IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 283/08
5129424

	BETWEEN	FLORENTINES PATISSERIE Applicant
	AND	MARTIN BENNETT Respondent

Member of Authority:	Vicki Campbell
Representatives:	Kim Stretton for Applicant Darryl Andrews for Respondent
Investigation Meeting	4 August 2008 at Tauranga
Determination:	8 August 2008

DETERMINATION OF THE AUTHORITY

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[1] Florentines Patisserie (Florentines) has applied to the Authority for a compliance order with a non-solicitation clause contained within the written employment agreement between the parties and which includes a restraint on Mr Bennett, a former employee of Florentines, from working in product development for Melba Foods until 31 August 2008.

[2] In an additional document lodged in the Authority on 10 July 2008 Florentines claims Mr Bennett was accessing trade secrets with regard to manufacturing product on behalf of his new employer.

[3] Florentine claims Mr Bennett approached a supplier of the Florentines and accessed a unique product, developed for and supplied to Florentines by Bakel Oils. The Applicant claims that the unique mix used to create the product had been formulated following trials by the Applicant's food technologists.

[4] Two working days before the Investigation Meeting the Applicant filed an amended statement of problem. The amended application related to remedies and an

additional claim against the Respondent for a breach of the employment agreement with regard to notice.

[5] The issues for determination are:

- Whether the restraint is reasonable so as to be enforceable;
- Whether Mr Bennett has breached the confidentiality clause of the employment agreement;
- Whether any action lies against Mr Bennett due to the notice provided to Florentines with regard to ending the employment relationship.

Background

[6] Florentines is a company which manufactures and markets premium frozen cakes and desserts for the food-service and retail sectors throughout Australasia. Mr Bennett commenced employment with Florentines in 2006. Mr Bennett signed a written employment agreement prior to commencing his employment. The employment agreement contains confidentiality and non-solicitation clauses.

[7] On 31 August 2007 Mr Bennett resigned from his employment. For the ensuing 9 months he bought a business which he then on sold and travelled. In May 2007 Mr Bennett entered into an employment relationship with Melba Foods (Melba). Melba also manufactures a range of frozen desserts for the food-service and retail sectors in Australasia.

[8] It was common ground that not long after he commenced his employment with Melba, Mr Bennett contacted Florentines and advised the company that he had accepted a job with Melba. It was as a result of that disclosure that this application is now before the Authority.

Employment Agreement

[9] The parties were subject to a written employment agreement which contains the following relevant provisions (verbatim):

3. CONFIDENTIALITY

3.1 It is a fundamental condition of this agreement that the employee shall not take any action, or disclose any information including recipes and procedures to another person which would cause harm to the employer's business.

20. NON SOLICITATION / COMPETITION

20.1 In order to protect Florentines proprietary rights and in recognition of Florentines advanced technology, including various trade secrets, a restraint applies to the employee. The employment offer and paid remuneration is compensation for the following :

(a) The employee shall not during his/her employment or for a period of twelve months after ceasing employment set up business, or be directly or indirectly involved (whether as an employee, independent contractor, shareholder, director, consultant, partner or any other capacity) in a business which manufactures and sells frozen cakes or desserts, or frozen sweet pastry desserts and who is deemed in competition with Florentines within New Zealand.

(b) During employment and for a period of 12 months following termination, the employee must not solicitor or endeavour to entice away or encourage any other person to solicit or endeavour to entice away any person, firm, company or other organization who is at the date of termination of employment or who is during the proceeding six months a customer or client of the employer or any person who was an employee of the employer at the date of termination of employment.

17. TERMINATION

17.1 Four week's notice of termination of employment shall be given by either party or four week's wages shall be paid or forfeited in lieu of such notice. This shall not prevent the instant termination of employment for serious misconduct. The employer reserves the right to decide the date of termination should the notice by the employee extend beyond four weeks.

Is the restraint reasonable so as to be enforceable?

[10] The law relating to restraints of trade is well settled (*Brown v Brown* [1981] NZLR 484, *Bates v Gates* (1986) 1 NZELC 95,269; *Gallagher Group Limited v Walley* [1999] 1 ERNZ 490; *Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 ERNZ 46).

[11] The general rule is that restraints of trade are contrary to public policy and therefore are void. As an exception to this a restraint will be enforced if it is no wider than the circumstances of the case reasonably requires. Reasonableness is to be assessed in the circumstances of each case according to the legitimate interests of the parties to the restraint and also the wider public interest.

[12] Subsidiary legal principles are:

- A restraint will only be enforceable to the extent that it is required to protect a proprietary interest;

- The reasonableness of a restraint is to be measured at the time it was entered into, although future developments reasonably within the contemplation of the parties at that time may also be taken into account;

- The scope of the restraint in time and location is relevant in determining reasonableness;

- The relative bargaining power of the employer and employee is also relevant;

- The nature of the employer's business and of the relationship between the employee and the customers or clients of that business, are both important when considering whether a restraint is reasonably necessary.

- A restraint is generally unreasonable if its injurious effect on the employee is greater than its benefit to the employer;

- For a restraint to be valid and enforceable the employer must give valuable consideration to the employee in return for it.

[13] Mr Bennett says the restraint provisions are not enforceable because there is no proprietary interest to be protected, the provisions are too broad with regard to time and there was no consideration.

Proprietary Interest

[14] I find that Florentines does have a proprietary interest to protect by the restraint provisions. That interest is in respect of its recipes and its processes with regard to the method or process used to make the recipes.

[15] It was common ground that Mr Bennett had an overseeing role with regard to the development of new products and the testing of new recipes and methods. By way of example, there were many trials undertaken with regard to the use of a new margarine in Florentine's pastries. It was through these trials the correct balance and method was established. Mr Bennett had an overseeing role throughout that trial process and was extremely knowledgeable about the recipes and the methods or processes used to create the new products.

[16] It is reasonable I find for Florentines to have a short period to protect and maintain the position it holds in the market because of the features of its products in which it has a proprietary interest.

Scope of the restraint

[17] The restraint covers the whole of New Zealand but is restricted to businesses which manufactures and sell frozen cakes or desserts, or frozen sweet pastry desserts and who is deemed in competition with Florentines within New Zealand. I am satisfied that the geographic scope of the restraint is reasonable given that the company has customers New Zealand wide and Mr Bennett would have been familiar with Florentine's customers and the products each would purchase. The limitation on the types of businesses adds to the unreasonableness.

[18] I find, also that the duration of the 12 months of the restraint is reasonable. Mr Greg Knights, a Director of Florentines, told me the period of 12 months is necessary as it takes a long time for the planning, trialling and production stage to be completed before a product is manufactured.

[19] Mr Bennett was a senior employee of Florentines. He was directly involved in the management of trials for new products and methods including the trialling of new ingredients, he also had responsibility for managing the processes used to produce products and had some input into the marketing of the products.

Public Interest

[20] The public interest is concerned with balancing the employer's reasonable interests with those of the employee. Mr Bennett says the imbalance of power inherent in the employment relationship means a potential employee is unlikely to feel confident about challenging the terms of the job out of concern he/she will not be given the job.

[21] I find there was no significant imbalance between Florentines and Mr Bennett when the restraint was stipulated as a term of employment. There was no evidence that Mr Bennett accepted the employment at Florentines out of desperation to have the job itself.

[22] Further, Mr Bennett was provided with a copy of the agreement and had ample opportunity to review the agreement and to even seek legal advice about the terms contained within the agreement. Mr Bennett's oral evidence is that he was happy with the agreement, he signed it and returned it to Mr Knight.

Consideration

[23] The Court of Appeal held, in its recent decision *Fuel Expresso Ltd v Hsieh* [2007] NZCA 58 at paragraph 18:

> What we are dealing with here is the initial (and only) agreement of the parties. The traditional definition of consideration requires that there be "something of value" which must be given, and that consideration is either some detriment to the promise or some benefit to the promisor. But the law does not enquire into the adequacy of the consideration, nor, as the Judge seems to have thought, does it require an extra "premium" for the restraint of trade clause. It is also a very well settled principle of contract law that even mutual promises can be consideration for each other.

[24] Mr Bennett was aware of the restraint provisions before he accepted the offer of employment. He had an opportunity to take advice about them.

[25] Like any other contract, an employment agreement is a collection of mutual promises made between the parties. I find it can be reasonably inferred that Mr Bennett received valuable and legal consideration for promising to be bound by the restraint. Further, the parties agreed in the employment agreement that the offer and paid remuneration was consideration for the restraint.

Conclusion

[26] I find that the restraint provisions were reasonable at the time they were entered into. Florentines had a proprietary interest to properly protect with the provisions which in scope were not greater than required to give that protection. I find that in his new role with Melba there is some risk that Mr Bennett might disclose, even inadvertently or indirectly, information that Florentines is entitled to protect for a limited period.

Mr Bennett is ordered to comply with the written employment agreement and is to cease working in product development for Melba Foods until 31 August 2008.

Did Mr Bennett breach the confidentiality clause of the employment agreement;

[27] Florentines' claim Mr Bennett accessed trade secrets with regard to manufacturing product on behalf of his new employer. This claim is in relation to a claim by Florentine that Mr Bennett approached a supplier of Florentines and accessed a unique product, developed for and supplied to Florentines by Bakel Oils. The Applicant claims that the unique mix used to create the product had been formulated following trials by the Applicant's food technologists.

[28] I have interviewed Mr Roger Pickering, the Food Service Sales Manager of Bakels Edible Oils (Bakels). I accept his evidence that the product was, by the time Melba Foods was enquiring about it, an "off the shelf" product. I am also satisfied the product was not a unique product developed for Florentines. There is no evidence to support Florentine's claims that the product had been formulated specifically for Florentines.

[29] The product in question is a margarine product. Initially it was developed for Oporto in Australia. Even while the product was being made and packaged for Oporto, Bakels were selling it in New Zealand in a plain carton as an industrial margarine. In 2006 the product was no longer made and packaged for Oporto but Bakels have continued to produce it as a standard industrial margarine. It was this standard product, which Melba received a sample of in July 2008.

[30] Mr Bennett says Melba made enquiries about the product in April 2008 which is before he had any contact with Melba. After interviewing Mr Pickering, I am satisfied it is more likely than not that during a Food BOP meeting in April 2008 Mr Pickering and Mr Parker from Melba, had a discussion which may have included the margarine product in question.

[31] I am also satisfied that after Mr Bennett commenced working with Melba, Mr Parker attended a plant tour of Bakels where the margarine product was discussed. It was Mr Pickering's evidence, which I accept, that during the tour Mr Pickering offered to send Mr Parker a sample of the margarine. When the sample product was delivered to Melba, Mr Bennett was working for Melba and took possession of the product.

[32] Since receiving the sample product, Melba has not placed any orders for the product.

[33] I am satisfied on the balance of probabilities that it is more likely than not that Mr Parker was aware that the industrial margarine product was available from Bakels prior to Mr Bennett commencing work with Melba. The product itself is unlabelled. Mr Bennett was aware it was originally made for Oporto and it was common ground that during his employment at Florentines the product was referred to as Oporto margarine. It is likely therefore, that if there was any discussion with Mr Bennett about the product he would have referred to it as Oporto. However, referring to a product in such a way does not constitute a breach of the confidentiality clause of the employment agreement.

[34] Mr Pickering was clear in his evidence that Bakels were working hard to extend their customer base. I am satisfied that Bakels saw a potential customer in Melba Foods, thus the offer of a plant tour. Further, given that Florentines, also a customer of Bakels, used the industrial margarine, it seems logical that Mr Pickering would have considered the product as a useful product for Melba.

[35] I am not satisfied Mr Bennett has breached the confidentiality provisions of the employment agreement he had with Florentines and this aspect of Florentines application fails.

Does any action lies against Mr Bennett due to the notice provided to Florentines with regard to ending the employment relationship?

[36] Florentines' seek payment for the breach of the employment agreement with regard to notice. The employment agreement requires four weeks notice by either party. Where the required notice is not given four weeks wages shall be paid or forfeited in lieu of the notice.

[37] On 31 August 2007 Mr Bennett resigned from his employment with Florentines without notice. Mr Bennett cited stress from his job as the main reason for his resignation although he also acknowledged that his mother's condition was becoming much worse and that this also contributed to his decision.

[38] On 20 September 2007 Mr Barry Knight, Business Manager for Florentines wrote to Mr Bennett and stated:

> …
> We were so disappointed to receive your letter of resignation from your position as Operations Manager for Florentines. However, we do understand your reasons and wish you all the very best for whatever you decide to do in the future.

> We would like to record that we really do appreciate the work that you did for us while you were here, Martin. We recognise that your job was at times very demanding but you always carried out your duties diligently and without complaint. Your product development skills will be missed and the efficiencies and cost savings that you introduced to our production process took us to a new level.
> …
> We are sorry to hear that your mothers condition has deteriorated. We do hope that this is not placing too much stress on you.

[39] At the investigation meeting Mr Bennett told me he had discussed leaving Florentines in July, before he left to commence a period of annual leave. Mr Bennett says Mr Greg Knight persuaded him to stay and complete work on a new marketing brochure for which he was arranging photographs. Mr Bennett's uncontested evidence is that he agreed to stay to complete the brochure.

[40] I am satisfied from the tone and content of the 20 September letter from Mr Barry Knight, that Mr Bennett's resignation on 31 August did not come as a surprise. Neither does it raise any issue with regard to the lack of notice. Further the delay in raising this issue is significant, being 11 months after Mr Bennett's resignation.

[41] Considering objectively the circumstances of this case I am satisfied that following Mr Bennetts resignation, Florentines conduct amounted to a waiver of the requirement on Mr Bennett to provide four weeks notice. Florentines application in this regard fails.

Penalty

[42] Florentines seek payment of a penalty against Mr Bennett for breaching his employment agreement when he undertook work for Melba Foods in contravention of the non-solicitation clause of the employment agreement.

[43] Mr Bennett was fully aware of the implications of the restraint contained within the non-solicitation clause of his employment agreement. He had been required, during his employment with Florentines to, explain the restraint to new employees and in particular its relationship to a prohibition on working for Melba during the period of the restraint.

[44] However, Mr Bennett advised Florentines early on in his employment with Melba that he was working for Melba and made assurances that he would not be passing on confidential information. It was only because of Mr Bennett's honesty in that Florentines became aware he was working for Melba inside the restraint period.

[45] In those circumstances I exercise the discretion to decline to award a penalty.

Costs

[46] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject with 28 days of the date of this determination and the matter will be determined. In attempting to resolve the question the parties should be aware that given all the circumstances of this case I would be minded that this might be a case where costs should lie where they fall. However, submissions made will be carefully considered if the parties are unable to resolve the matter between them.

Vicki Campbell
Member of Employment Relations Authority