED t/a TINT GUARD Applicant
A N D	ALAN THOMAS JAMES POOLE First Respondent
A N D	JESER BORGES Second Respondent
A N D	X PERT WINDOW TINTING LIMITED Second Respondent

Member of Authority:	T G Tetitaha
Representatives:	B Edwards/R Bryant, Counsel for Applicant G Bennett, Advocate for Respondents
Investigation Meeting:	9 May 2013
Submissions Received:	16 May 2013 from Applicant 16 May 2013 from Respondents
Date of Determination:	18 October 2013

DETERMINATION OF THE AUTHORITY

Orders

A. The restraint of trade clauses 12.5 to 12.7 are unenforceable. The application for injunction is dismissed.

B. Jeser Borges breached his duty of good faith by undertaking work in competition to Tints without consent.

C. Jeser Borges is to file a sworn statement and copies of the invoices and/or bank account statements evidencing the money he received for window tinting work during the term of employment within 14 days of the date of the determination. Parties are to file submissions on quantification of damages within 14 days thereafter. A decision on quantification of damages shall be dealt with on the papers.

D. Costs are reserved. If costs are sought, submissions are to be filed within 14 days of the determination. The other party may file submissions in reply 14 days thereafter.

Employment relationship problem

[1] This is the substantive hearing following an interim determination making a modified interim order for restraint of trade.[1] Tints New Zealand Limited (Tints) is an Auckland-based company providing window tinting services to the automotive, residential and commercial markets. Alan Thomas James Poole and Jeser Borges were employed full time as workshop managers until July and August 2012. Messers Poole and Borges resigned to set up X Pert Window Tinting Limited (X Pert) providing window tints and signage for home, office and vehicles.

[2] Tints alleges the respondents breached the restraint of trade clauses in the employment agreements and duties of fidelity, trust, confidence and good faith by doing window tinting during employment for their own profit, diverting business to X Pert and making adverse comments about Tints. It seeks enforcement of the restraint of trade clauses in their employment agreements for 12 months and damages.

[3] The respondents deny the alleged breaches. They submit the restraint of trade clauses are unenforceable because there is no proprietary interest to be protected and are unreasonable.

Issues

[4] The issues for determination are:

a) Are the restraints of trade set out in clause 12.5 to 12.7 of the agreement enforceable having regard to:

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i) What effect does an unsigned agreement have on the enforceability of restraint of trade clauses?

ii) What is Tints proprietary interest sought to be protected?

iii) Was the 12 month duration of the clause reasonable?

iv) Was the geographical scope of the clause reasonable?

b) Did Messrs Poole and Borges breach their duty of fidelity by undertaking window tinting jobs during their employment?

c) If yes to the above issues, what remedies should be granted?

Facts

[5] Messrs Poole and Borges were employed in October 2011. They received draft employment agreements. Mr Poole never signed his agreement. Mr Borges signed his agreement on 13 October 2011. The employment agreements contained clauses 12.5 to 12.7 prohibiting employees from using, disclosing or distributing confidential information, non-solicitation of clients and employees for 12 months and a non-competition clause for a period of 12 months within a radius of 25 kms from the employer's premises.

[6] During the course of employment, it is alleged Messrs Poole and Borges undertook tinting jobs for their own benefit. There is a dispute whether Tints knew and consented to this occurring.

[7] In July 2012, Messers Poole and Borges resigned. Alexander Seuili, director of Tints, met with both men and went through their employment agreement.

[8] On 16 July 2012 Mr Poole incorporated X Pert Window Tinting Limited. Mr Borges went to work for X Pert.

[9] Mr Seuili was informed by customers Messers Poole and Borges were contacting them offering competitive quotes and making allegations about Tints workmanship and workplace. Tints subsequently filed proceedings seeking an injunction, enforcement of the restraint of trade clauses and damages from the respondents.

Legal Framework

[10] Restraints on economic activity after the end of employment are unlawful because they are contrary to public policy, except to the extent that they might be reasonably necessary to protect the employers legitimate proprietorial interests.[2] The employer must show some proprietary right, whether in the nature of a trade connection or secret, which the restraint is reasonable to protect.[3]

[11] The general duty not to disclose confidential information during the course of employment survives the termination of a contract of employment although in a more restricted form. It is established law that only information in the nature of a trade secret, or of a similarly highly confidential nature, will be protected. The existence of a restraint-of-trade provision cannot operate to protect an employer against mere competition.[4]

[12] An unsigned agreement including a restraint of trade has been held to be binding where there has been express acceptance of the employment contract and the employee remains employed.[5]

[13] Confidential information excludes information *which is public property and public knowledge*.[6] Confidentiality may still attach to such factors of knowledge as the fragility of a relationship between the employer and its customers, even where individual suppliers or customers are matters of public knowledge.[7]

[14] A distinction must be made between information that is properly part of the employee's own wealth of skills and knowledge, and information that belongs to the employer. An employer will have to establish that it has a proprietary interest in the knowledge, skills or information held by the employee.[8]

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2 *Jerram v Franklin Veterinary Services (1977) Ltd* [2001] ERNZ 157, 171, para 46
3 *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 (HL)
4 Brookers *Employment Law* CL2.03 Implied post-employment obligations
5 *Royal v Axon Computer Systems Ltd* [1994] 1 ERNZ 312 (EmpC); *Space Industries (1979) Ltd v McKavanagh* [2000] 1 ERNZ 490 (EmpC)
6 *AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515 (CA) at 521
7 *Medic Corp Ltd v Barrett* [1993] 2 NZLR 122, [1992] 2 ERNZ 1048 (HC)
8 Brookers *Employment Law* CL2.03 Implied post-employment obligations

[15] In the context of a restraint of trade, *solicit* means *to seek assiduously to obtain, to ask earnestly or persistently for*, and *request* or *invite*.[9]

Are the restraints of trade set out in clause 12.5 to 12.7 of the agreement enforceable?

What effect does an unsigned agreement have on the enforceability of restraint of trade clauses?

[16] It is common ground Mr Poole received but never signed his employment contract but continued to be employed by Tints. Mr Poole states he did not really look at the contract. Mr Seuili infers from his silence and continued employment it was accepted.

[17] Silence is usually equivocal as to consent.[10] An intended agreement must not be treated as an employment agreement if the employee has not signed it or agreed to any of the terms and conditions specified in the intended agreement (s64(6)(b). Agreement may be inferred from a parties conduct.[11]

[18] There is no conduct evidencing agreement here. Neither party turned their minds to whether there was an agreement concluded upon the terms set out in therein. Mr Poole never acknowledged he had been advised to take independent advice or that he had read and understood the terms of employment.[12] Some of the terms required written consent[13] irrespective of his continued employment. The Authority declines to impose an obligation upon an employee such as a restraint of trade in these circumstances. Accordingly the restraint of trade clauses 12.5 to 12.7 are unenforceable against Mr Poole.

What was Tints proprietary right sought to be protected?

[19] Tints submit protection is required for its confidential information. This confidential information is Mr Seuili's 12 years trading experience and window tinting knowledge, Tints marketing position, business operating systems such as the

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9 *Deloitte & Touche Group-ICS Ltd v Halsall* EmpC Auckland AEC74/97, 24 July 1997 at 12

10 Burrows Finn & Todd *Law of Contract in New Zealand* Third Ed Lexis Nexis para. 3.4.1 Effect of Silence p 58 citing *Felthouse v Brindley* (1862) 11 CBNS 869; Miller 35 MLR 489.

11 *Decom Limited v Cleaver*, ERA Christchurch, CA2A/09, 24 March 2009.

12 Affidavit AA Seuili dated 30 November 2012 Exhibit "B" paragraph 14.4 Employee Acknowledgement

13 See above paragraph 14.3 deductions from salary/wages. The Wage Protection Act 1983 prohibits deductions from wages unless requested or authorised in writing.

'job board', specially designed filing systems for motor vehicle window patterns, expertise to tint without removing the door panel, Tints profit margins, training and processes.[14]

[20] The respondents submit Tints proprietary interest is not a trade connection or secret which is reasonable to protect.

[21] Mr Seuili's 12 years trading experience and window tinting knowledge is not a proprietary interest of Tints to be protected under the restraint of trade clauses.

[22] There is no evidence of what is Tints marketing position to be protected. There is no evidence of Tints business operating systems other than the 'job board'. There is no evidence of Tints profit margins, training and processes than generic reference thereto. The reference to target market, unique price points, discount strategies based on volume and front of street appeal to walk in's[15] does not disclose the proprietary interest to be protected. Access to customer lists with contact details, marketing strategies, pricing and sales techniques does not identify the confidential nature of this information which requires protection.

[23] There is little evidence Messrs Poole and Borges received training or information in window tinting, sales, marketing and pricing which advanced knowledge and skills they already possessed. Mr Poole had 5 and Mr Borges 11 years window tinting business experience. There is reference to reports Mr Poole filled in for team trainings each morning[16] but no disclosure of what the team trainings involved and the proprietary interest to be protected. At hearing Mr Seuili referred to a manual he had produced which Messrs Poole and Borges has access to. Mr Poole denied reading the manual. There was no evidence he copied the manual or otherwise replicated it. The manual was not produced as evidence. The proprietary interest to be protected remains unknown.

[24] There was no evidence Messers Poole and Borges job involved sales except in a peripheral way. They were workshop managers not salespeople. Their performance targets were competency and turnover of window tinting jobs, not sales.[17] They dealt with walk in customers and phone enquiries when they were not applying window

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14 Statement AA Seuili dated 18 April 2013 para. 8.3
15 See above para. 2.30
16 See above Attachment "A" Reports A Poole
17 See above.

tints. Mr Poole admitted at hearing he was aware of the discount applied for four clients but not others. Mr Seuili was contacted for quotes on window tinting.[18] He and another employee told him how much the discount was, but Mr Poole did not know how the discount was made up. The discount appeared similar to his previous employer's discounts. Claims against sales employees generally had proof of development and maintenance of close personal associations with their employer's customers or suppliers.[19] This is not the case here.

[25] There remains little evidence the clients were exclusive to Tints. It was accepted Tints customers were *comparing window tinting prices*[20] and shopped around for tinting.[21] There was no evidence X Pert approached Tints clients during the employment. One client was allegedly approached by Mr Borges and another by both Messrs Poole and Borges.[22] Mr Seuili asserts there were others approached but does not name them. The evidence is equivocal about the date they were approached by these parties. The statement makers were not produced for clarification or evidence about reliability. Even if there was solicitation, there is no proof of damage. Lost profits cannot be blamed upon Messrs Poole and Borges approaching two clients, both of whom refused them business. Tints have had the benefit of the interim injunctive relief. There is no evidence of further breaches or losses. The Authority declines to extend the injunctive relief in these circumstances.

[26] Mr Seuili's evidence of what he was told by clients and the implied criticism in a Facebook posting are relied upon as evidence the respondents made disparaging remarks about Tints.[23] The Facebook posting is equivocal. It does not specifically refer to Tints. Mr Poole denies it was intended to refer to Tints specifically, but rather the trend of rebranding products. It does not of itself evidence disparaging remarks about Tints. Mr Seuili's evidence about client comments is heresay. The client statements he produced do not refer to disparaging remarks about Tints.[24] He does not name the clients whom alleged they made disparaging remarks to or give evidence

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18 Affidavit AA Seuili dated 30 November 2012 paragraph 27.

19 *Kiwis Stat Ltd v Nichols* [2010] NZEmpC 151

20 Affidavit AA Seuili dated 30 November 2012 paragraph 27 and 30.

21 Affidavit ATJ Poole dated 12 December 2012 paragraph 16.

22 Statement AA Seuili dated 18 April 2013 Attachment "F" Email J Reid 17 April 2013 and "H" Statement M Breslin

23 Statement AA Seuili dated 18 April 2013 para. 8.14; Affidavit AA Seuili dated 30 November 2012 para 30 and Exhibit "E"

24 Statement AA Seuili dated 18 April 2013 Attachment "F" Email J Reid 17 April 2013 and "H" Statement M Breslin

of their reliability.[25] The Authority is cautious about admitting heresay in these circumstances. The statement makers were not produced and there is no evidence their statements were reliable. The evidence is ruled inadmissible.

[27] The specially designed filing systems for motor vehicle window patterns, refers to a display board of different tints. Tints display board and signage were sought to be protected. Evidence was given of similar display boards and signage being used by other window tinting businesses. The display board and signage were publically available. They are not a trade secret.

[28] The respondents admit using a 'job board' operating system similar to Tints. At hearing, Mr Seuili stated he had invented the 'job board' operating system, not Tints. If Mr Seuili retains ownership, his rights are not protected by the restraint of trade clauses.

[29] There was a dispute about the confidentiality of Tints window tinting technique. The technique involved window tinting without removing a door panel. At hearing Mr Poole alleged he learnt this technique from a former employer, not Tints. He also alleged the technique was available publicly on the internet through Youtube videos. Any training he received was limited to fitting Tints cheaper window tints which he admitted he had difficultly doing. X Pert used a more expensive window tint which did not require that technique. Mr Seuili disputed the technique was taught by a former employer or available publically. He believed the technique was not limited to cheaper types of film but applied to all tints. There is no expert evidence about the uniqueness of this technique. There is no evidence the respondents used this technique as opposed to their existing knowledge. The evidence does not reach the threshold required to show a proprietary interest to be protected.

[30] There is no evidence of solicitation of Tints staff. Messrs Poole and Borges admit during a general discussion about signwriting and tinting, Mr Poole says *he wouldn't mind opening up a business of his own doing tinting*. Mr Borges then said *if you set up a business then I'll come with you*.[26] This does not meet the test of solicitation. Mr Borges was not requested or invited by Mr Poole or X Pert to join them. The non-solicitation clause cannot prevent staff leaving of their own free will.

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25 Affidavit AA Seuili dated 30 November 2012 paragraph 30

26 Affidavit J Borges sworn 12 December 2012 para.7

[31] Tints have failed to disclose a proprietary interest capable of protection by the restraints of trade clauses. The restraint of trade clauses 12.5 to 12.7 are unenforceable. The application for injunction is dismissed.

[32] Given the above determination, it is unnecessary to determine the issues of length of restraint of trade and geographical area.

Did Messrs Poole and Borges breach their duty of fidelity by undertaking window tinting jobs during their employment?

[33] Tints allege Messrs Poole and Borges undertook window tinting jobs during their employment. This is evidenced on a Facebook page and Treatme website. Mr Pool denies he undertook window tinting jobs during his employment because he never had time to do so. He states he used Mr Borges Trademe website which included comments from customers Mr Borges did work for in January to July 2012. Mr Borges admits he did window tinting jobs, but with Tint's knowledge. These were client jobs Tints could not do. Tints denied giving consent.

[34] Mr Poole's explanations about the websites were not seriously disputed at hearing. There was no direct evidence he undertook jobs during his employment. It is through his association with Mr Borges this allegation arises. This is insufficient to meet the burden of proof there was a breach by Mr Poole.

[35] Mr Borges was not available for hearing. It seems illogical and unlikely an employer would grant permission for an employee to act in competition to it during the term of employment. Mr Borges explanation these were jobs Tints could not do, does not ring true. He was employed by Tints and could do the job. No reason was given for Tints to allow him to privately profit doing work he was paid to do for them. The Authority determines Mr Borges private window tinting during his employment was not consented to by Tints.

[36] Mr Borges employment agreement has an express term for employees to conduct themselves in the best interests of the employer and to deal with them in good faith (clause 4.2). The Employment Relations Act 2000 imposes a duty upon employers and employees to deal with each other in good faith (s4).

[37] Any conduct by an employee which is likely to damage the employer's business, for instance by impairing its goodwill, or to undermine significantly the trust

which the employer is entitled to place in the employee, could constitute a breach of duty. The duty of fidelity and good faith carries with it a duty not to undermine the relationship of trust and confidence.[27] Undertaking work in competition to your employer without consent and for an employee's own profit is a breach of the duty of good faith.

[38] The Authority determines Jeser Borges breached his duty of good faith by undertaking work in competition to his employer without Tints consent.

What remedies should be granted?

[39] The evidence of quantification of damages for breaching good faith is insufficient. Tints lost profit was not necessarily caused by Mr Borges breach. Those losses could have been attributed to other reasons such as economic downturn. The profits made by Mr Borges from these window tinting jobs are directly connected to his breach.

[40] Accordingly Jeser Borges is to file a sworn statement and copies of the invoices and/or bank account statements evidencing the money he received for window tinting work during the term of employment within 14 days of the date of the determination. Parties are to file submissions on quantification of damages within 14 days thereafter. A decision on quantification of damages shall be dealt with on the papers.

[41] Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority

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[27] *Tisco Ltd v Communication & Energy Workers Union* (1993) 4 NZELC 98,234; [1993] 2 ERNZ 779; [1993] ELB 107