

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

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BETWEEN BAY AUDIOLOGY LIMITED
Applicant

A N D SYLVIA DEN BREEMS
Respondent

AND BETWEEN BAY AUDIOLOGY LIMITED
Applicant

A N D BERNARD MAGER
Respondent

AND BETWEEN SYLVIA DEN BREEMS
Applicant

A N D BAY AUDIOLOGY LIMITED
Respondent

AND BETWEEN BERNARD MAGER
Applicant

A N D BAY AUDIOLOGY LIMITED
Respondent

Member of Authority: Paul Montgomery

Representatives: Doug Alderslade and Marie Wisker Counsel for Bay
Audiology Limited
Graham Malone, Counsel for Den Breems and Mager

Investigation Meeting: 1 and 2 September 2009 at Nelson

Submissions Received: On the day

Determination: 18 May 2010

DETERMINATION OF THE AUTHORITY

Introduction

[1] The matters addressed in this determination began with Bay Audiology (Bay) lodging an application seeking interim relief from alleged breaches of obligations to the company by Mr Mager and Ms den Breems. Later, Mr Mager and Ms den Breems, who are personal partners, then counter-claimed alleging Bay Audiology had constructively dismissed them.

[2] In respect of the interim matter, the Authority granted the relief sought pending the investigation of the substantive issues between the parties. Undertakings were given by Mr Mager and Ms den Breems which became the interim orders of the Authority and an additional interim order was made prevent Mr Mager or Ms den Breems from using any information relating to Bay's clients pending further orders. Their co-operation was appreciated.

[3] The investigation of the substantive issues was promptly scheduled. However, it was delayed as a result of Mr Mager's need to have urgent medical treatment for a condition which had developed unexpectedly. The meeting was deferred and finally took place on 1 and 2 September 2009.

[4] As the matters before the Authority are based on a single factual matrix, the files have been consolidated and the substantive issues dealt with in one investigation and one determination.

The problems

A. Bay's claim

[5] Mr Mager is a qualified Audiologist and his partner Ms den Breems a trained Audiology Assistant. Prior to leaving New Zealand for Australia, the couple had operated a successful audiology practice on the North Shore. The General Manager of Bay at the time these matters arose was Mr Francois Gillain, who had been the couple's Accountant for their North Shore practice.

[6] After some time in Australia the couple returned to New Zealand and settled on a lifestyle property on the outskirts of Nelson. They contacted Mr Gillain enquiring whether Bay could use their experience and after a series of discussions both accepted employment with Bay.

[7] Mr Mager was employed as a Charge Audiologist working mainly in the Richmond Clinic, premises in Motueka and, on occasions, at the Nelson Clinic. He began employment with Bay on 22 January 2008. An individual employment agreement was signed that day. Ms den Breems began her employment with Bay on 21 April 2008 in a Customer Service and Sales role, although her employment agreement was not signed until 1 May 2008. There is a dispute over the role she was to fill as the position description referred to Audiology Assistant.

[8] Ms den Breems' employment was subject to a 90 day trial period which permitted Bay to extend that trial to assess suitability for permanent employment or to dismiss on two weeks' notice. It was also subject to clauses relating to confidentiality, intellectual property and non-competition.

[9] Ms den Breems worked primarily at the Nelson Clinic, but occasionally travelled with her partner to the Richmond and Motueka premises.

[10] Both agreements contained restraints of trade, the terms of those restraints being varied given the different positions held by each of the couple.

[11] Difficulties arose between Bay and Ms den Breems over the role she was to undertake. As a trained Audiology Assistant she was eager to be involved in assisting audiologists and in particular her partner. A welter of emails between various senior employees at Bay and Ms den Breems clearly indicate Ms den Breems' dissatisfaction with the role as set out in what Bay believed was the job description and that she was pressing Bay to provide work in the Assistant's role.

[12] Discussions on the extent to which Bay could accommodate Ms den Breems' aspirations while meeting the employer's objectives in the sales and customer service aspect of its Nelson operation, were still in process when Ms den Breems tendered her resignation on 17 September 2008.

[13] Bay say that following her resignation, Ms den Breems engaged in establishing an audiology practice, Hearing Plus, in breach of her obligations. By its solicitors, Bay sought undertakings and assurances on 25 September 2008 that Ms den Breems would abide by the terms of her agreement, but unsuccessfully. Bay seeks penalties from Ms den Breems and damages.

[14] Mr Mager's terms of employment included an annual salary with, at the discretion of Bay's Directors, an annual clinic performance bonus of \$3,000. These terms also included a 90 day trial period and clauses relating to confidentiality, intellectual property and non-competition.

[15] A debate regarding the structure of the annual bonus for Mr Mager arose. Again, email traffic over a few months indicates he and Mr Gillain engaged in correspondence on this issue. Mr Mager proposed using a bonus system similar to that operated in Australian practices and detailed that to his General Manager.

[16] Mr Gillain was on leave at the time and hence did not reply to that proposal. Having heard nothing from Mr Gillain, Mr Mager resigned his position with the company on 17 September 2008. Bay advised Mr Mager he was not required to attend work for the notice period which, under the agreement, would expire on 17 December 2008. Bay further advised it would write to him and confirm his ongoing obligations to the company under the agreed restraints. Those restraints covered a period of five months and an area within a radius of 10 kilometers of any of the company's premises including any clinic of the company or satellite clinic, commencing on the date of the termination of the employee's employment.

[17] The non-competition clause prohibited Mr Mager from accepting instructions from any of the company's clients comparable to the types of instruction that was within the company's ordinary business to accept; to obtain service from any of the company's suppliers comparable to the types of service it was within the company's ordinary business to obtain; to provide services to any of the company's customers comparable to the types of service that it was within the company's ordinary business to provide; to employ or solicit the services of, or offer employment to, any person who is employed by the company or was employed by the company within the three months preceding the date of termination of the employee's employment, or to endeavour to entice any of the company's customers away from the company.

[18] These prohibitions prevented Mr Mager entering business on his own account, working as a consultant or a contractor or as a partner, agent, employee, trustee, shareholder, member or director of any other person or company either directly or indirectly, without the written consent of Bay.

[19] Bay seeks penalties and damages against Mr Mager in respect of what it alleges are breaches of those obligations.

[20] Both Mr Mager and Ms den Breems deny they have breached their agreements and further say the restraints are not enforceable.

B. Counterclaims

[21] Ms den Breems alleges she was unjustifiably constructively dismissed by reason of a breach by Bay. She says Bay hired her to undertake audiological duties as her primary role but was not permitted to do this work. Further, Ms den Breems says while the company would discuss and address how some such duties could be introduced to her role, it refused to substantially alter the position description and accordingly, Ms den Breems says she had no alternative but to repudiate the agreement.

[22] Ms den Breems also says she intended to extend the 90 day trial period to enable the issues to be resolved but received no substantive response from the company.

[23] She seeks the remedies of compensation for hurt and humiliation and costs.

[24] In response, Bay says it proposed to introduce 3 hours audiological duties per day to Ms den Breems' job description and increase those hours as the Richmond and Motueka practices grew and were able to sustain further input from her. The company denies it is in breach of its obligations to Ms den Breems and declines to offer any remedies.

[25] Mr Mager says he was unjustifiably constructively dismissed from his role due to a breach by Bay of its obligations to him. He says the bonus is a component of his remuneration as a Charge Audiologist and the failure of the company to address his concerns over the bonus issue in a timely way was a serious breach and justified his repudiation of the agreement. He seeks the remedies of compensation for hurt and humiliation and costs.

[26] Bay says there was no breach as the matter was under discussion with Mr Gillain who was unable to respond to Mr Mager as he was overseas at the relevant

time. Further, Bay says Mr Mager's action was precipitous and linked to Ms den Breems' resignation, thus Bay declines to grant the remedies sought.

The issues

[27] To resolve these matters the Authority needs to make findings on the following issues:

- (a) Alleged breaches by Mr Mager and Ms den Breems.
 - Were the restraints in trade in respect of each of the applicants individually reasonable; and
 - Was there consideration of the restraints in the remuneration arrangements of both employees; and
 - Were the geographical boundaries reasonable in all the circumstances; and
 - If Mr Mager or Ms den Breems has individually breached legitimate constraints, to what remedies is Bay entitled?

- (b) Constructive dismissals.
 - Was the company in breach of its implicit or implied obligations to either Mr Mager and Ms den Breems; and
 - If a breach occurred in respect to either, was the breach of such a serious nature as to justify either employee repudiating the agreement; and
 - Were those repudiations reasonably foreseeable to the company at the time the resignations occurred; and
 - If Mr Mager and Ms den Breems are found to have been constructively dismissed, to what remedies are they entitled?

The tests

(a) Restraints

[28] The tests to be applied are whether the restraints are necessary to protect an employee from unfair competition by a former employee; whether the employee receives some consideration for accepting those restraints; whether the scope of the restraints is reasonable; whether each of the former employees was of sufficient seniority to warrant the restraints which applied to each; and if the individual restraints were unreasonable, to what extent should they be modified, if at all.

(b) Constructive dismissals

[29] The initial onus of proof a resignation is in fact a dismissal, lies initially with the one making such a claim. That onus transfers to the former employer only when the behaviour alleged by the employee is established as so serious that no reasonable person would endure the treatment and turns on their heel in repudiating the agreement.

[30] The resigning employee must also establish it was reasonably foreseeable to the employer that failure to address an alleged breach would likely result in resignation.

The investigation meeting

[31] The Authority heard evidence presented for Mr Mager and Ms den Breems by the couple on their own behalf. For the company, evidence was presented by Mr Gillain; Ms Redfern-Daly, the Human Resources Adviser; Ms Anita Kraak, Nelson Audiologist; Mr Simon Melville, Director and Regional Manager of Bay Audiology South Limited, which is a subsidiary of Bay Audiology; Ms Siobhan Bowden, Bay's Operations Manager; Ms Donna Mitchell, Sales Support person for Bay; and Mr Reburn, a client of Bay's Richmond Clinic.

[32] All witnesses presented their evidence openly and honestly when answering questions from the Authority and counsel. In spite of the soured personal relationships between Mr Gillain and Mr Mager and Ms den Breems, the investigation proceeded on a professional footing which does credit to all involved.

[33] I record the Authority's appreciation to all who gave evidence. I also acknowledge the diligent and focused approach to the evidence taken by counsel. This has been a complex matter to manage through its various stages. The Authority appreciates the attention to procedural detail by all counsel involved, but in particular that of Ms Wisker, a younger solicitor in the company of two very experienced and able counsel.

[34] The quality of submissions was very high, accurately isolating the key issues, relevant case law and clearly presented. My sincere thanks for those efforts which have been of great assistance in preparing this determination.

Discussion and analysis

(a) Constructive dismissals

(i) Ms den Breems

[35] Ms den Breems' evidence is that she was offered a role as an Audiology Assistant by Mr Gillain. The evidence of Mr Gillain is that the role was that of Client Services and Sales, and was also the clear understanding of Ms Mitchell.

[36] Ms Mitchell told the Authority that she is the person responsible for supporting Bay's administration staff throughout the South Island. This witness said *[The] job description did not include any clinical duties*. Ms Mitchell also concurred with evidence given by Ms Siobhan Bowden, Mr Melville and Ms Redfern-Daly that consistent with the company's support for personal development, all were supportive of Ms den Breems' wish to take on more clinical work. She also said *However, we were concerned that she also fulfilled the requirements of the role for which she had been employed. After several discussions and meetings, we agreed Ms den Breems would do three hours clinical work per day assisting Ms Clark in the Nelson Clinic*".

[37] There is a serious issue over which job description of two was given to Ms den Breems on 1 May 2008. Clearly there are two, one for Client Service and Sales, the other for Audiological Assistant. In considering the evidence of witnesses at the hearing, I reject any suggestion Ms den Breems conjured up the description for Audiological Assistant. The business cards provided to her carried the title of *Audiological Assistant* which is consistent with her evidence that she had accepted that role with Bay.

[38] Given she was placed in a service and sales role by the company, Ms den Breems was entitled to attempt to challenge Bay's insistence that that was her role and in the light of its resistance to offering her anything more than 3 hours per day in audiological services and the balance in sales or client services, I find she was entitled to repudiate the agreement. I accept the honesty of the company's witnesses who denied they knew how the confusion arose, but in the circumstances, the evidence of Ms den Breems needs to stand.

[39] I also find, in the light of the email sequence regarding Ms den Breems' pressing for the audiological role, the company ought to have foreseen the possibility of her resigning.

[40] Ms den Breems was unjustifiably dismissed and is entitled to compensation for hurt and humiliation.

(ii) Mr Mager

[41] The issue of Mr Mager's claim is that of the bonus payment. Mr Mager signed an agreement allowing for a discretionary annual bonus of \$3,000. Subsequent to his signing the agreement he sought a variation to the initially agreed bonus payment. I say *variation* because the initial agreement was for \$3,000 per annum.

[42] Mr Mager, familiar with an alternative bonus scheme adopted in the industry in Australia, proposed a scheme different to that to which he had initially agreed. He put that proposal to Mr Gillain. There is no evidence Mr Gillain rejected Mr Mager's proposal out of hand. Mr Mager resigned his position with Bay before Mr Gillain replied regarding the proposal.

[43] Essentially, Mr Mager was seeking a variation to the original agreement he signed with Bay. He was entitled to seek such a variation, which needed to be agreed with Bay. That agreement was not denied but, due to Mr Gillain's absence, was unable to be considered let alone agreed.

[44] For whatever reason, Mr Mager no doubt frustrated by the delay, resigned before the negotiations in train could be concluded. In such a setting his claim of constructive dismissal falters.

(b) Breaches of employment agreement

(i) Ms den Breems

[45] Under the terms of her employment agreement, Ms den Breems was bound by restraints within the period of working out her notice. The company said she was also bound for a further period of six months within the South Island not to directly or indirectly or in any role work with any private audiology practice competing with Bay. Further, for a period of 12 months Ms den Breems was prohibited on any ground or in any role to employ or solicit the services or offer employment to any person employed by Bay or who was employed by Bay within the three months preceding the date of resignation, or endeavouring to entice any of the company's customers away.

[46] On the evidence before the Authority, the agreement between Ms den Breems and Bay was dated 1 May 2008. However, Ms den Breems had commenced her employment on 21 April 2008. Her evidence was no restraints were proposed nor discussed in the course of interviews and discussions regarding her employment and she commenced employment without knowledge that restraints applied to her.

[47] Mr Malone submitted there was no consideration in the original arrangements when Ms den Breems began work and also the inclusion of restraints in the written agreement constitutes an unlawful variation as Ms den Breems had never agreed to their inclusion. Further, counsel submits Ms den Breems' position with Bay was far from that of a senior role and the restraints are manifestly unreasonable and unnecessary. Mr Malone also submits this issue of restraints entitled Ms den Breems to repudiate the agreement.

[48] I accept, in spite of para.23.4 of her employment agreement, Ms den Breems was not aware of the restraint provisions at the time she was employed nor was she offered any consideration of them later. In her case I find the restraints are invalid on the basis of their longevity and South Island exclusion.

[49] I disagree with the submission that Ms den Breems' resignation arose from the restraints, but rather from the disagreement in respect of her aspirations to work as a full Audiological Assistant.

[50] That, however, is not the end of the matter. In the course of working out her notice on *garden leave* Ms den Breems was still under the obligations of fidelity to her employer until the expiry of the notice on 1 October 2008 under the trial period notice arrangements.

[51] In the course of the period 17 September to 1 October 2008 Ms den Breems clearly undertook tasks regarding the establishment of Hearing Plus. The company was incorporated on 23 September 2008 and other arrangements made to facilitate its commencing to trade were made by Ms den Breems during that period.

[52] The making of these arrangements breached her obligations of fidelity to Bay and Bay is entitled to a penalty for the breach on the part of Ms den Breems covering this period.

(ii) Mr Mager

[53] The restraint provisions set out in clause 24 of Mr Mager's employment agreement are referred to above. Those provisions are more restrictive than those applying to Ms den Breems and are so due to the senior role with Bay and his having more close involvement with clients and thus the opportunity to gain and retain their confidence.

[54] Considering the evidence and the submissions of counsel, it seems the non-competition restriction of five months and 10 kilometer radius to Bay's Clinics in the Nelson region was reasonable. While Ms den Breems was faced with a period of six months within the South Island, Mr Mager's agreement specifies no geographical perimeter in a non-competition setting. It applied to any location anywhere.

[55] Any attempt by Bay to enforce these restrictions outside Nelson/Marlborough would have inevitably failed. Mr Mager, apart from the North Shore some years ago, had not undertaken his profession apart from Bay and would have been unknown to the populations outside Nelson, Marlborough and the North Shore.

[56] The issue here is he accepted involvement with Hearing Plus in Richmond and Motueka, both of which were within a 10 kilometer radius of Bay's existing clinics. I find Mr Mager in breach of his obligations from 17 September 2008 until his undertakings were given following the interim hearing on this matter.

[57] There has been an objection to the placing of both Mr Mager and Ms den Breems on garden leave for the period of their respective periods of notice. While acknowledging consultation is desirable, clause 11.2 provides the right of the employer to require an employee to work from home or undertake reduced or alternative duties consistent with the company's normal operations during the notice period.

(c) Mr Mager's bonus

[58] It is clear from the employment agreement that Mr Mager is entitled to an annual bonus as part of the consideration for his agreement to the restraints. That bonus has not been paid and while I accept Mr Mager was not employed by Bay for a 12 month period and the bonus is paid on an annualised basis, I think it just to direct Bay to pro rata Mr Mager's entitlement to a bonus for the period during which he was employed by Bay.

Findings

[59] The Authority makes the following findings:

Ms den Breems

- Ms den Breems was constructively dismissed and is entitled to compensation for hurt and humiliation.
- Ms den Breems' restraints in trade are invalid and thus unenforceable.
- Ms den Breems is in breach of her obligations of loyalty and fidelity from 17 September to 1 October 2008 and Bay is entitled to a penalty in respect of this breach.

Mr Mager

- Mr Mager was not constructively dismissed.
- Mr Mager is in breach of his obligations to Bay from 17 September until the date on which he gave undertakings to the company following the interim hearing.

- Bay is entitled to a penalty only for that period as the date on which the restraints under the agreement has now expired.

Bay Audiology

- Bay was entitled to place both Ms den Breems and Mr Mager on *garden leave* for the respective periods of notice. Clause 11.2 of the respective individual employment agreements establish the company's right to do so.
- Bay is to pay Mr Mager that portion of his bonus to which he is entitled on a pro rata basis, under the terms of his employment.

Directions of the Authority

[60] As is clear from the above, this has been a somewhat convoluted matter. The parties are directed to mediation at the earliest possible date to agree the issues of penalties and payments based on the Authority's findings.

[61] In the event agreement is not achieved, leave is reserved for either party to return to the Authority to establish respective financial liabilities.

Costs

[62] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority