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THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart ltd

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Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
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Restrained Restraints

A recent Employment Relations Authority decision considers the complexity, and for employers, pitfalls of interim injunction relief for apparent breaches of restraint provisions.

The case was ***Silver Fern Immigration Services 2015 (SFI) Ltd v. Garima Gupta***. Garmina Gupta had worked as an Immigration Advisor for SFI for three years until she resigned on 15 March 2019, to set up a business with her husband in competition with SFI. The new company was registered on 7 March 2019.

On 20 May 2019 Ms Gupta lodged a claim for arrears of holiday pay, and bonuses and a disadvantage for failure to review her salary. On 18 July 2019 the parties attended mediation. On 3 September 2019 Ms Gupta amended her claim to include a claim of constructive dismissal. On 3 October 2019 SFI filed the current application for interim orders. An investigation meeting was set for 28 – 30 April 2020 to hear the respective claims for both parties. The interim hearing was held on 5 December 2019 and the determination was given 4 days later on 9 December 2019.

SFI sought specific relief that would prevent, at a future hearing of the Authority, Ms Gupta from:

a. Making contact with or soliciting any client being a person or business with whom SFI had done business in the previous 12 months.
b. Providing immigration services to any client of SFI.
c. Using document or confidential information of SFI.
d. Disclosing any documents or confidential information of SFI.

Ms Gupta was employed as one of two advisors for SFI, she was a provisionally licensed Immigration Advisor.

At the time of her resignation she asked SFI to provide her with a copy of her emails to clients because the Immigration Advisors Code required that "*a licensed Immigration Advisor must maintain a hard copy or electronic file for each client for no less than 7 years from closing the file*". When she left, she kept a copy of client applications that she had worked on. SFI claimed, having reviewed her email contacts, that she maintained contact with some clients and that she signed a service agreement with one client on 19 March 2019. They also claimed that before giving notice she had forwarded emails about three clients including details about their immigration applications, health and police records to her personal email. Her former emails also showed that Ms Gupta had had contact with three SFI clients in May and July 2019. In addition, SFI claimed that on 21 February Ms Gupta forwarded her own leave record to her personal email and an email to her husband (and subsequent business partner). This email contained a copy of an SFI brochure, instructions for accessing, editing and managing the SFI website including access passwords. It also included a zip folder for the Photoshop Templates for SFI's social media posts of which she stated to her husband *"You can edit these templates using Photoshop. You will need to download Photoshop first via the Adobe Creative Cloud Desktop App."*

Ms Gupta's employment agreement contained a requirement that *". . . the employee will not directly or indirectly use, copy, share or permit the use or copying of any confidential information owned by the employer unless they get written permission."*

The employment agreement also defined confidential information explaining that the obligation survived the termination of employment. The agreement also contained restraints restricting solicitation of SFI clients:

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"The employee shall not, either during their employment or for 24 months after leaving the business, do the following:

- *Directly or indirectly, alone or with any other person, approach or solicit any of the employer's clients, suppliers or customers, or try to persuade them to end or limit their relationships with the employer.*
- *Directly or indirectly, alone or with any other person, approach, employ, engage or otherwise try to take away any of the employer's staff or contractors.*

The following definition applies to this clause:

- *'Client' means any person, organisation, business or entity that the employer has sold to or done business with in the 12 months before the end of the employee's employment."*

SFI sought interim orders asking the Authority to prevent Ms Gupta from using this information, contacting or having dealings with former clients until their substantive action for damages and penalties could be heard.

Applications for interim injunctions are evaluated by the Authority with reference to three questions. *"[F]irstly, whether the applicant has an arguable case for the findings and substantive relief sought; secondly, where the balance of convenience lies between now and the Authority's eventual determination of the substantive issues (including whether adequate alternative remedies are likely to be available to the party seeking the injunction); and, thirdly, on standing back and considering the matter as a whole, where the overall justice lies from now until determination of the substantive application.*

The merits of the case, insofar as they can be ascertained at the interim injunction stage, are relevant in the assessment of the balance of convenience and the overall justice of the case."

A. Arguable Case

SFI had to establish an arguable case that Ms Gupta's actions amounted to breaches of her contractual obligations of confidentiality and restraint and that an interim order was the appropriate way to prevent any future breach:

"The threshold for establishing that arguable case was relatively low. SFI needed to establish only that the evidence in support of its claims was more than frivolous and vexatious."

It was accepted by the Authority that Ms Gupta had been in contact with at least 7 clients, that she had kept copies of files of clients and that one client had chosen to use Ms Gupta's services. The Authority found that it was arguable that this conduct established that Ms Gupta had persuaded SFI clients to end or limit their relations with SFI.

The Authority found that the restraints *". . . to the extent likely to be enforceable, could appropriately be applied through an interim order to prevent ongoing or further breaches meanwhile."*

Similarly, they found that it was arguable that Ms Gupta had taken confidential information belonging to SFI insofar as it related to website information that was not publicly available, as was the removal of client files. The Authority held that it was however arguable that the appropriation of the passwords did not require interim relief because the ongoing harm could be solved by simply changing the passwords.

B. Balance of Convenience

"The question of the balance of convenience considers the relative injustice that may be caused to SFI if the interim relief it sought was not granted against the burden borne by Ms Gupta during that period if the order was granted. It also considers whether adequate alternative remedies are available to SFI if the interim orders sought are not granted. . ."

This matter was considered with the merits of the case. The merits required consideration of the validity of the restraints. The Authority found that *"While its non-solicitation term was expressly addressed to the legitimate interest in the relationships Ms Gupta would form with SFI clients, its scope was unreasonably and unnecessarily too wide and too long."*

Firstly, the definition of client (anyone doing business with SFI in the previous 12 months) was too wide; a reasonable restraint could not extend to clients with whom she had no dealings. Also 24 months was found to be unreasonable. The Authority concluded that in a substantive hearing it would in all likelihood use its discretion to modify the restraint to 6 months. The Authority concluded that the merits of holding client files remained with Ms Gupta because of her obligations to the IAA.

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The Authority also questioned the merits of the alleged solicitation of clients. While SFI argued that she had contacted clients and some had transferred to her, Ms Gupta stated that they had gone to her, rather than being solicited. The Authority held that SFI could not enforce an action merely because clients had transferred. They had to provide solicitation and *". . . could not expect enforcement of a term that was any wider than what it had contracted for — which in this case prohibited her approaching clients and trying to persuade them to end or limit their relations with SFI."*

C. Alternative Remedies

The Authority held that:

". . . if a substantive inquiry by the Authority found that such breaches were found to have occurred, the inquiry into damages could be carried out by a relatively straightforward comparison of the client lists of SFI and TISL."

The Authority also held that an injunction would be an unreasonable fetter on the rights of the third party clients who were not Ms Gupta's clients.

D. Overall Justice

Three factors were relevant in the final decision to decline the application by SFI for an interim injunction.

Firstly, the application was too late in coming. Having resigned in March the application was not lodged until almost 7 months later in October. Secondly, the Authority felt that any protection of non-solicitation was unlikely to be upheld for longer than 6 months, therefore if an injunction were awarded, SFI would get what amounted to a 12 month restraint by the time of the substantive hearing. Lastly, if they were successful, SFI could be adequately compensated by orders of damages or penalties.

Ultimately the claim for interim injunction was unsuccessful. The lesson for employers is that irrespective of whether they have an arguable case, such claims may not be granted where the overall merits do not warrant it. Significantly, restraints must be reasonable and secondly actions for interim orders need to be made in a timely fashion.

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Employment Relations Practice Course

Our next Employment Relations Practice Course has been set down for **Wednesday 11 and Thursday 12 March 2020.**

Topics covered include:

- Pre-employment
- Dealing with absences from the workplace
- Discipline and Termination
- Performance Management
- Holidays Act
- Parental Leave
- Negotiations and Good Faith
- Redundancy and Restructuring
- Introduction to Health and Safety
- Policies
- Legislative Updates

Further information in regard to the course content and registration details can be found on our website – www.mgz.co.nz/training

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