

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 107/07  
5096296

BETWEEN HEARING PROFESSIONALS  
MARLBOROUGH LIMITED  
Applicant

AND VERA SETZ  
Respondent

Member of Authority: Helen Doyle

Representatives: Simon England, Counsel for Applicant  
Brian Fletcher, Counsel for Respondent

Investigation Meeting: Friday 24 August 2007 at Blenheim

Determination: 31 August 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Hearing Professionals Marlborough Limited (Hearing Professionals Marlborough) seeks from the Authority an interim injunction enforcing the restraint of trade provision in the respondent's Employment Agreement.

[2] Hearing Professionals Marlborough also sought an interim injunction on a quia timet basis enforcing the confidentiality provision in the respondent's Employment Agreement. At the investigation meeting Mr England accepted the respondent's affidavit evidence that she is aware of the confidentiality provisions and has not, and will not, breach that provision. Hearing Professionals Marlborough therefore does not seek an interim order in respect to that matter.

[3] The respondent, Vera Setz, does not accept that she is in breach of a restraint of trade provision or that such restraint of trade provision is enforceable.

[4] The differences between the parties aside from the restraint of trade are of a commercial nature. Accordingly the parties agreed prior to the proceedings being lodged with the Employment Relations Authority to a commercial mediator. The mediator was unable to attend at the appointed time and place because of an emergency at Blenheim Airport, but discussions still took place that day between the parties and their legal advisers in the mediator's absence.

[5] I indicated to the parties that I would proceed to deal with the application and discuss any issues with respect to mediation and whether it would be of assistance following determination of this matter.

[6] I dealt with the application on the basis of the affidavit evidence provided and with the assistance of helpful submissions from Mr England and Mr Fletcher. An affidavit in support of the application for an interim injunction and an affidavit by way of reply was provided by a director of Hearing Professionals Marlborough, John Coppola. Ms Setz provided an affidavit in opposition to the application for an interim injunction.

### **Jurisdiction**

[7] The jurisdiction of the Authority to make orders for interlocutory relief to enforce restraints of trade has been confirmed by the Full Court of the Employment Court in *Credit Consultants Debt Services NZ Ltd v Wilson* 5/4/07 WC 12A/07.

### **The Facts**

[8] I set out the relevant background facts in this case. The facts set out are not disputed.

[9] Hearing Professionals Marlborough is a duly incorporated company having its registered office in Nelson. It carries on the business as a supplier of audiology diagnostic and rehabilitative services and supplies those services to members of the public from its treatment rooms at 54 Scott Street, Blenheim.

[10] Ms Setz is a registered audiologist who resides in Blenheim.

[11] For the period 1 July 2004 to 11 May 2007 Ms Setz was an employee of Hearing Professionals Marlborough. Ms Setz is also a 49% shareholder in Hearing Professionals Marlborough. Issues relating to that shareholding remain unresolved.

Prior to becoming an employee of Hearing Professionals Marlborough, Ms Setz was an employee of Hearing Professionals Limited which prior to July 2004 operated the applicant's Blenheim business.

[12] It was agreed that Ms Setz, in recognition of her work to date, would be provided with either an increase in salary or a share in the Blenheim business in 2004. Ms Setz chose a share in the Blenheim business of Hearing Professionals and it was agreed that she would be trained to take a more active role in the management of that business.

[13] It was agreed that a new company, the applicant company, Hearing Professionals Marlborough, would be formed and that the Blenheim portion of Hearing Professionals Limited business would be transferred to the applicant company. It was further agreed that the directors of Hearing Professionals Limited would also be appointed as directors of the applicant company and the shareholders of Hearing Professionals Limited would hold 51% of the shares of the applicant company and Ms Setz would hold the remaining 49% of the shares.

[14] It was further agreed that Ms Setz would be employed by the applicant, on similar terms to her employment with Hearing Professionals Limited, but as both an audiologist and practice manager.

[15] The terms and conditions of Ms Setz's employment with the applicant company were recorded in a written individual Employment Agreement dated 18 July 2004. The Employment Agreement included at clause 16 a restraint of trade provision as follows:

*16.1 The employee shall not at any time during the terms of this agreement or for a period of one (1) year after the termination of this agreement for any reason other than unjustifiable dismissal or redundancy, carry on or be connected, engaged or interested either directly or indirectly or alone or with any person or persons and whether as principal, partner, agent, Director, shareholder, employee or otherwise in any audiology business which is carried on within a radius of five (5) kilometres of the business premises of the employer wheresoever situated, without the express consent of the employer.*

[16] In early November 2006 Bay Audiology Limited, which is an audiology business, opened a full-time clinic in Blenheim which it operated from rooms located

at 139 High Street, Blenheim. These rooms are less than a kilometre from the applicant's rooms at 54 Scott Street, Blenheim.

[17] Some negotiations took place between Hearing Professionals Marlborough and Ms Setz in late 2006 and early 2007 with respect to her shares in the applicant company and possible consequential termination of her employment.

[18] On 19 March 2007 Ms Setz verbally advised of her intention to resign from her employment with Hearing Professionals Marlborough.

[19] Hearing Professionals Marlborough requested Ms Setz confirm her resignation in writing. On 10 April 2007 the respondent confirmed her resignation by email and nominated a final termination date of Friday 11 May 2007.

[20] Hearing Professionals Marlborough wrote to Ms Setz in a letter dated 16 May 2007 confirming that there was an expectation that the restraint of trade provision in the Employment Agreement with Ms Setz would be honoured subject only to any subsequent mutual agreement varying the obligation from that provision being reached between the parties.

[21] Ms Setz went to work for Bay Audiology Limited after 11 May 2007. Hearing Professionals Marlborough became aware of a full page colour advertisement in the local Blenheim newspaper, the Blenheim Sun, on Wednesday 16 May 2007 advising that Ms Setz was joining the team at Bay Audiology Limited.

[22] Similar colour advertisements were distributed in a pamphlet mail drop throughout Blenheim and also advertised in the Blenheim Sun on Wednesday 27 June 2007 and in the Nelson newspaper, the Nelson Mail, on 28 June 2007. The latter two advertisements specifically refer to Ms Setz prior employment with Hearing Professionals Marlborough.

[23] Correspondence took place between the applicant's and respondent's solicitors. The respondent requested Ms Setz to cease work with Bay Audiology Limited.

[24] Mr Coppola in his affidavit said that 124 patients had requested transfer of their files for the period 11 May 2007 to 31 July 2007 to Bay Audiology Limited and he expected a further 25 patients to request to transfer their files prior to 31 August

2007. It is not disputed by Ms Setz that the number of patient files transferred to her new employer is probably correct.

[25] The application for an interim injunction was lodged with the Authority on 9 August 2007. An undertaking as to damages was lodged with the application.

### **The application for an interim injunction**

[26] An injunction requires the exercise of a discretion. It is recognised that the answer to an interim injunction is not in the rigid application of a formula but there are two broad inquiries: first whether there is a serious question to be tried, and secondly, where the balance of convenience lies. The final question requires the Authority to stand back and ascertain where the overall justice lies –*American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and *Klissers Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd* [1985] 2NZLR 129 (CA).

### **Serious question to be tried**

[27] Mr Fletcher submits that the application by Hearing Professionals Marlborough is not genuinely directed at enforcing the restraint of trade provision but is being used to threaten Ms Setz in regard to other proceedings by way of arbitration as to the value of the company and shares which the majority of shareholders wish to purchase from her.

[28] Mr Fletcher also submits that Hearing Professionals Marlborough are not taking on any new patients and the only service offered is that of locums from Hearing Professionals Limited in Nelson finishing off work commenced by Ms Setz before 11 May 2007. He submits that calls into question whether there are any proprietary interests which remain to be protected.

[29] It is strongly arguable on the untested evidence that Ms Setz employment with Bay Audiology Limited in rooms less than one kilometre from Hearing Professionals Marlborough is in breach of the restraint of trade provision in her employment agreement and that there has been damage caused as a result. It is arguable therefore that that is the motive for the proceedings.

[30] A restraint of trade provision is prima facie void unless it is reasonable. That reasonableness is usually assessed at the time the employment agreement containing

the restraint of trade provision was entered into. It is arguable on the untested evidence that the restraint of trade in light of the history of Ms Setz's employment, the fact that she was the primary audiologist in the Blenheim office, had a manager role and held a 49% shareholding in the applicant company was reasonable and that there was a proprietary interest in the goodwill of the business to be protected.

[31] Mr Fletcher's submissions are correct in that if there was no longer any existing client base in Hearing Professionals Marlborough then there could be no justification in enforcing a restraint of trade provisions. Hearing Professionals Marlborough are not currently taking on new patients but it is arguable from the untested affidavit evidence that there is still an existing patient base and therefore a proprietary interest to be protected in terms of remaining goodwill in the applicant's business.

[32] The reasonableness of the duration of and area covered by the restraint and whether there should be modification are arguable together with causation of damage and any issues of delay at a substantive investigation meeting.

[33] In conclusion I find that there are serious and arguable issues to be tried between Hearing Professionals Marlborough Limited and Vera Setz.

### **Balance of Convenience**

[34] The Authority is required to look at the relevant detriment or injury that the parties will incur as a result of the interim injunction being granted or not in terms of considering the balance of convenience.

[34] Mr Fletcher submits that there is an alternative remedy available to the parties in this case by way of damages.

[35] Mr Coppola is able to assess in paragraph 67 of his first affidavit that the immediate financial damage to Hearing Professionals Marlborough as a result of transfer of patient files, in terms of the patients next scheduled appointment, is in the vicinity of \$49,128.61 through to 31 August 2007. He also says that it is impossible to accurately assess the future value of any given patient and the long term damage to the business in paragraph 66 of his first affidavit.

[36] In this case there is an ongoing loss of patients from the applicant company to Bay Audiology Limited. The long term damage is not able to be assessed and

measured accurately. I do not find damages to be an adequate alternative remedy in the circumstances.

[37] There was a delay in lodging the proceedings. The reasons for that are in dispute. I accept that there was some attempt by the parties to resolve outstanding issues between the parties. I do not consider however that the delay was prejudicial to Ms Setz and that factor does not favour her.

[38] It is important that Ms Setz not be prevented or restricted unnecessarily from earning a living and such a factor could tilt the balance of convenience in her favour. In paragraph 27 though of her evidence Ms Setz states that she is taking maternity leave for at least three months from the end of September 2007 and will not be personally providing any service through Bay Audiology Limited. Ms Setz, if the application is granted, would be prevented from working for a period of about four weeks prior to that leave. I indicated to the parties that a date for a substantive meeting would be available in late October 2007 so a date will be available within the period of leave for the substantive matter. The applicant is unable to accurately assess its long term damages but if a final injunction was not granted damages could be easily calculated in terms of the undertaking for a period of four weeks salary for Ms Setz. That is a factor that favours the applicant in terms of the balance of convenience.

[39] If the application is not granted then the respondent's business could be seriously diminished. I have carefully considered Mr Fletcher's argument in light of Ms Setz's anticipated leave at the end of September 2007 with respect to the balance of convenience. I agree with Mr Fletcher's submission that in terms of status quo the applicant cannot be returned to the position it was in May 2007 before Ms Setz resigned. I conclude however that the balance of convenience favours the applicant in terms of the very real potential of further or complete loss of the existing patient base even within that relatively short time period.

[40] I find that weighing up all matters the balance of convenience favours Hearing Professionals Marlborough Limited.

### **Overall Justice**

[41] I have considered in standing back and taking a broad view of all the issues the overall justice of the case requires that an interim injunction be granted.

**Determination**

[42] The application for an interim injunction to enforce the restraint of trade is granted.

**Orders**

[43] Until further order of the Employment Relations Authority Vera Setz shall not in terms of clause 16 of her Individual Employment Agreement with Hearing Professionals Marlborough Limited for a period of one year after 11 May 2007 carry on or be connected, engaged or interested either directly or indirectly or alone or with any person or persons and whether as principal, partner, agent, Director, shareholder, employee or otherwise in any audiology business which is carried on within a radius of five (5) kilometres of 54 Scott Street, Blenheim, without the express consent of Hearing Professionals Marlborough Limited.

[44] In terms of that order Vera Setz is to cease work at Bay Audiology Limited 139 High Street Blenheim, forthwith, until further order of the Employment Relations Authority.

**[45] Telephone Conference**

[46] A support officer will contact Mr England and Mr Fletcher during the week commencing 3 September 2007 to make an arrangement for a telephone conference to discuss mediation and a date for a substantive investigation meeting.

Helen Doyle  
Member of the Employment Relations Authority