

## EMPLOYMENT COURT: RESTRAINTS OF TRADE TO BE TAKEN SERIOUSLY

Restraints of trade can be useful tools in protecting the interests of a business. They are also notoriously difficult to enforce. Employers might accordingly take some heart from a recent Employment Court decision *Green v Transpacific Industries Group (NZ) Limited*, in which the Employment Court noted that:

*“Gone are the days, if they ever existed, when an employee could confidently sign up to a restraint and then breach it in the bold expectation that ‘those things are not worth the paper they are written on.’”*

The case concerned a dispute between Transpacific Industries and its former employee Stephen Green about the enforceability of a restraint of trade included in Mr Green’s employment agreement. The decision serves to remind employees that restraints of trade should be taken seriously, and to reassure employers that restraint provisions drafted with care can protect their legitimate business interests.

### The Decision

The Court was considering a challenge to an interim injunction granted by the Employment Relations Authority preventing Mr Green from working in the North Island for a competitor of Transpacific Industries. As the case was decided on an interim basis, the Court’s findings of fact were on the basis of arguable proof, rather than final determination.

### Terms of the Restraint

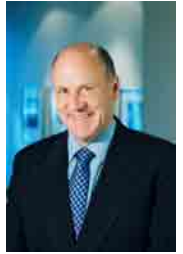
Transpacific was described as perhaps the major operator in the solid waste sector. Noting the intense competition in the collection and disposal of solid waste, the Court said:

*“As it was put long ago, succinctly (and in an inimitable northern English accent):  
‘Where there’s muck, there’s brass.’”*

Mr Green started work as Transpacific’s Auckland Business Development Manager in April 2010. His employment agreement included a non-compete provision which referred to the damage Transpacific would suffer if he took the knowledge and skills he acquired with the company and applied them for the benefit of a competitor. Mr Green

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was accordingly required not to work for any competitor in the North Island for three months after the end of his employment. The agreement also included clauses preventing the solicitation of customers, prospective customers, and staff.

### **The Job Offer**

On 12 November 2010, Mr Green told Transpacific that he had been offered a position with a competitor (Smart Environmental Limited) that was “too good to pass up”. He gave one month’s notice of resignation on November 16. Having acknowledged to Transpacific that he was proposing to work for a company in the same field, Mr Green was reminded of the restraint provisions and placed on gardening leave for his notice period. He was advised that the restraint of trade would apply until 16 March 2011, being three months after the end of that notice.

Following a disagreement about commission entitlements, Mr Green in fact began to work for Smart Environmental in late November 2010. He then purported to ‘cancel’ his employment agreement (and therefore the restraint of trade) on the basis that Transpacific had breached the agreement by placing him on gardening leave without being contractually entitled to do so, and that it had breached its obligations in relation to commission payments.

### **ERA Proceedings**

On 21 December 2010, Transpacific issued proceedings in the Employment Relations Authority. The Authority granted the injunctive relief being sought. Mr Green challenged the Authority’s determination in the Employment Court.

### **Purported Cancellation**

The Employment Court found little to support Mr Green’s argument that he was entitled to cancel the employment agreement. It considered that even if Transpacific had breached the agreement in relation to commission or gardening leave, the breaches would not have been

sufficiently fundamental as to entitle Mr Green to cancel the agreement.

### **Lawfulness of the Restraint**

The Court noted that the non-compete portion of Mr Green’s restraint of trade purported to prohibit competition even in respect of customers (or potential customers) who were not customers of Transpacific. The Court found that section of the restraint to be arguably unenforceable, noting that:

*“Whilst a restraint may be lawful to the extent that it protects reasonably a proprietary interest that the employer has, including in business with its customers, the law does not extend to prohibiting competition alone as [this clause] purports to do.”*

Noting that “competition per se is not able to [be] prohibited”, and that Mr Green’s skills and much of his knowledge were not the property of Transpacific, the Court found that the non-competition clause was very arguably void.

As regards the rest of the restraint, which addressed the business of customers and actively sought prospective customers of Transpacific with whom Mr Green had dealt, whose dealings he had supervised, or about whom he had acquired confidential information in the course of his employment, the Court found that these were proprietary interests that Transpacific was “*very arguably entitled to protect by a reasonable restraint*”. Transpacific was also found to have an arguable case of breach by Mr Green of that clause.

### **Duration and Geographic Area**

Mr Green tacitly accepted that the duration of the restraint (three months) was not unreasonable. He did however contend that the geographic scope (the North Island) was unreasonable, and argued that the Auckland

metropolitan area would be appropriate, relying on his title of “Auckland Business Development Manager”. However, noting that there was evidence that Mr Green undertook work outside Auckland, the Court found that he did not have so strong a case for unreasonableness as to warrant the modification of the restraint.

### Enforceability

In reaching its decision, the Court noted the need for it to

*“take appropriate cognisance of the clear signal given by the Court of Appeal in Fuel Espresso v Hsieh that not only are [restraints of trade] to be taken seriously by the parties that have entered into them expressly but that they are amenable to enforcement by injunction to the extent that they are reasonable and otherwise lawful.”*

### Comment

The Court’s impression that some employees sign up to restraints in the expectation that they will be unenforceable is likely an accurate one. This case suggests that a more robust approach may be taken towards the enforcement of restraints in future.

However, the Court’s refusal to uphold the non-compete provision of this restraint of trade is also a reminder of the need to take care when drafting restraint clauses. A clause carefully drafted to fit the specific role and organisation is much more likely to be enforceable than an ‘off the shelf’ clause.

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## SLEEPING ON THE JOB AND PAID TO DO IT?

In *Idea Services Limited v Dickson* the Court of Appeal has upheld the Employment Court’s decision that workers who are required to do ‘sleepovers’ are undertaking work for the entirety of the sleepover period and are therefore

entitled to payment of the minimum wage for each hour worked.

### Facts

Mr Dickson was employed by Idea Services (an IHC subsidiary) as a community services worker to provide care for people with disabilities who live in community houses. As part of his role, Mr Dickson was required to do ‘sleepovers’ which necessitated him staying in the community house overnight or sleeping over. During the sleepover period Mr Dickson was responsible for those living in the house and dealing with any incidents that arose.

Mr Dickson’s employment agreement provided for payment of wages of \$17.66 per hour and a sleepover allowance of \$34.00 per sleepover, plus his normal hourly rate for any time he actively spent dealing with



incidents that arose in the house. If no incidents arose then Mr Dickson’s hourly rate for the sleepover equated to approximately \$4.00 per hour.

During a sleepover, Mr Dickson was allowed to sleep, study, watch TV or undertake other tasks consistent with a quiet house where people were sleeping. He was not able to leave the house, have visitors without consent, consume alcohol and had to be readily available (even if sleeping) to respond to any incidents.

Mr Dickson brought a claim for a breach of the Minimum Wage Act 1983 claiming that he was entitled to be paid the minimum wage of \$12.50 per hour for each hour

of the sleepover period as he was working during the sleepover. The Act provides that every worker shall be paid the minimum wage for any “work” they perform.

Idea Services resisted the claim arguing that sleepovers did not constitute “work” under the Act. Further, Idea Services argued that even if they did fall within the definition of “work”, the question of whether Mr Dickson received the minimum wage should be determined by averaging his hourly rate of pay over his fortnightly pay period (where he worked significant hours at the rate of \$17.66 which is well in excess of the minimum wage) as this would mean that his average pay for each hour worked during the fortnight would be in excess of \$12.50.

### **Court of Appeal Decision**

The Court of Appeal did not accept either the work or averaging argument and found in favour of Mr Dickson. The Court held that sleepovers did constitute “work” in accordance with the Minimum Wage Act because of the significant restraints and restrictions placed on Mr Dickson when he was engaged in a sleepover. The Court also rejected the submission that Mr Dickson’s hourly rate should be averaged over his two-week pay period. It held that Mr Dickson was paid by the hour and that he was entitled to the minimum wage for each hour worked.

### **Implications**

Idea Services faces a significant claim for unpaid wages and the Government has said paying staff for sleepovers will cost more than \$500 million over the next three years (including \$350 million in back pay) and that changing the law may be considered.

For employers who require workers to undertake sleepovers or who employ on-call workers, the decision could mean a liability on the part of the employer to pay the worker for each hour they are on call or sleeping. It is possible that workers who are on call at home and not even required to attend for work will be considered to be working for the

purposes of the Act. To some extent this will depend on the constraints and restrictions placed upon them by the employer. The days of on-call and sleepover allowances that pay less than the minimum wage may be over.

### **Supreme Court Appeal**

Given that the ramifications of the decision are of wide public importance it is not surprising that Idea Services has recently applied for leave to appeal to the Supreme Court.

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## **EMPLOYERS BEST TO AVOID OLD WOUNDS**

A recent decision of the Employment Court has illustrated the risk employers face in attempting to belatedly deal with historical employment issues.

In *Service v YMCA of Christchurch Incorporated*, both the employee (Roslyn Service) and the YMCA challenged aspects of an earlier determination of the Employment Relations Authority. Ms Service challenged the Authority’s finding that her claim for unjustified disadvantage was without merit, as well as its finding that she contributed to the situation that gave rise to her successful unjustified dismissal grievance. The YMCA challenged the Authority’s finding that the dismissal was unjustified.

### **Facts**

Ms Service had been employed by the YMCA in various senior roles for close to 20 years up until she was summarily dismissed. The circumstances that gave rise to this dismissal related to a course that the YMCA provided for beginner mechanics. The mechanics’ course was to be run out of a mechanic’s garage. The mechanic was on home detention at the time. Ms Service was assured by another employee that the mechanic’s convictions related only to vehicle matters but on a police record check she discovered that the mechanic also had drug-related convictions and a conviction for arson. Nevertheless, Ms

Service decided to proceed with the course after discussing it with her colleagues and requesting consent forms to be signed by the students' parents. Only students for whom consent had been received were allowed to continue in the course. Ms Service gave evidence that she briefed the then CEO on the matter and that he was "*satisfied with this and happy for the programme to proceed*".

The real difficulties arose when a student who attended the course told police that outside of course hours (after midnight) she attended the mechanic's garage in an intoxicated state. She alleged that she had been raped by two men, one of whom was the mechanic providing the course. The police informed Ms Service that the student had first reported the incident to another employee of the YMCA, but at that time the student had said that the sex was consensual. Ms Service immediately instructed that the course should be cancelled. She also allegedly informed the then CEO, Mr Tindall, of the situation. Her evidence was that Mr Tindall agreed with her view that the matter was in the hands of the police and that he took no further action and left Ms Service to deal with it.

### **The New CEO**

Almost 20 months after the incident took place, the YMCA's new CEO (Ms Ogden-Schroeder) received an anonymous telephone call from a woman who told her about the incident and "*was threatening to go to Close Up and stuff*". Ms Ogden-Schroeder immediately spoke to another employee who confirmed that the incident had occurred but was unable to talk about it further. The following day, Ms Ogden-Schroeder asked Ms Service to come to her office. Ms Ogden-Schroeder confronted Ms Service about the incident and specifically asked if the previous CEO had been briefed on the matter. Ms Service did not answer as she was at the time looking through her files for information concerning the incident.

Once Ms Ogden-Schroeder undertook a further investigation of the matter, she met again with Ms Service

and advised her that she was being suspended for two days on full pay and that the incident was serious and could cost her her job. Following further meetings between Ms Ogden-Schroeder and Ms Service, Ms Service's employment was summarily terminated on the basis that the YMCA no longer had trust and confidence in her.

### **The Decision**

The Court considered all the factual circumstances of the case, with a particular focus on the previous CEO's involvement. There was much deliberation regarding what, if anything, he had been told about the incident. In this regard, Ms Service's and Ms Odgen-Schroeder's evidence was in direct conflict. Ms Service was certain that she had briefed the former CEO, while Ms Odgen-Schroeder provided evidence that she had discussed the situation with the former CEO who had no recollection of hearing about the incident. In this regard, the YMCA relied on email correspondence between the two CEOs. However, this was inconclusive given that the former CEO was unable to be 100% sure of what had happened. He did not appear as a witness before the Court.

After considering the conflicting evidence on this point, the Court preferred the evidence of Ms Service. It found that the previous CEO, being fully aware of the incident and the events, was supportive of Ms Service and did not believe that it was necessary to instigate an investigation or take disciplinary action against her. The Court essentially believed that the former CEO shared Ms Service's view that the incident occurred outside of class time and was not the YMCA's responsibility. It found that a fair and reasonable employer would not, some 20 months later, proceed to re-open a matter that had already been brought to the attention of the employer and handled adequately at the time. Instead of accepting Ms Service's explanation, Ms Ogden-Schroeder had preferred to draw conclusions that were adverse to Ms Service based on the limited amount of contact she had with the former CEO.

In addition to this, the procedural requirements that apply in disciplinary situations were not followed. Specifically, the YMCA had not prior to the meetings with Ms Service informed her that the matter was a serious one and that the termination of her employment could occur as a result. She was not provided with an opportunity to provide feedback on the proposal to suspend her and was not advised that she was entitled to have a support person present at these meetings. On the whole, the Court considered that Ms Ogden-Schroeder's investigation into the matter was unfair and undertaken in a pre-determined manner.

### **Remedies**

Ms Service was awarded over \$60,000 for lost remuneration as well as \$25,000 for the hurt and humiliation arising from both her unjustified dismissal and the unjustified disadvantage that she suffered as a result of the unjustified suspension of her employment. The Court also found that Ms Service did not contribute in any manner to the events surrounding her dismissal. Accordingly the Court's remedies were considerably more than those originally awarded by the Authority.

### **Implications**

This case serves to highlight the fact that employers must take particular care when seeking to investigate events that took place some time ago. This will be especially so where, due to a change in personnel, the decision-maker that originally may have overseen the event is no longer in place. The Court also reinforced the fact that no matter how serious an employer may consider an issue to be, it must follow correct procedures in dealing with it.

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## **EMPLOYEE REQUIRED TO REPAY OVER \$24,000 IN ALLEGEDLY MISAPPROPRIATED FUNDS**

Cases before the Employment Relations Authority and Employment Court very often relate to employees' claims for compensation from their (usually former) employers. Less common are claims by employers seeking damages from their former employees. The Employment Court at Auckland has recently handed down a decision in which it ordered a former employee of a healthcare provider to pay damages of \$24,639.20, together with interest.



### **Facts**

Juanita Nathan worked initially as a Medical Receptionist at a clinic run by the Raukura Hauora O Tainui Trust. Although there was some debate over her position at the end of her employment, the Court found that Ms Nathan had been promoted to Senior Clinic Administrator and finally to Clinic Co-ordinator. Both positions involved responsibility for supervising the trust's receptionists.

From June 2007, the clinic's cheque and deposit books had been given to Ms Nathan with instructions to inform the receptionists on how to use it. It was the Trust's case

that each day the receptionists would collect the day's takings and either provide them to Ms Nathan for her to bank personally or, if she was absent, leave them in a secure place for her to collect.

The Trust's records showed an amount of \$24,639.20 collected from patients in the period 1 June 2007 to 4 February 2008. None of that money was ever banked in its accounts. The Court noted that it was a peculiar feature of the case that for the entire eight-month period, no one in the Trust's top management appeared to have detected that the takings were not being banked. Ms Nathan's employment was terminated soon after the shortfall was discovered in February 2008.

In its claim before the Employment Court, the Trust contended that Ms Nathan had breached the terms of her employment agreement and either misappropriated the unaccounted-for money or had failed to ensure that they were banked into its account. Ms Nathan said that it was the receptionists who were responsible for receiving the payments and doing the banking and that the deposit book had never been given to her. She maintained that in fact she had only seen the deposit book once or twice during the period.

### **The Claim**

The Trust's claim for damages was made under section 162 of the Employment Relations Act. That section allows the Employment Court, in a matter related to an employment agreement, to make any order that a High Court or a District Court may make under any rule of law relating to contract.

The Trust relied on specific and implied terms in Ms Nathan's employment agreement, including the duties of good faith and fidelity. The common law position is that an employee's breach of such duties will render them liable in damages to their employer, provided that the employer can prove both causation and that the damage is not too remote.

It was therefore for the Trust to prove that Ms Nathan's breaches of her duties caused the funds to go missing, and that the Trust's losses were sufficiently proximate to those breaches.

### **The Burden of Proof**

In cases involving allegations of a criminal nature, the standard of proof is different from that in other circumstances. In an employment context, the leading Court of Appeal case on such situations is *Honda New Zealand Limited v New Zealand Boilermakers' etc Union*, in which it was held that where there is an allegation of a criminal offence, the standard of proof (although still based on the balance of probabilities) requires the evidence to be as convincing as the charge is grave. The Court cited the well known Lord Denning quote:

*"[I]n proportion as the crime is enormous, so ought the proof to be clear"*

### **Credibility and Decision**

The Court found that Ms Nathan was not a credible witness. There were a number of instances in which her lack of candour was "*only too evident*". The Court noted that throughout her cross-examination, despite overwhelming evidence to the contrary, Ms Nathan continued to deny her promotion to the positions of Senior Clinic Administrator and later Clinic Co-ordinator. Despite having sent emails describing herself as Senior Clinic Administrator, she continued to claim that the position had not been official. Eventually, Ms Nathan's counsel confirmed from the Bar that the promotions were admitted.

In contrast, the Court found the evidence of the three receptionists that at the end of each day they would either hand the takings directly to Ms Nathan or (if she was absent) place it in her filing cabinet to be "*absolutely compelling*".

The Court was accordingly satisfied that the high standard of proof had been met and that the Trust had made out

its case that Ms Nathan had misappropriated the patient money which should have been banked into the plaintiff's account. The Trust was therefore successful and damages were awarded against Ms Nathan in the sum of \$24,639.20 plus interest.

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## OVERSEAS SNIPPETS

### United States - Wiretapping at Work

Getting a drivers license suspended for drunk driving is bad. Losing a job because of it might be worse. But David Szymuszkiewicz, an employee of the American IRS, managed to turn a bad situation into a calamity. In a recent decision of the US Court of Appeals for the Seventh Circuit, Mr Szymuszkiewicz recently had his conviction under the Wire Tap Act for intercepting an electronic communication confirmed on appeal to the Seventh Circuit.

As it was put the by Seventh Circuit Chief Judge, Mr Szymuszkiewicz was in trouble at work. His drivers license had been suspended for driving while drunk. This threatened his job because, as a Revenue Officer, he was required to travel to delinquent tax payers' homes.

Worried that he might be fired, Mr Szymuszkiewicz decided to monitor the email messages being sent to his supervisor. When the supervisor received training in Microsoft Outlook, she discovered by accident a rule which directed Outlook to forward to Mr Szymuszkiewicz all messages that she received. This amounts to intentionally intercepting an electronic communication under the Wire Tap Act. Mr Szymuszkiewicz was sentenced to 18 months' probation.

### United Kingdom - £13,000 Paid to Thief

The *Telegraph* has reported the payment of £5,000 in compensation and £8,000 in legal costs to Essex man Mark Gilbert in settlement of a civil claim brought by him against his former employer, Simon Cremer. Mr

Gilbert had been seeking two years' lost earnings and distress damages.

The matter arose after Mr Gilbert was marched by Mr Cremer to the local police station wearing a sign which read:

*"THIEF. I STOLE £845.*

*AM ON MY WAY TO POLICE STATION."*



The forced march followed Mr Gilbert using his employer's chequebook to write a cheque to himself and cashing it. He was reported to have claimed it related to wages he was owed (and that he wanted to take a holiday). Mr Cremer was reported as saying, after settling Mr Gilbert's civil claim, that paying even a penny to Mr Gilbert "*really sticks in my throat.*"

**OVERVIEW**

In 2011, Quigg Partners will be offering its popular seminar series.

The series will focus on five issues currently at the forefront of New Zealand employment law. Each seminar will provide participants with in-depth knowledge from specialist presenters, including updates on recent case law and tips on how to avoid potentially costly mistakes.

**TOPICS**

**3 May**

***Conduct Outside the Workplace***

In an area of law that is fast becoming a potential minefield for employers, this seminar will include both practical and legal tips on social media, privacy and misconduct issues.

**7 June**

***Advanced Restructuring***

This seminar will look past the 'ABC' of restructuring and dive into the more difficult areas of the topic, including selection criteria, the relevance of performance issues, and the sale of business.

**5 July**

***State Sector Issues***

An essential update on the issues facing the state sector in challenging times, including restructuring, the introduction of 'trial' periods, negotiating settlements, and issues under the New Zealand Bill of Rights Act.

**6 September**

***Protecting Employer Interests***

An area of law that has recently received increased attention before the Courts. This seminar will include a look at restraints of trade, copyright, and intellectual property.

**1 November**

***Incapacity and Medical Issues***

Stress, ill-health, and medical retirement will be included in this seminar which deals with the difficult question of "when can an employer fairly cry halt?".

**VENUE**

**Quigg Partners Boardroom**

Level 8, The Bayleys Building  
28 Brandon Street (Corner Brandon Street and Lambton Quay)  
Wellington

**TIME**

12:30 pm to 2:00 pm (nibbles provided)

**COST**

\$75 (incl. GST) per seminar or \$250 (incl. GST) for all 5 seminars.  
Payment via cheque or direct credit to Quigg Partners,  
Account No. 06-0501-0859155-00

**REGISTRATION**

To register please email Evelyn Pong at [evelynpong@quiggpartners.com](mailto:evelynpong@quiggpartners.com), or visit our website [www.quiggpartners.com](http://www.quiggpartners.com) to fill out the online registration form.