IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CIV-2022-004-001700
[2023] NZDC 20411

BETWEEN	VIVA DIVA MANUREWA LTD Plaintiff
AND	RAJWINDER KAUR Defendant

Hearing: 19 July 2023

Appearances: M Sheleg for the Plaintiff
A Ho for the Defendant

Judgment: 22 September 2023

RESERVED JUDGMENT OF JUDGE AA SINCLAIR
[on Application for Summary Judgment by Defendant]

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[1] This is an application for summary judgment by the defendant seeking an order dismissing the plaintiff's various claims and for costs. The defendant submits that the plaintiff has no standing to bring the claim and no cause of action can therefore succeed against the defendant.

[2] The application is opposed by the plaintiff.

Plaintiff's claims

[3] The plaintiff issued proceedings against the defendant in October 2022. In summary, Mr Sheleg states that in June 2021 he purchased the business/clientele/customer base/goodwill of Great South Hair 2019 Limited (GSH 2019) and started a new business by the name of Viva Diva Manurewa Limited leveraging the clientele/business/customer base/goodwill of GSH 2019.

[4] The defendant was an employee of GSH 2019 and had entered into an employment agreement with that company prior to the acquisition of the business by Mr Sheleg.

[5] The plaintiff says that under her employment agreement with GSH 2019, the defendant was subject to restraints of trade including not to solicit its clients. It contends that in breach of this agreement, the defendant breached her obligations of conflict of interest and non-solicitation of clients both personally and through her corporate entity, Abel Beauty Limited[1].

[6] The plaintiff alleges that as a result of such breaches by the defendant, the plaintiff suffered a "loss of revenue and profit" of $60,000 per year. In making this allegation, the plaintiff relies upon the revenue ledger showing historical monthly revenue of GSH 2019 (and predecessor company) from 2010 to 2021 which the plaintiff contends shows a reduction coinciding with the breach by the defendant of her employment obligations. Alternatively, the plaintiff contends that the defendant has been unjustly enriched by her unlawful conduct.

[7] In addition, the plaintiff asserts that the defendant's employment agreement with GSH 2019 contained express and implied obligations of confidentiality, fidelity, trust and confidence. The defendant breached these obligations in the following ways:

(a) by taking preparatory steps to incorporate Able Beauty Limited;

(b) retaining confidential information obtained in the course of her employment;

(c) using that confidential information to transfer significant amounts of business from the plaintiff to Able Beauty Limited; and

(d) failing to keep GSH 2019 fully informed about matters relevant to her employment and of her business activities which may have had a bearing on GSH 2019's business.

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[1] Clause 10.3 conflict of interest and clause 10.6 non-solicitation of clients.

[8] Finally, the plaintiff alleges that the defendant misused her position as manager at GSH 2019 where "she architected, orchestrated and exploited" at least one immigrant worker by making that person work "48 hours per week while only logging in 40 hours per week".

[9] The plaintiff claims that the various breaches by the defendant of her obligations to GSH 2019 has caused loss of business, revenue, profits, goodwill, clientele and customer base to the plaintiff which had "acquired these aspects of GSH 2019 as a going concern". The following relief is claimed:

(i) That [the defendant and Able Beauty Limited] cease the use of GSH 2019/VIVA DIVA customers, including any contact and provision of any services; and return any details of GSH 2019/VIVA DIVA customers to the plaintiff without retaining any copy of the same;

(ii) Penalties against the defendant pursuant to s 134 of the Employment Relations Act 2000 for those breaches;

(iii) $60,000 for the loss of revenue, income and profit by the solicitation of business, clientele [and] customers away from VIVA DIVA;

(iv) $10,000 compensation for each immigrant worker exploited by the defendant taking into account the compensation of the workers, the potential for reporting the matter to Human Rights Commission, Immigration New Zealand and the New Zealand Police;

(v) The defendant to return confidential customer information;

(vi) The defendant to be liable for payment of damages and an order for payment of profits as made by her;

(vii) Costs and disbursements.

Defendant's application for summary judgment

[10] The defendant gave affidavit evidence that she was originally employed in 2013 by Great South Hair Limited. In April 2019 she was informed by the director of GSH, that he was selling the Manurewa salon to Mr Glenn Ramsbottom and that he

would be taking over the business via his company Great South Hair 2019 Limited (GSH 2019). On or around 1 April 2019 the defendant entered into an employment agreement with GSH 2019. The terms of that agreement were identical to those with GSH.

[11] The defendant and her husband incorporated Able Beauty Limited in January 2019 and commenced trading as a beauty salon in Botany (more than 10 km away from the Manurewa Salon) in mid-2019.

[12] Mr Ramsbottom became aware of this business and allowed the defendant to operate her business while continuing to maintain her employment with GSH 2019. Mr Ramsbottom confirmed this in an email annexed to the defendant's affidavit.

[13] The defendant states that in late 2020 Mr Ramsbottom introduced Mr Sheleg and advised her that Mr Sheleg was intending to purchase the business. The defendant was subsequently told on or around 26 May 2021 that Mr Sheleg had purchased the business and she was asked to assist with Mr Sheleg's due diligence. It was the defendant's evidence that at that time, she was on maternity leave and helped Mr Sheleg remotely. She was not advised by either Mr Sheleg or Mr Ramsbottom with regard to the status of her employment with GSH 2019.

[14] Subsequently, on 10 June 2021, Mr Sheleg sent a text message asking whether the defendant was interested in being a hairdresser. The defendant stated that she informed Mr Sheleg that if her former position as manager was not available then she would need to be paid out per her redundancy provisions of her employment agreement. Mr Sheleg responded by text stating that "there is no legal agreement between us".

Legal principles

[15] Rule 12.2(2) of the District Court Rules 2014 provides:

> The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

[16] The relevant principles were discussed by the Court of Appeal in *Westpac Banking Corp v M M Kembla New Zealand Ltd*[2]:

> ...Rule [12.2(2)] permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed....
>
> The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim. Examples... are where the wrong party has proceeded or where the claim is clearly met by qualified privilege.
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> The defendant bears the onus of satisfying the Court that none of the claims can succeed. It is not necessary for the plaintiff to put up evidence at all although, if the defendant supplies evidence which would satisfy the Court that the claimant cannot succeed, a plaintiff will usually have to respond with credible evidence of its own.

Analysis

[17] Importantly, it is not contended that the defendant was ever an employee of the plaintiff. Instead, Mr Sheleg asserts that the defendant breached the terms of her employment agreement with GSH 2019. He contends that the plaintiff is able to enforce the terms of that agreement having purchased the business of GSH 2019 as a going concern.

[18] Rather than considering the merits of any such claim there is a more fundamental issue which forms the basis of the defendant's application. Namely, GSH 19 is an entirely different company from the plaintiff. The plaintiff did not purchase the shares in GSH 19 which continue to be held by Mr Ramsbottom. There is therefore no contractual relationship between the plaintiff and the defendant and no basis on which the plaintiff can bring a claim under that agreement against the defendant.

[19] The plaintiff relies upon the decisions in *Egon Zehnder Limited v Tilman*[3], *Herbert Morris Limited v Saxelby*[4], *Smiths City (Southern) Ltd (In rec) v Claxton*[5] and

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[2] *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298, at [60],61] and [64].
[3] *Egon Zehnder Limited v Tilman* [2019] UKSC 32, [2020] AC154.
[4] *Herbert Morris Limited v Saxelby* [1916] 1 AC 689 (HL).
[5] *Smiths City (Southern) Ltd (In rec) v Claxton* [2021] 19 NZELR 80.

Rooney Earthmoving Ltd v McTague[6]. However, as submitted by Mr Ho, these cases all involve contracts of employment and the parties to the litigation in each case are the parties to the particular employment agreement. That vital element is lacking in the present claim. Accordingly, these cases are not applicable.

[20] In these circumstances, the plaintiff has no standing to bring proceedings seeking to enforce the terms of the employment agreement between GSH 19 and the defendant. The claim therefore fails at this point.

[21] By way of general comment, even if liability could be proven (and there is no evidence produced by the plaintiff in this regard), it is not sufficient to simply assess quantum on the basis of a drop in turnover. To be able to prove such losses, it is necessary to show a causative link between the breaches by the defendant and the downturn in the plaintiff's business in the relevant time period. There can be many reasons for such a downturn. Notably, the defendant observed in her evidence that it is a saturated and highly competitive market and the plaintiff could have lost clients to any of the other 16 hair salons in the area. With regard to her own business, the defendant stated that she operated in a completely different area. However, in view of the Court's finding that the plaintiff has no standing to bring the claim, it is not necessary for the Court to address the merits.

[22] Finally, the plaintiff has also made allegations with regard to the employment of immigrant workers. The defendant was never the employer and such allegations are therefore totally without any foundation. Furthermore, there is no basis on which the plaintiff can claim compensation for the immigrant workers alleged to have been exploited.

Decision

[23] The defendant's application for summary judgment is granted and the plaintiff's claim against the defendant is dismissed.

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[6] *Rooney Earthmoving Ltd v McTague* (2009) 6 NZELR 774.

Costs

[24] The defendant has been successful in her application and is entitled to costs.

[25] Costs are awarded on a scale 2B basis together with disbursements. These are to be fixed by the Registrar and are immediately payable by the plaintiff to the defendant.

AA Sinclair
District Court Judge