

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 47
3205999

BETWEEN CONCEPT TRAVEL
 LIMITED trading as SKI
 TRAVEL SPECIALISTS
 Applicant

AND STEVE TEIXEIRA
 Respondent

Member of Authority: Peter Fuiava

Representatives: Penny Swarbrick and Joy Kaur, counsel for the
 Applicant
 Respondent in person

Investigation Meeting: 27 January 2023

Submissions received: 25 January 2023 from Applicant
 26 January 2023 from Respondent

Determination: 31 January 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. An interim injunction is granted. By order of the Authority, Steve Teixeira is restrained from directly or indirectly carrying on or being interested in any capacity in any business that is similar to Concept Travel Limited’s business until 1 May 2023.**
- B. For the avoidance of doubt, Amped the Ski Adventure Travel Specialists is a similar business to Concept Travel Limited (Concept Travel or the company).**
- C. By consent, Mr Teixeira is ordered to comply with the non-solicitation restraint provision in his employment agreement**

**with Concept Travel for a period of 12 months ending
16 December 2023.**

Employment Relationship Problem

[1] Concept Travel seeks an interim order restraining its former manager and ski consultant Steve Teixeira from taking up a position of employment with one of its direct competitors. Mr Teixeira opposes the application on the basis that he has received legal advice that the restraint of trade provisions in question are unenforceable.

The Authority's investigation

[2] Concept Travel lodged its Statement of Problem (SOP) with the Authority on 20 December 2022 and sought interim and substantive relief on an urgent basis which was supported by a signed undertaking by its sole director Greig Leighton, affidavits in support from Mr Leighton and his wife Caroline Paull-Leighton, and an application for an abridgment of time for Mr Teixeira to file a Statement in Reply (SIR).

[3] On 22 December 2022, the duty Authority Member granted Concept Travel's application for urgency and for an abridgement of time to file the SIR which was filed on 29 December 2022. In his SIR, Mr Teixeira raised a counter claim based on breaches of the Employment Relations Act 2000, the Wages Protection Act 1983, constructive dismissal and unjustified disadvantage. At the time of filing the SIR, Mr Teixeira was legally represented but he later withdrew his instructions due to costs.

[4] On 18 January 2023, Mr Teixeira filed an amended SIR with the Authority which repeats the same counter claim but clarifies the amount that is alleged to have been unlawfully deducted from his wages by Concept Travel. On 20 January 2023, he filed an affidavit in which he stated that the petition for an injunction under urgency was a tactic by the company to prevent him from being able to work and earn an income.

[5] The parties attended mediation as directed by the Authority but the matter did not resolve there. On 23 January 2023, I held a case management conference and directed that an affidavit in response from Mr Leighton and written submissions from

both parties be filed. The matter was set down for a submissions hearing on 27 January 2023 which was to be by audio-visual link via Zoom.

[6] Due to the urgent nature of the application for interim relief, the issues raised in Mr Teixeira's counter claim will be determined at a later date. This preliminary decision deals with the application for an interim injunction only.

What are the relevant facts that give rise to the problem?

[7] In March 2017, Mr Leighton purchased the business of Concept Travel from its previous owner. He and his wife have owned the business since then. The company trades as Ski Travel Specialists and as the name suggests specialises in selling ski packages and air fares to ski destinations around the world. In New Zealand there are only three agencies and one travel broker that operate in the ski travel industry. It is a niche and boutique market.

[8] Shortly after taking over the business, Mr Leighton employed Mr Teixeira in April 2017 as manager and ski consultant. The two men had known each other for approximately 30 years having previously worked together in the airline industry. A draft copy of Mr Teixeira's employment agreement was provided to him to consider on 21 March 2017 which includes the two post-employment restraint covenants namely a 12-month non-solicitation clause (which Mr Teixeira agrees to abide by way of a consent order) and a six-month non-compete clause which states:

19.4 The Employee agrees that for a period of 6 months following the termination of employment for any reason the Employee undertakes not to directly or indirectly carry on or be interested either alone or in partnership with or as a manager, agent, director, shareholder, financier, or employee of any person in any business similar to the business.

[9] While Mr Teixeira raised some issues with the agreement's terms and conditions such as the start and finish time of work, flexible work hours, sick leave, and the three-month notice period, he raised no objection regarding the non-solicitation and non-complete clauses in his employment agreement which he signed on 2 April 2017.

[10] In June 2021, Mr Teixeira suffered a heart attack which he attributes to the work-related stress and his working conditions at Concept Travel. In an effort to

prioritise his health over his work, he accepted an offer of employment in September 2022 from Amped which trades as The Ski Adventure Travel Specialists (Amped). Amped is a direct competitor of Concept Travel.

[11] On 20 September 2022, Mr Teixeira gave verbal notice to Mrs Paull-Leighton that he was going to resign. She asked him where he was going but he did not say. Later that day, Mrs Paull-Leighton received an email from Mr Teixeira that confirmed his resignation and which stated:

Hi Caroline

As per our conversation this afternoon, I would like to formally let you know of my intention to resign from Ski Travel. I will serve out my 90 day notice period and my last day will be Friday 16 Dec.

[12] Mrs Paull-Leighton informed her husband of the resignation and that she had asked Mr Teixeira where he was going but that he would rather not say. Initially, Mr Leighton was not too concerned because of the long notice period and that he expected Mr Teixeira would make an announcement closer to the start date of his new job. However, when either Mr Leighton or his wife broached the subject with him, he was reluctant to tell them where he was going. After a few weeks, the couple started to become concerned which prompted Mrs Paull-Leighton to email Mr Teixeira on 9 November 2022 which, among other things, reminded him of the restraint of trade clauses in his employment agreement with Concept Travel.

[13] In a reply email (13 November 2022), Mr Teixeira stated that following his heart attack in 2021, he had made the decision to prioritise his health over his career and that he had decided to find a job closer to his home on the North Shore. He stated that he had intended to leave the travel industry but at 55 and having worked in the travel industry for 36 years, it was hard for him to find alternative work. Mr Teixeira went on to state:

Which brings me to Section 19 of my contract. I have no intention of taking clients with me, starting up my own business, or trying to undermine your business in any way. However, I have to earn a living and I have the right to be happy, so the contract wording in Clause 19.4 stating I am breaching my contract if I work in a similar workplace is unenforceable under NZ Contract Law. I have spoken to two separate Employment Lawyers who have both verified this.

[14] In his emailed response, Mr Teixeira did not indicate where he was going or for whom he would be employed. On 24 November 2022, Concept Travel had its Christmas function during which Mr Leighton asked Mr Teixeira directly where he was going to work. He refused to disclose the name of his employer which prompted Mrs Paull-Leighton to write to Mr Teixeira the following day to remind him again of his post-employment obligations to the company. Her letter invited him to attend a meeting with her and Mr Leighton and stated:

You have so far declined to disclose to us where you will be working after Concept Travel, although you have confirmed you will be in the travel industry. I do not disagree with you that you are free to work in the travel industry, however, if you are intending to work in the area of ski/snow packages, which is our specialty, then we would regard that as being contrary to your post-employment obligations.

[15] At the meeting, which was held on 7 December 2022, Mr Teixeira finally informed Concept Travel that his new employer was Amped. Mr Leighton let him know that if he were to commence employment with Amped, he would be in breach of his post-employment obligations. However, Mr Teixeira's response was that these were not enforceable.

[16] Following the meeting, Mr Leighton instructed his lawyers who wrote to Mr Teixeira on 12 December 2022 and his prospective employer the following day. Mr Teixeira's last day of employment was 16 December and although he was to commence his new employment on 5 January 2023, the start date was deferred by the owner of Amped to 1 February as a matter of precaution.

The issues

[17] The essential issue is whether the six-month non-compete restraint of trade provision in Mr Teixeira's employment agreement with Concept Travel is enforceable or not. As Mr Teixeira has no objection to the 12-month non-solicitation clause in his employment agreement being enforced against him, a consent order is made accordingly which is to apply until 16 December 2023.

[18] What remains is the non-compete provision which requires me to decide whether an injunction be granted for the entirety of the six months, or for some lesser

period. The Authority has jurisdiction to issue interim injunctions.¹ The legal principles for interim injunctions provide a convenient list of issues to consider. Those principles are as follows:²

- (a) Is there an arguable case?
- (b) Where does the balance of convenience lie?
- (c) What is the overall justice of the case?

Is there an arguable case?

[19] The threshold to establish an arguable case is a low one. An applicant must merely establish that the claim is not vexatious or frivolous.

[20] Mr Teixeira submits that the non-compete clause in his employment agreement is unenforceable as a matter of law. Restraints of trade are *prima facie* unlawful because by their very nature they suppress competition and are unwelcome fetters on the freedom of individuals to move jobs and to use their skills and experience. However, such provisions may be justified if they are reasonable as between the parties themselves and reasonable in terms of the public interest. The reasonableness of a restraint clause is to be determined at the time the agreement was entered into.³

No objection raised at contract formation

[21] I was provided with email correspondence from Mr Leighton showing that he had given Mr Teixeira a draft individual employment agreement to review and obtain independent legal advice about. Mr Teixeira never raised any issue about the restraint provisions in his agreement. In explanation for this, Mr Teixeira stated during the submissions hearing that he did challenge the three-month notice period but when that objection was rebuffed, he felt Mr Leighton would respond the same way had he challenged the non-compete clause as well.

[22] I note that Mr Teixeira successfully challenged the start and end times of his employment and that he managed to get Mr Leighton to agree in principle to a more flexible working arrangement for him. While Mr Teixeira may not have succeeded

¹ *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252 and *WN v Auckland International Airport Ltd* [2021] NZEmpC 153.

² *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90 at [12].

³ *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 at [23].

with all of his objections, he did have a measure of success with others. It has not been shown that Mr Teixeira's decision not to raise an objection against the non-compete clause to his employment agreement was because he considered this a futile exercise. He had ample opportunity at the material time to raise an objection but did not do so.

Untested affidavit evidence

[23] During the course of the submissions hearing, Mr Teixeira submitted that clause 19.4 of his individual employment agreement was vague, broad and overreaching. Moreover, he alleged that when he gave notice of his resignation on 20 September 2022, he had informed his employers that he was moving to another company that they might consider would breach the non-compete clause. That assertion is denied by Mr Leighton and Mrs Paull-Leighton.

[24] At this interim stage of the proceedings, I am not able to deal with issues of factual dispute. This is the function of the investigation meeting to come. However, I note that there is no express mention of the alleged disclosure by Mr Teixeira in his resignation email of 20 September 2022 or in his email of 13 November to Mrs Paull-Leighton.

Reasonableness of duration and scope

[25] I find the non-compete clause to be clear in its wording and narrow in scope. The clause applies for a finite period of six months which coincides with the seasonal nature of Concept Travel's business. It is understood that 2023 is somewhat of an outlier in that the company is already receiving customer inquiries for ski trips in the Northern Hemisphere.

[26] However, in a typical year, Concept Travel starts to receive customer inquiries from as early as mid-to-late March and these become increasingly more frequent from there. It was Mr Leighton's evidence as recorded in his affidavit in reply that from the period from around end of September to mid-December, consultants are in the process of finalising booking arrangements and payment with customers.

[27] In light of the six-month cyclical nature of Concept Travel's business which typically starts from mid-to-late March to late September, I find the six month non-

complete clause to be reasonable and no wider than is necessary to protect its proprietary interests.

[28] According to Concept Travel, the proprietary interest it seeks to protect is the good will which the company has with its customers who form a special bond with their ski consultant. Mr Teixeira rejected the notion of such a bond stating that clients were loyal to the company rather than the individual consultant and would therefore remain with the business after the consultant had left. The difficulty with that submission is that it presumes that the reasons why a customer may change travel agencies are easily known or can be found out when that is not always so.

[29] Mr Teixeira further submitted he would deal with a client one year and another consultant would handle the same client the following year. The inference that Mr Teixeira wishes me to take from this is that a client rotates from one consultant to another and as such there is no risk of anyone following him to his new role. However, at the time of Mr Teixeira's employment, Concept Travel employed only three sales consultants. While the company has recently employed an additional staff member to handle marketing, the business remains relatively small which is conducive for the formation of strong bonds between a customer and a consultant.

[30] Although Mr Teixeira does not accept the analogy of travel consultants being like hairdressers who customers are more likely to follow in the event of a change of employment, the suggested example of a coffee barista by Mr Teixeira does not take into account the level of trust that customers place on ski consultants to organise appropriate ski holidays that are both pleasurable and safe for the customer and potentially their partner, family members and friends.

[31] The six-month non-complete clause does not bar Mr Teixeira from finding alternative employment in the travel industry. The restrictive covenant applies only to businesses that are similar to Concept Travel. Mr Leighton and Mrs Paull-Leighton have no issue with Mr Teixeira working for another business in the travel industry. However, the couple do take issue with him working for a direct competitor such as Amped which like Concept Travel operates as a ski travel specialist.

[32] It was Mr Leighton's evidence that there are only three agencies and one travel broker that operate in New Zealand. Although Mr Teixeira acknowledged that the market for off shore skiing is limited, he stated that annual spend by New Zealanders in ski tourism each year is approximately \$40M - \$50M of which \$20M is captured by the three agencies, including Concept Travel. There was more than enough for everyone. However, I can give the submission no weight because this is Mr Teixeira's opinions and opinion evidence is generally inadmissible.

[33] Towards the end of the submissions meeting, Mr Teixeira stated that 20 percent of Concept Travel's business was in general travel. The inference was that the company was not exclusively a ski/snow travel business. Even if true, a significant proportion of Concept Travel's revenue is in the boutique niche market of ski adventure tourism. It stands to lose financially if clientele so inclined follow a departing travel consultant out the door.

Delay and geography

[34] Mr Teixeira raised the issue of delay in that he had disclosed to Concept Travel on 7 December 2022 that he would be working for Amped but that the company had left it until 20 December to file proceedings in the Authority. However, the submission ignores Mr Teixeira's own contribution to any delay on the part of Mr Leighton who I find acted promptly to protect his business once he finally learnt that he was going to work for a direct competitor.

[35] Finally, Mr Teixeira raised the issue of geography in that Amped is located on the North Shore approximately 25 kilometres from Concept Travel whose office is in Newmarket. I find the geographical locations of Amped and Concept Travel to be negligible as most business is received remotely via telephone or online. Most clients from all over the country will approach either business by these means.

Conclusion on whether there is an arguable case

[36] Considered cumulatively, I find that there is an arguable case for Mr Teixeira to answer. He was employed almost from the beginning when Mr Leighton took over the business and as manager will have been privy to sensitive commercial information including profit margins. Although this information will eventually go stale, Concept Travel will need time to shore up its defences to meet the competition.

[37] I find the non-solicitation and non-compete restrictive covenants in Mr Teixeira's employment agreement to be reasonable and necessary to protect Concept Travel's specific and legitimate proprietary interests which will have been established between Mr Teixeira and the customers he has booked ski holidays and trips for over the five years he has worked for the company.

Where does the balance of convenience lie?

[38] This part of the analysis involves a weighing exercise and requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. The balance of convenience has often been described as the balance of the risk of doing an injustice.⁴ Factors that are relevant to an assessment of where the balance of convenience lies include the adequacy of damages for both parties, the relative strength of each party's case, and the conduct of the litigants.

Inadequacy of damages if injunction is not granted

[39] To protect its proprietary interests, Concept Travel says it needs more time to liaise with its customers especially when it is having to do so at a time when it typically does not interact with them as clients are presently on holiday. The affidavit evidence from Mr Leighton suggests that it is not until mid-to-late March that the company starts to receive inquiries from its customers. This year however has been different with some customer queries already starting to come through.

[40] It is noted that Mr Teixeira has been with the business since Mr Leighton took over and consequently he will be familiar with many of Concept Travel's long-standing customers. If not enough time is given for other ski consultants to form relationships with those clients, Mr Leighton fears that the level of loss could cripple his business. In determining where the balance of convenience lies, I must have regard to the relative hardships for both parties.

[41] During the submissions hearing, I asked Mr Teixeira questions about his financial position because his written submissions record that he had been living on his savings since finishing work and that he had undertaken some *ad hoc* decking work which has recently ended. He further deposed that for every week that he is not

⁴ *Pottinger v Kelly Services (New Zealand) Ltd* [2012] ERNZ 411 at [76] and [77].

permitted to work, he loses approximately \$2,000 which is made up of a combination of lost wages and lost sales bonuses.

[42] When I asked Mr Teixeira about the *ad hoc* work he had been doing, he stated that this was for a friend who was a builder. Mr Teixeira admitted that he could potentially receive more work from his friend if required. I learnt also that Mr Teixeira's wife worked part-time and that he has sufficient financial resources to pay for his medical visits to his family doctor who he sees quarterly each year for his heart.

[43] In my view Mr Teixeira's financial position is sufficiently robust for him to carry the financial burden of an interim injunction. However, it has not been shown that he is able to meet a damages award in the event that interim orders are declined, the matter proceeds to substantive determination, and Concept Travel succeeds against him. This suggests that an award of damages may not be an adequate alternative remedy. Conversely, Concept Travel has filed an undertaking as to damages. No issue is taken in relation to its sufficiency.

Conduct of the parties

[44] It is common ground that it was not until 7 December 2022, seven working days before the end of Mr Teixeira's employment, did he eventually admit that he was going to work for a competitor. Although he submits that it was not made clear to him that he could still work in the travel industry, a letter from Mrs Paull-Leighton (see [14] above) suggests that he was told that he could work in the travel industry just not for another business that also sold ski and snow packages.

[45] My overall impression of the evidence is that Mr Teixeira was reticent in informing his employer where he was going and that reticence has had the effect of reducing the time Concept Travel has had to protect its proprietary interests. It must do so now at an inopportune time. Had Mr Teixeira disclosed the fact that he had accepted an offer of employment in September 2022 to work for Amped, Concept Travel could have placed him on garden leave or in a non-facing customer role while he was serving out his notice period. His conduct is a factor that keeps the balance of convenience in the company's favour.

Conclusion

[46] For the reasons given above, the inadequacy of damages, Mr Teixeira's financial position and his conduct to date are such that the balance of convenience lies with Concept Travel. To avoid repetition, I have not dealt specifically with the strength of each party's case having determined that there is an arguable case here.

What is the overall justice of the case?

[47] The final consideration for the Authority is to stand back and consider the overall justice of the matter. I find that standing back, the overall justice of the case favours Concept Travel. It finds itself in a position not of its making. If Mr Teixeira had relied on the advice of two employment lawyers that the restraint covenants in his employment agreement were unlawful, he could have advised Concept Travel much sooner than he did which may have resulted in a declaration being sought in the Authority as to the correctness of that advice.

[48] I acknowledge that Mr Teixeira will be disappointed by the outcome of this preliminary determination but in agreeing to work for Amped in September 2022, he will have been well aware of his post-employment obligations to Concept Travel. That said, while I grant Concept Travel an interim injunction, there is a need to factor in issues that go towards Mr Teixeira's physical and mental health needs which includes the benefit of being able to work. However, the period of the injunction needs to be sufficient for Concept Travel's consultants to talk to customers and that process does not truly start until mid-to-late March this year.

Interim orders

[49] The Authority makes the following interim orders:

- (i) Steve Teixeira is restrained from directly or indirectly carrying on or being interested in any capacity in any business that is similar to Concept Travel Ltd's business until 1 May 2023.
- (ii) For the avoidance of doubt, Amped which trades as the Ski Adventure Travel Specialists is a similar business to Concept Travel. Mr Teixeira is barred from taking up his employment with Amped on 1 February 2023. The earliest he may take up that employment is 1 May 2023.

- (iii) By consent, Mr Teixeira is ordered to comply with the 12-month non-solicitation clause in his employment agreement with Concept Travel Ltd for a period of 12 months ending 16 December 2023.

Costs

[50] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority