

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 54
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, Counsel for Applicant
G Bennett, Advocate for Respondent

Submissions Received: 21 December 2012 from Applicant
21 December 2012 from Respondent

Date of Determination: 18 February 2013

DETERMINATION OF THE AUTHORITY

Orders/Directions

A. Pursuant to an undertaking as to damages dated 30 November 2012, an interim injunction shall issue against the first and second respondents expiring 31 May 2013 or the date of substantive hearing (whichever is the earliest) upon the following terms:

- i) The first and second respondents or their agents shall not initiate contact with the appended list of Tints customers whose place of**

business is within a 25 km radius of Tingtard Manukau 24 Cavendish Drive, Manukau.

- ii) **It will not be a breach of this order if Tints customers initiate contact with the respondents or agents.**

B. Costs are reserved.

Employment relationship problem

[1] Tints New Zealand Limited is an Auckland-based company providing window tinting services to the automotive, residential and commercial markets. Tints has workshops at 24 Cavendish Drive, Manukau, Auckland and 15 Mahuru Street, Newmarket, Auckland. There are three full time employees.

[2] Mr Alan Thomas James Poole and Mr Jeser Borges were employed full time as “window tinters” on 10 October 2011. Mr Poole received a draft employment agreement but disputes he signed or returned the agreement. An employment agreement was signed by Mr Borges on 13 October 2011.

[3] Both Mr Poole and Mr Borges employment agreements contained clauses prohibiting employees from using, disclosing or distributing confidential information, non-solicitation of clients for 12 months and a non-competition clause for a period of 12 months within a radius of 25kms from the employer’s premises.

[4] During their employment it is alleged they undertook tinting jobs for their own benefit. There is a dispute if this occurred with the employer’s knowledge and consent.

[5] In July 2012, Mr Poole resigned from his position. Tints director, Alex Seiuli, alleges he met with and went through a draft employment agreement with Mr Poole including the non-competition and non-solicitation clauses.

[6] On 16 July 2012, Mr Poole incorporated the third respondent company, X Pert Window Tinting Limited. He is the sole director. The company provided window tints and signage for home, office and vehicles.

[7] Mr Borges subsequently resigned on 31 July 2012. On his last day of employment, Mr Seiuli met with him and went through a draft employment agreement

including the non-competition and non-solicitation clauses. It is inferred he then went to work for the third respondent.

[8] There is a dispute Mr Poole and/or Mr Borges made false allegations about Tints workmanship to obtain customers.

[9] Tints alleges both Mr Poole and Mr Borges are bound by and have breached the terms of their employment agreements as follows:

- a) Breached duties of fidelity, trust and confidence while employed by:
 - Soliciting Tints clients and employees and failing to disclose this to the employer
 - Undertaking window tinting jobs for their own benefit
- b) Breached clauses 4(iii) and (iv) employment agreement to act in best interests and good faith by above acts while employed
- c) Breached clauses 12.5 and 12.6 non-competition and non-solicitation of clients following termination by:
 - Acting in competition through X Pert Window Tinting Ltd within 25 kilometer radius
 - Soliciting clients following termination of employment
 - Making false allegations Tints was untrustworthy, used cheap products which fell off and was a bad place to work.

[10] Tints alleges X Pert Window Tinting Ltd aided and abetted the above breaches following termination.

[11] Tints seeks the following interim injunction:

- (a) An injunction that for a period of 12 months following the termination of their employment, for whatever reason, the first and second respondents shall not, either personally or as an employee, consultant, or agent for any other entity or employer, carry on business in competition with Tints within a radius of 25kms from Tints' premises;

- (b) An injunction that for a period of 12 months following the termination of their employment, for whatever reason, the first and second respondents shall not, either personally, or as an employee, consultant or agent for any other entity or employer, seek to solicit or carry out any work of the same nature for any client or customer of Tints with which the first or second respondents had any contact or dealings whilst employed by Tints.

[12] Messers Poole and Borges have filed a counterclaim. They allege:

- Mr Poole would did not and would not have signed the agreement given these clauses
- Mr Borges required the agreement for immigration purposes and did not properly consider it before signing the agreement
- Tints has not disclosed and there is no proprietary interest to be protected by the non-competition and non-solicitation clauses
- The clauses are unreasonable and unnecessary

Issues

[13] In determining an application for interim orders, the issues for the Authority are¹:

- Whether there is a serious question to be determined;
- Where the balance of convenience lies between the parties in the period until the Authority determines the substantive application; and
- The overall justice of the case.

Is there a serious question to be determined?

[14] 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

¹ *Clissers Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); *Port of Wellington Ltd v. Longworth* [1995] 1 ERNZ 87 (CA) at 91; *Hally Labels Ltd v. Powell* [2011] NZEmpC 43, (2011) 8 NZELR 532 at [21].

reasonably necessary to protect the employers legitimate proprietary 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

[15] In determining the arguable case for the reasonableness of the restraint of trade clauses, the following sub-issues arise:

- What is Tints proprietary right to be protected?
- Is the 12 month length of the restraint reasonable?
- What is the geographical area of the restraint?

What is Tints proprietary right?

[16] There is little evidence about Tints proprietary interest to be protected. Access to allegedly confidential information including customer lists with contact details, marketing strategies, pricing and sales techniques does not identify the confidential nature of this information which requires protection. What is confidential to Tints about this information and in need of protection by these clauses is unclear and contradicted by the evidence filed.

[17] There is no differentiation in the evidence between Tints training in sales, marketing and pricing and these employees existing experience. Mr Poole had 5 and Mr Borges 11 years window tinting business experience. They state they learnt nothing about the business side of Tints during employment that they did not already know.⁴

[18] The employment agreement refers to a job description but none was appended. Both Mr Poole and Mr Borges were employed as workshop managers, implying they primarily worked in the application of the window tints as opposed to pricing, sales and marketing. Mr Poole describes their sales experience at Tints as dealing with walk in customers.⁵ Mr Seuli was contacted for quotes on window tinting⁶ and dealt

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 Affidavit ATJ Poole dated 12 December 2012 paragraph 14.

⁵ Affidavit ATJ Poole dated 12 December 2012 paragraph 18.

⁶ Affidavit A Seuli dated 30 November 2012 paragraph 27.

with customer complaints.⁷ There is little evidence these employees had any involvement in Tints pricing, sales or marketing.

[19] Case law on claims against sales employees generally had proof of development and maintenance of close personal associations with their employer's customers or suppliers.⁸ This is not the case here. There is nothing to indicate the Tints relationship with these customers and suppliers would have been affected at all by Messers Poole and Borges departure. Mere access to information and customers is insufficient to show a close personal association and a proprietary right to be protected. The client relationship was and remained with Tints (primarily Mr Seuili), not these employees.

[20] There is no evidence the clients were exclusive to Tints. There were several competing window tinting businesses in the area. Mr Poole had been working at a competitor 190 meters away prior to employment.⁹ Tints customers were "comparing window tinting prices"¹⁰ indicating non-exclusivity. As Mr Poole states:

*"... people shop around for tinting, even regular customers, to find a good deal and good tinting. There is always the possibility that a customer of [Tints] may end up with work being done by me. This is the type of business we are in."*¹¹

[21] If as the evidence suggests, customers were contacting window tinting businesses directly for competing quotes, there can be little proprietary right in Tints customer lists and contact details.

[22] The lack of evidence of proprietary right may be remedied at substantive hearing. Disputed evidence cannot be resolved at this stage. Although the state of the evidence is unsatisfactory, the possibility it may be remedied at later hearing cannot completely exclude the existence of an arguable case.

Length of restraint of trade

[23] The proposed length of the restraint is 12 months.

⁷ Affidavit ATJ Poole dated 12 December 2012 paragraph 19.

⁸ *Kiwis Stat Ltd v Nichols* [2010] NZEmpC 151

⁹ Affidavit ATJ Poole dated 12 December 2012 paragraph 8.

¹⁰ Affidavit AA Seuili dated 30 November 2012 paragraph 27 and 30.

¹¹ Affidavit ATJ Poole dated 12 December 2012 paragraph 16.

[24] Tints delayed applying for an interim injunction until 30 November 2012 – 2 months after the breaches were detected in September and 5 months after the termination of employment. There are 4 months of the restraint of trade period left. The necessity for a longer period of restraint has not been evidenced.

Geographical area

[25] The non-competition clause refers to a geographical area “*within a radius of 25 kilometers from the employers premises*” (clause 12.5). The place of work is defined as “*Tintgard Manukau and at any other reasonable location they may be directed from time to time by the employer*” (clause 5.1).

[26] It is reasonable for the geographical area to be limited to the place of work defined within the agreement namely Tintgard Manukau 24 Cavendish Drive, Manukau. There is a dispute about another location in 15 Mahuru Street, Newmarket being the “employers premises” or a workshop. This cannot be dealt with at an interim stage.

Where does the balance of convenience lie?

[27] Balance of convenience refers to the hardships each party may suffer in the granting or refusal of the interim injunction.¹² Interim relief is designed to protect applicants from injury which cannot be adequately compensated in damages if they are successful at substantive hearing. The remedy is discretionary. The applicant’s protection needs to be balanced against damage to a respondent from being unable to exercise its rights if the applicant fails at the substantive hearing.

[28] Tints have provided evidence of its financial ability to pay damages. No issue has been taken with Messers Poole and Borges ability to meet damages.

[29] Although Tints attests to future losses, the nature of the window tinting business suggests this may occur irrespective of Messers Poole and Borges. The cause of any alleged damage is disputed and amount un-quantified. It is reasonable to tailor any protection for Tints taking into consideration the nature of this business.

[30] The effect of an interim injunction upon the respondents would be the loss of their window tinting business and means of support. The ability of a former employee

¹² [Baker v Armourguard Security Ltd](#) [1998] 1 ERNZ 424 (EmpC) at 435–437

to earn their livelihood in the event an injunction is granted¹³ is a factor favouring the respondents.

What is the overall justice?

[31] Standing back the Authority must consider the overall justice of this matter. Relevant matters include:¹⁴

- Strength or weakness of the applicant's substantive case or the respondents' defence
- whether the grant or refusal of an interim injunction may have the practical effect of granting one party or the other final judgment without a full hearing
- availability of date for substantive hearing

[32] There are weaknesses in Tints case which may be remedied at later hearing. The respondents' defence is also not without weaknesses which could be exposed at hearing.

[33] Tints provided a list of 30 customers.¹⁵ Two of these customers have been allegedly approached by Messers Poole and Borges. Weighing the need for Messers Poole and Borges to earn a living, the nature of the business and need to prevent possible future (unquantified) damage to Tints, an interim injunction limited as to time, geographical location and preventing the initiation of contact by the respondents with Tints clients is reasonable. This would not effectively grant the final orders sought without hearing but would allow the respondents to earn a living and preserve Tints customer base.

[34] There are substantive hearing dates available in April and May 2013. Given the availability of dates, the time for the interim injunction shall be limited accordingly. Counsel shall liaise with the support officer as to an appropriate date for hearing.

[35] Accordingly the following orders are made:

¹³ *Medic Corp v Barrett* [1992] 2 ERNZ 1048 (HC) at 1060.

¹⁴ *Baker v Armourguard Security Ltd* [1998] 1 ERNZ 424 (EmpC) at 435–437

¹⁵ The list of customers provided is subject to an order of the Authority prohibiting publication under clause 10 Schedule 2, ERA 2000.

a) Pursuant to an undertaking as to damages dated 30 November 2012, an interim injunction shall issue against the first and second respondents expiring 31 May 2013 or the date of substantive hearing (whichever is the earliest) upon the following terms:

iii) The first and second respondents or through their agent (the third respondent) shall not initiate contact with the appended list of Tints customers whose place of business is within a 25 km radius of Tintgard Manukau 24 Cavendish Drive, Manukau.

iv) It will not be a breach of this order if Tints customers initiate contact with the respondents or agent.

b) Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority