IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 223
5343717

	BETWEEN	AFFCO NEW ZEALAND LIMITED Applicant
	AND	JASON GRAHAM First Respondent
	AND	SILVER FERN FARMS LIMITED Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Mary Wilson for Applicant Diccon Sim for Respondent
Investigation Meeting:	20 May 2011
Determination:	25 May 2011

DETERMINATION OF THE AUTHORITY

A. Until 5 August 2011, or further order of the Authority or the Employment Court, Jason Graham is restrained from having any involvement in the business of Silver Fern Farms Limited without the express prior written consent of AFFCO.

B. Costs are reserved.

Employment Relationship Problem

[1] AFFCO New Zealand Limited sought an interim injunction to prevent its former operations manager, Jason Graham, working for Silver Fern Farms Limited (SFFL) during a three-month restraint of trade period previously agreed with AFFCO. It lodged the necessary undertaking as to damages with its application.

[2] AFFCO also sought penalties against Mr Graham for alleged breaches of his former employment agreement and against SFFL for aiding such breaches: s134 of the Employment Relations Act 2000 (the Act).

[3] In a case management conference by telephone the parties were directed to mediation with arrangements made to hear the interim injunction application urgently and to schedule an investigation meeting of the substantive matters. Dates were reserved for that latter meeting to occur on 23 and 24 June 2011 if necessary and to consider the matters of penalties and whether a permanent injunction should be issued (whatever the outcome on the interim injunction application).

[4] After the conference the parties attended mediation under urgency but without resolving the matter. Mr Graham and SFFL then lodged a statement of reply and affidavits from Mr Graham and SFFL's chief operating officer Kevin Winders opposing the interim application. AFFCO had earlier lodged an affidavit from its operations director Rowan Ogg supporting the application and lodged a further affidavit from Mr Ogg in reply to those of Mr Graham and Mr Winders.

[5] The Authority considered the usual questions in deciding this interim injunction application – firstly, whether there was an arguable case that the purported restraint was reasonably necessary to protect legitimate proprietary interests of AFFCO and should be enforced by enjoining Mr Graham from activities contrary to those interests until the expiry of the three-month restraint period; secondly, where the balance of convenience lay (including whether damages would otherwise be an adequate remedy); and, thirdly, where the overall justice of the case lay. The evidence on which the determination was made was given by affidavit only. While this evidence is not tested as it would be in a full investigation meeting, the Authority may make some commonsense assessment of disputed assertions.[1]

[6] I heard submissions from the parties' representatives on the relevant questions and how the evidence in those affidavits applies to those questions.

[1] *Wellington Free Ambulance Service Inc v Alana Adams* [2010] NZEmpC 59 at [17]-[18].

Is there a serious issue to be determined?

[7] Mr Graham worked for AFFCO from 18 September 2006 until 5 May 2011 when his employment ended by redundancy. He turned down two relocation opportunities because they required moving to Northland or Manawatu and, for family reasons, he wanted to remain in the Waikato region.

[8] When he started work for AFFCO he was its Rangiuru plant manager but from 4 December 2006 also became responsible for its Horotiu and Wairoa plants. His job title changed to general manager. In 2009 he was provided with a revised employment agreement, which appointed him as Operations Manager for the Moerewa, Rangiuru, Wiri and Napier plants.

[9] He did not sign that later agreement but accepted it "*generally described*" his employment conditions. Specifically he accepted he was bound by some of the requirements reflected in clause 9 but not "*a blanket restraint of trade*":

> *9.0 Restraint of trade*
>
> *9.1 In order to protect the Employer's proprietary interests, for three months after the termination of this agreement the Employee agrees not to engage to work for or on behalf of an organisation in direct competition with the Employer, nor establish their own business in competition with the Employer.*
>
> *9.2 For three months after the termination of this agreement the Employee agrees not to solicit in competition with the Employer the custom of any person who has at any time during the period of the Employees employment by the Employer been a customer of the Employer or who shall become a customer of the Employer as a result of any tender, negotiations, arrangements or proceedings made or taking place at the date of such termination.*
>
> *9.3 Consideration for this restraint is included in the remuneration package provided in clause 5 of this agreement.*
>
> *9.4 It is acknowledged that in view of the Employee's position with the Employer and the Employee's direct association with the customers of the Employer during your employment, the restraint provided for in sub-clause 9.1 is fair and reasonable and does not inhibit the Employee's ability to earn a reasonable living.*

[10] Mr Ogg deposed that these terms were identical in all respects to the employment agreement Mr Graham was already working under at that time. While neither party provided a copy of the earlier agreement, counsel both advised me there

was no dispute that those terms were the same in both agreements.

[11] The 2009 agreement had a privacy, confidentiality and proprietary information clause but did not expressly refer to an obligation on Mr Graham not to use confidential information he gained about AFFCO's business for the benefit of himself or future employers once he left AFFCO. However, in a 6 May letter to AFFCO's chief executive Hamish Simson, Mr Graham said he accepted and acknowledged his ongoing obligations in relation to confidential and proprietary information belonging to AFFCO and he would not use or disclose any such information of which he might be aware.

[12] Mr Graham has accepted new employment with SFFL. Mr Ogg's affidavit recounted some hearsay evidence that Mr Graham was to be SFFL's area manager for its Paeroa, Waitoa and Te Aroha plants – which Mr Graham's affidavit in reply did not contradict. Mr Graham referred to plans to first be involved in the development phase of building SFFL's new Te Aroha plant which he would later manage. There were also some "*other plants*" for which he said he would "*in due course have responsibility*".

[13] As part of a "*familiarisation tour*" he was at SFFL's recently-purchased Wallace Waitoa plant (near Te Aroha) on 9 May 2011 where he was part of a conversation with a representative of Heinz Watties, a business which is also a customer of AFFO. Since then he had gone on leave pending the hearing of the interim injunction application.

[14] AFFCO claimed Mr Graham taking a job with SFFL, and his activities in its employment earlier this month, breached his obligations under clause 9.1 because, in his previous operations manager role, he had access to and knowledge of information in which AFFCO had a proprietary interest. That information concerned costings; financial results including weekly profit and loss; livestock processing volumes; daily and weekly performance data including productivity, efficiencies, yields, costs and revenues; strategic planning and capital expenditure details; product types and specifications; customer lists; industrial agreements; wage rates; goods and service procurement; and procurement pricing for both livestock and goods and services.

[15] On general principles, I accept there is a real prospect that a trade restraint for a manager at Mr Graham's level would, more likely than not, be found to be reasonable and enforceable for three months provided the asserted proprietary interests in respect of the information were established at the substantive investigation. That AFFCO could generally have a proprietary interest in information of the kinds identified is not really controversial. The real point of contention is whether Mr Graham, in fact, has or is likely to have had, information in which AFFCO would retain a proprietary interest throughout the full three months of that purported restraint period. That cannot be determined definitively on affidavit evidence.

[16] Mr Graham deposed that he was "*unable to accept*" any information on costings and financial results to which he was exposed while working for AFFCO (but now could not recall in detail) would be of any use if intentionally or inadvertently released to SFFL. While he was aware of livestock processing volumes, various factors changed these dramatically and he could not identify any proprietary interest in that information. He considered other information – such as weekly performance data and profit and loss information – was not "*particularly*" confidential as reports were circulated widely. He described his involvement in planning as limited to efficient use of existing AFFCO infrastructure and not strategic plans for livestock procurement or sales and marketing. He accepted he had access to customer information but no overview or detail able to be used for SFFL's competitive advantage. Livestock pricing changed weekly due to a range of factors and was regularly published so was neither confidential nor proprietary. He acknowledged that he might have some role in other staff leaving AFFCO to join SFFL but proposed an arrangement whereby he would have no dealings with existing AFFCO staff for at least three months.

[17] However Mr Ogg deposed an emphatically different view of the information available to Mr Graham as being of the kind that, if divulged, would enable a competitor to apply counter strategies which would damage AFFCO. He noted Mr Graham was one of two operations managers nationally and had four plant managers reporting to him. He said Mr Graham was involved in weekly management meetings which looked at pricing and "*procurement strategies*", stock pricing, supplier arrangements, industrial issues and strategies, costs, capital expenditure, sales

strategies and "*analysed all facets of the Company performance, including livestock procurement, plant operations, sales and marketing activities and financial transactions, including foreign exchange*".

[18] The Authority may make some commonsense assessment of such divergent evidence. While Mr Ogg's affidavit evidence may exaggerate the nature and value of the information held by Mr Graham from performance of his former role, I found Mr Graham's evidence minimised that knowledge to a level that was less likely for someone in a management position of that type, participating in management meetings and with access to that level of information.

[19] For that reason I accept AFFCO's submission that this particular matter is analogous to the circumstances found in *Allright v Canon New Zealand Limited*[2] and the Authority should follow the same approach and authorities relied on by the Court in that case.

[20] These conclusions of the Court apply to the present case:[3]

> *It is not possible to say as a matter of principle that, where the key interest of the party seeking to enforce a restraint is to protect its confidential information, that a restraint of trade will not be reasonable in addition to an express commitment to confidentiality. Inevitably, whether or not that is so will depend on the particular facts of the case. … This is not a case of a particular process or other specific trade secret which a departing employee might be expected to keep confidential without great difficulty. Rather, it is a case where the departing employee, through the importance of his position, has a very extensive knowledge of the employer's business at all levels. That knowledge includes a myriad of detailed information, some of which is confidential and some of which is not but which, in many cases, will be intertwined. That information comprises not only facts but also opinions and plans of possible action.*

[21] Relying, as the Court did in *Canon*, on an earlier decision in *Television New Zealand Limited v Bradley*, I accept AFFCO's submission that there is a real risk of innocent or inadvertent use by Mr Graham of its confidential information, even if he were able to honour a commitment not to deliberately disclose such information.

[22] There is also the difficulty of establishing a breach of confidentiality and its

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[2] Unreported, EC Auckland, AC 47/08, 3 December 2008, Judge Couch.
[3] *Canon* at [27] – [28].

effects in circumstances of this type. On that point the English Court of Appeal expressed the following conclusion in *Littlewoods Organisation Limited v Harris*: [4]

> *It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to provide a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.*

[23] In *Canon*, the former employee has said in correspondence and his affidavit that he was aware of his obligations in respect of confidential information and took them seriously. However the Court found this was not enough to protect from the risk of inadvertent or innocent disclosure of confidential information in which the former employer had a proprietary interest. It issued an interim injunction enforcing a three month restraint.

[24] A distinction might be drawn between the position of the former employee in *Canon*, where the Court described his role of chief financial officer as a very senior position, with Mr Graham's position as a manager which he deposed was "*not part of the company's senior management team*". However, in my analysis, the Court in *Canon* was not identifying the confidential information as proprietary because of the seniority of the position held by the former employee but rather indicating the nature and quality of the information to which he had access through a particular role. That is the relevant inquiry rather than how high or low the former employee is in the hierarchy of the particular business.

[25] In the present case I accept there is an arguable case that Mr Graham had access to a 'myriad' of information about the operations and plans of AFFCO which was of a mixed confidential and non-confidential nature and the restraint is necessary to protect that portion of the information which is truly confidential and in which AFFCO has a legitimate interest in protecting from the risk of disclosure whether deliberate, inadvertent or innocent.

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[4] [1978] 1 All ER 1026 at 1033 per Lord Denning MR.

[26] I do not accept Mr Graham's submission that the strength of that argument is reduced by the suggestion in some case law that it is questionable whether a restraint should be enforced in a situation of redundancy. If that were a real issue, he rather than AFFCO could have sought a declaration from the Authority or the Court. Instead, he and SFFL (as expressed in Mr Winders' affidavit) acted on their view that the restraint was neither reasonable nor enforceable.

[27] It was an approach against which the Employment Court recently cautioned:[5]

> *Ultimately, this Court must take appropriate cognisance of the clear signal given by the Court of Appeal in* Fuel Espresso v Hsieh *([2007] ERNZ 60) that not only are such provisions to be taken seriously by the parties that have entered into them expressly but that they amenable to enforcement by injunction to the extent that they are reasonable and otherwise lawful. Gone are the days, if they ever existed, when an employee could confidently sign up to a restraint and then breach it on the bold expectation that "those things are not worth the paper they are written on".*

Where does the balance of convenience lie?

[28] I find the balance of convenience favours AFFCO for the following reasons.

[29] Firstly, while SFFL has indemnified Mr Graham for any damage he might have to pay to AFFCO in the event of loss from proven breaches of his obligations regarding confidential information, establishing and quantifying such loss is not an easy exercise. There is the 9 May example where he ended up in a meeting with a third party representative while on tour of an SFFL site and where there was discussion about a commercial activity in which AFFCO and SFFL are competitors. Even allowing for the fact that the third party was already a customer of both businesses, and accepting that Mr Graham had not sought or intended to be part of such a meeting, there was a risk of his innocently contributing information which he did not appreciate was confidential to AFFCO but which provided some competitive advantage to SFFL. It is more just that Mr Graham be restrained by injunction for the balance of the restraint period than that AFFCO be required to prove loss and damages in further litigation.

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[5] *Green v Transpacific Industries Group (NZ) Limited* [2011] NZEmpC 6 at [37] per Chief Judge Colgan.

[30] Secondly, Mr Graham is not without resources to see him through the restraint period, or without prospects following it. He was paid in lieu for a month-long period of notice that was still running at the date of this determination. His final pay included redundancy compensation equivalent to a further six weeks salary and six days of holiday pay. And while Mr Winders deposed how useful Mr Graham's work would be to SFFL during the next few months, there was nothing to suggest that it would dispense with his services on a long term basis if he was not free to work for his new employer until 5 August. His right to work and exercise the general knowledge and skills he developed in his role with AFFCO, and from earlier management jobs elsewhere, does not appear to be compromised once the restraint period expires.

[31] Thirdly, I do not accept that the effect on SFFL, as a third party, of not having the benefit of Mr Graham's work until then outweighs the potential detriment to AFFCO and for which AFFCO had contracted with its former employee to avoid. Mr Graham and Mr Winders deposed that an interim injunction would interfere with Mr Graham's ability to participate in a trip to Europe by a team of SFFL managers due to leave on 21 May and return by 30 May. I accept AFFCO's submission that the SFFL trip was likely organised before Mr Graham gave notice to AFFCO on 2 May. That notice brought to an end AFFCO's redundancy consultation process with him and on 5 May he was then given a month's notice of redundancy. At that time Mr Graham and his new employer must have known of the risk that he could be required to work out the notice period which then ran through to 5 June. That would have meant he could not have gone on the SFFL trip in any event. SFFL and Mr Graham also took the view that the restraint would not be enforceable. On both accounts the risk they took has not worked out so well for them and they must bear any detriment from it, for the moment at least.

[32] Fourthly, alternatives proposed by Mr Graham to a 'blanket' restraint, would not adequately protect AFFCO from the identified potential risk of inadvertent disclosure. Mr Graham's affidavit set out several measures that would amount to a modified restraint. For the balance of the restraint period he was willing to limit his activity for SFFL to planning of its new Te Aroha plant (scheduled to open in March 2012), not be involved in the management of the other plants for which he would in

due course have responsibility, and have no dealings with existing AFFCO staff. By letter to AFFCO's chief executive of 6 May Mr Graham had also undertaken not to disclose "*confidential and proprietary information belonging to AFFCO*" of which he was aware although he said he was not clear that he had any such information. He also said he would not deal with anyone on the "*procurement side of the business*" as well as sales customers. While the references to contact with suppliers and staff went beyond the express terms of the restraint in his employment agreement, those proposals do not adequately protect against the possibility that, despite his best efforts, Mr Graham would not be influenced in the views he expressed and decisions he made by the knowledge that he has of AFFCO's business, some of which is confidential information.[6]

What is the overall justice of the case?

[33] For the reasons already outlined above I consider that the overall justice in this case is best served, for the 71 remaining days of the restraint period, by making the order AFFCO seeks enjoining Mr Graham from working for SFFL.

[34] If the matter proceeds to an investigation by the Authority of the substantive issues, AFFCO does have more to do in providing evidence of the confidential information in which it has a proprietary interest lasting the full three month period, given some of the information referred to is 'stale' within a shorter period or is too widely known to be truly confidential. However it has established to the necessary level of arguable case or serious issue that there is some information in which it has proprietary interests and requires protection by interim injunction.

[35] AFFCO has not compromised that by any unnecessary delay in seeking relief, having lodged an application within a few days of the situation with Mr Graham's new employment with SFFL becoming clear.

[36] I need not go as far as accepting AFFCO's submission that Mr Graham has already breached his undertaking not to have any dealings with customers because of the circumstances where he ended up in a meeting with a representative from one of its customers on 9 May. Rather that example supported the proposition that the risk

[6] See *Canon* at [29].

of inadvertent or innocent breaches is real, not fanciful.

Orders

For the reasons given I am satisfied AFFCO should be granted its application for an interim injunction to enforce clause 9.1 of Mr Graham's employment agreement. The order is that until 5 August 2011, or further order of the Authority or the Employment Court, Jason Graham is restrained from having any involvement in the business of Silver Fern Farms Limited without the express prior written consent of AFFCO.

Next steps

[37] The Authority, in discussion with counsel, has reserved dates for an investigation meeting on the substantive issues. I have asked for a further case management conference by telephone to be convened in the next week to discuss whether this should proceed and, if so, necessary arrangements.

Costs

[38] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority