IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 240
5444588

	BETWEEN	ISO LIMITED Applicant
	A N D	JASON KENA First Respondent
	A N D	INDEPENDENT STEVEDORING LIMITED Second Respondent
Member of Authority:	James Crichton	
Representatives:	Daniel Erickson, Counsel for Applicant Matthew McGoldrick, Counsel for First Respondent Shima Grice, Counsel for Second Respondent	
Investigation Meeting:	29 April 2014 at Auckland	
Date of Determination:	17 June 2014	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (ISO) alleges that the first respondent (Mr Kena) is in breach of his employment agreement with ISO in that he has breached the restraint of trade provision in that agreement and in consequence, interim orders are sought restraining Mr Kena from breaching that agreement pending the resolution of the substantive matter together with permanent injunctions, penalties and damages because of the alleged breach or breaches.

[2] In addition, ISO seeks similar orders against the second respondent (Independent Stevedoring) for allegedly aiding and abetting the purported breach of Mr Kena's employment agreement.

[3] Mr Kena contends that the restraint of trade provisions on which ISO relies are invalid and unenforceable and accordingly no remedies are appropriate.

[4] Independent Stevedoring denies that it has aided and abetted Mr Kena in breaching his employment agreement with ISO.

[5] Both ISO and Independent Stevedoring are stevedoring companies trading in New Zealand. They are in direct competition. Mr Kena was employed by ISO in terms of a written employment agreement dated 8 July 2011 which comprised at clause 23 a restraint of trade provision.

[6] Mr Kena commenced employment with ISO on 25 July 2011 and at the time of his resignation from the service of ISO, he was employed in the role of Associate Operations Manager. In simple terms, that meant that Mr Kena had responsibility for loading and unloading of vessels and the managing of the stevedoring staff required to achieve that task.

[7] On 11 November 2013, Mr Kena gave four weeks' written notice of his resignation in terms of the operative individual employment agreement and around 9 December 2013, ISO became aware that Mr Kena had commenced employment with Independent Stevedoring working at the same port that he had previously worked at for ISO (Marsden Point). Moreover, Independent Stevedoring had been engaged to participate in a contract for a particular cargo previously stevedored by ISO.

[8] On 13 December 2013, ISO's solicitors wrote to Mr Kena in effect reminding him about the restraint of trade provisions in his employment agreement with ISO. There was no response. Contemporaneously, ISO's solicitors also wrote to Independent Stevedoring to put the latter on notice about Mr Kena's obligations.

[9] Solicitors for Independent Stevedoring responded to the letter to their client indicating their view that the relevant provision in Mr Kena's employment agreement with ISO was not enforceable. There was further correspondence between the parties' solicitors but without resolution.

Issues

[10] The central question in the instant case is whether the relevant provision in ISO's employment agreement with Mr Kena is enforceable or not. Having decided

that question, the Authority will then need to consider whether the scope of the clause ought to be restricted and if so on what terms, and finally I must decide if remedies ought to be awarded as a consequence of the conclusions I reach in the substantive matter.

[11] It follows that the questions for me to decide are as follows:

(a) Is the relevant provision enforceable; and

(b) Is there scope to restrict the ambit of the clause; and

(c) Are remedies of any sort due?

Is the relevant provision enforceable?

[12] The provision in dispute is in the following terms:

> *23. Restraint of trade*
>
> *23.1 In order to protect the employer's proprietary interests, for six months after the termination of this agreement the employee will not engage to work for or on behalf of an organisation in direct competition with the employer, nor establish his/her own business in competition with the employer.*
>
> *23.2 Consideration for this restraint is included in the remuneration provided in clause 6 of this agreement.*
>
> *23.3 It is acknowledged that in view of the employee's position with the employer and his/her direct association with customers of the employer during his/her employment, the restraint provided in subclause 23.1 is fair and reasonable and does not inhibit the employee's ability to earn a reasonable living.*

[13] The law on restraints of trade is well settled and the helpful submissions of the three parties in this matter all traverse common ground.

[14] It is a truism that restraints of trade are contrary to public policy and therefore void and unenforceable. This is because, to quote *Asiaciti Trust New Zealand Ltd v. Harris* [2013] NZEmpC 238 at para.[33]:

> *There are strong policy reasons for that principle to apply as a worker's right to work and to a means of earning a living are jealously guarded in employment law.*

[15] However, the Court went on to say:

> *There is an exception to the general principle in that the right to restraint may be enforceable so long as it is no wider than the circumstances of the case reasonably requires. The reasonableness of a restraint clause is to be assessed in the circumstances of each case according to the legitimate interests of the parties to the restraint. This involves a balancing of the respective positions between the employer and the employee.*

[16] The Court then adds a series of subsidiary principles including the reasonableness of the restraint in terms of timeframe and geography, the relevant bargaining powers of the parties, and in particular if the injurious effect on the employee is greater than the benefit to the employer. There must be valuable consideration for the restraint and it can only be enforceable to the extent that it is required to protect a proprietary interest.

[17] It follows from the foregoing summary of the law that while restraints are prima facie unenforceable, if a restraint is necessary to protect a legitimate proprietary interest of the employer and the restraint is in other respects reasonable, then the Authority has the power to enforce the restraint.

[18] Not surprisingly, ISO makes much of the argument that parties who make agreements with each other ought to keep those agreements and that in a dealing such as this, each party ought to be able to rely on the other to keep its part of the bargain.

[19] It is also a truism that a restraint directed exclusively at reducing competition is unlawful. There must be a legitimate proprietary interest which is capable of protection and which will be protected by the imposition of the restraint, before the restraint can be enforced. Mere competition in the marketplace is not enough.

[20] The first question for me to decide then is whether ISO has a valid proprietary right which requires the protection provided by the restraint of trade in Mr Kena's employment agreement.

[21] As I discern it, ISO's argument in this regard rests on two claims. The first is that Mr Kena, to quote ISO's submissions, *"held a senior position"*. Second, and perhaps more significantly, ISO had developed a state of the art ship loading system which it was contended Mr Kena had an intimate working knowledge of, and which it sought to protect.

[22] I turn first to consider the submission that Mr Kena was a senior employee of ISO. I do not accept that submission.

[23] The factual matrix is important here. Mr Kena was originally employed as a stevedoring foreman and there was a written individual employment agreement for that starting role. That individual employment agreement does not contain a restraint of trade provision.

[24] Subsequently, the parties entered into a second individual employment agreement which does contain the restraint of trade provision set out earlier in this determination.

[25] Witnesses in my investigation meeting all confirmed readily that the nature and extent of the duties contemplated by the stevedoring foreman role were almost exactly the same as the nature and extent of the duties contemplated by the associate operations manager role.

[26] But despite the self-evident similarity in the roles, ISO witnesses would not concede that the roles were one and the same and they maintained that the role of stevedoring foreman was a role where the employee was *"still learning"*.

[27] Moreover, ISO witnesses told me that the stevedoring foreman role reported to the associate operations manager role. It is also apparent on the evidence I heard at the investigation meeting that at some point towards the end of the employment with ISO, Mr Kena became designated as a Shift Manager, although there is no job description for that role before the Authority and indeed the evidence the Authority heard from Mr Dragovich, the General Manager Stevedoring for ISO, is that the job description for associate operations manager would be the same as the job description for shift manager. This is because Mr Dragovich accepted in cross-examination from Mr McGoldrick the proposition put to him that the job description for the associate operations manager describes the shift manager role as well.

[28] For the avoidance of doubt, I should make clear that while Mr Kena commenced employment with ISO on 25 July 2011, he had previously been employed by a company called New Zealand Associates Limited as a stevedoring foreman on and from 1 May 2007.

[29] While the evidence for ISO proceeds on the footing that Mr Kena resigned from the employment of New Zealand Associates Limited and was subsequently employed by ISO, it is plain on the evidence that New Zealand Associates Limited and ISO have a close commercial understanding. In the brief of evidence from Mr Carter, a witness for ISO, he describes New Zealand Associates Limited as having *"an exclusive supply agreement"* with ISO to supply labour for its stevedoring operations throughout New Zealand.

[30] That closeness is further illustrated by Mr Carter's own position. He is Director of Operations of New Zealand Associates Limited but also contracted by ISO as General Manager Human Resources and on his own evidence is part of ISO's senior management team. Mr Kena's evidence is that he was *"rolled over"* from the employment of New Zealand Associates Limited into the employment of ISO and that this happened to his employment in conjunction with the same situation happening to a number of other staff as well.

[31] Accordingly, I think I can safely conclude that ISO and New Zealand Associates Limited have a close working relationship and that it would be more likely than not that Mr Kena's recollection of being rolled over from the employment of one to the employment of the other is a more accurate description of what happened than the more formalistic evidence offered by ISO to the effect that Mr Kena resigned from one and commenced employment with the other. The reality is that both of these commercial entities (New Zealand Associates Limited and ISO) were intimately engaged in a single business operation and that is demonstrated by the evidence of Mr Carter which I have referred to above.

[32] Because of the conclusion that I have just drawn from that evidence, I think it is appropriate for me to consider the juxtaposition between the two employment agreements for Mr Kena, the first concerning his employment as a stevedoring foreman with New Zealand Associates Limited and the second his employment as an associate operations manager with ISO. As I have already noted, the job descriptions for those two positions are virtually identical yet the associated employment agreement with the stevedoring foreman role has no restraint of trade position whereas the employment agreement associated with the associate operations manager role does contain a restraint of trade provision.

[33] Given they are the same role on an almost word-for-word basis, it is difficult to understand why a restraint of trade provision should be necessary for one but not for the other. I was not persuaded by the evidence of ISO witnesses (Mr Dragovich in particular) that the associate operations manager role was somehow more senior than the stevedoring foreman role. If that were the case, I would have expected to see some evidence of those differences in the words used in the job description and although there are differences, I do not think they go to the seniority of the positions.

[34] Moreover, I was not persuaded by the contention that Mr Kena, by virtue of this alleged seniority, was engaging with ISO's clients as is contended by ISO. Mr Kena was adamant in his oral evidence to the Authority that *"I never had any contact with customers"* although, of necessity, he would have dealt with the principals' agents and supercargoes.

[35] I turn now to consider the second basis on which it is contended by ISO that it has a proprietary interest which needs protection. This is the aspect involving the SHIPsys system. This is described by ISO as a state of the art IT system dealing with stowage handling and inventory planning.

[36] It is common ground that Mr Kena used the system when he worked for ISO and that he trained other staff to use it.

[37] What is not common ground is ISO's next contention that the SHIPsys system is unique and provides ISO *"with a significant competitive advantage over other stevedoring companies"*. Nor is it accepted that Independent Stevedoring for instance does not have a comparable system.

[38] It was apparent to me that ISO was very proud of its SHIPsys system, that it had spent a great deal of money developing it and it saw it as giving it a competitive advantage in the marketplace. That notwithstanding, it is nonetheless a fact that it lost the contract for the particular commodity that Mr Kena was involved in working with and at the port that Mr Kena worked at, to its competitor, Independent Stevedoring.

[39] The evidence for Independent Stevedoring emphasised the practical realities of cargo handling on the New Zealand waterfront. Mr Danen, the Operations Manager of Independent Stevedoring who gave evidence at my investigation meeting, made the point that in hiring Mr Kena, it was looking *"for people who knew how to load ships. That is because computers don't load ships, people do"*.

[40] He then goes on to make the point that Independent Stevedoring did not need Mr Kena to add to Independent Stevedoring's intellectual property on how to load vessels as it has been managing bulk cargo for 17 years.

[41] The usual practice at Marsden Point (where Mr Kena worked for ISO and continues to work for Independent Stevedoring), for log ships was that the customer appointed a Cargo Superintendent often known as Supercargo. The supercargo effectively works between the ship's officers and the stevedore to maximise the efficient and effective loading of vessels. In particular, the supercargo will do detailed calculations about weights and trim for the vessel and may direct the stevedore where to load the cargo in the ship.

[42] When ISO lost the log stevedoring contract at Marsden Point, Independent Stevedoring was not directly the successful bidder. It was a subcontractor to the successful bidder, a company called Quality Marshalling (Mt Maunganui) Limited (Quality Marshalling). Quality Marshalling was successful with the bid and critically for our purposes, I am satisfied on the evidence I heard that any intellectual property in the way in which log vessels are now loaded at Marsden Point reposes with Quality Marshalling and not with Independent Stevedoring. Independent Stevedoring is a subcontractor that simply provides the physical input required to load the vessels so data management, marshalling of the logs and relationships with the customer are all managed, not by Independent Stevedoring, which now employs Mr Kena, but by Quality Marshalling. It follows, I am satisfied, that any IT product or process used in the ship loading process would be under the control of Quality Marshalling and its employees and not under the control of Independent Stevedoring and its employees.

[43] Mr Danen goes to some lengths to challenge the evidence of ISO about the utility of its SHIPsys system, noting its age and the fact that there are similar systems available as well as material on the internet and available from the ship's owner about matters such as the carrying capacity of particular ships.

[44] It seems to me that Mr Dranen' evidence goes to the heart of the issue between the parties in a number of respects. First, it is apparent from his evidence that Mr Kena has no opportunity to make use of the SHIPsys system even were it to be contended that he might do that inadvertently. At this point I emphasise the point made by all parties that no one was alleging that Mr Kena would deliberately make

use of intellectual property which belonged to ISO; the allegation made by ISO was that there might be an inadvertent lapse by Mr Kena which would justify the restraint.

[45] But if, as Mr Dranen says, Mr Kena has no opportunity whatever to even inadvertently use or disclose material from ISO, then it is difficult to see what needs to be protected.

[46] The structure of the relationship described by Mr Dranen between Quality Marshalling and Independent Stevedoring itself seems to me to militate against any reasonable prospect that Mr Kena could even inadvertently disclose material which ISO had a proprietary interest in.

[47] Moreover, I accept Mr Dranen's evidence that Mr Kena, as a straightforward operational person, had no engagement with the customer but was engaged exclusively in efficiently and effectively loading vessels.

[48] Moreover, it is apparent on the evidence for Independent Stevedoring that some of the claims made by ISO in respect of the SHIPsys system may over-emphasise its uniqueness. Mr Dranen described his own firm's modus operandi in far more practical terms and made the point, understandably, that notwithstanding the different approach used by Independent Stevedoring, it nonetheless was part of a successful tender for the log trade at Marsden Point to the exclusion of ISO.

[49] Accordingly, I am satisfied on the evidence I heard that there is no justification for protecting ISO's legitimate proprietary interests and I am also satisfied for the same reasons that the restraint of trade is neither reasonable nor enforceable. Indeed, my conclusion is that the only effect of the restraint of trade provision is to seek to prevent Mr Kena from earning a living in his chosen work and that is the very reason that the Courts have taken the narrow view they have of covenants in restraint of trade.

[50] While I am satisfied that conclusion deals completely with ISO's claim, I need also, for the sake of completeness, to deal with subsidiary points raised in the proceeding. The first of these is the allegation that Mr Kena was not provided with an adequate opportunity to be advised of the restraint of trade provision in the operative individual employment agreement. His evidence is that he was simply presented with the agreement, asked to initial each page and sign it on the execution page. He says

he had no knowledge of the restraint and that the restraint provision was not drawn to his attention.

[51] The evidence for ISO is frankly equivocal. Mr Jordan who attended on Mr Kena when the latter signed his employment agreement, makes clear that he cannot remember the *"actual events surrounding the signing of Mr Kena's agreement"*, but that he had an invariable practice of ensuring the employee had an opportunity to read it, ensuring they have a copy of the agreement after they have signed it and ensuring that a signed copy is kept on the file.

[52] Mr Carter, who drafted the agreement, did not attend the signing of it. While Mr Jordan's usual practice is clear enough, Mr Kena's evidence is to the contrary and for the avoidance of doubt, I prefer Mr Kena's evidence.

[53] I do this for a number of reasons. The first is that Mr Jordan himself makes clear that he does not remember the particular circumstances of Mr Kena's execution of the document. Conversely, Mr Kena was very clear about what happened and his evidence is specific on the point. Next, Mr Kena's evidence on the signing of the document and in particular on his failure to understand that he was committing himself to a restraint of trade, is consistent with his later behaviour when he sought to obtain a copy of the agreement so that he could study it.

[54] Next, I am satisfied the evidence suggests Mr Kena may have been lulled into a false sense of security because his original employment agreement had no restraint of trade provision, and I am satisfied on the evidence the significant change to include such a provision, was not drawn to his attention.

[55] Moreover, when Mr Kena engaged in conversation with his superiors at ISO about opportunities for him in the future and his possible need to move elsewhere, neither of his superiors took the opportunity of drawing his attention to the restraint of trade or even encouraging him not to think about leaving. Indeed, Mr Kena's evidence, which again I accept, is that he was encouraged to look for opportunities elsewhere.

[56] Even when there was a subsequent altercation between Mr Kena and his superiors relating to an alleged disciplinary incident, there was still no mention of the restraint.

[57] I am satisfied then that on the evidence I heard, Mr Kena was not given a proper opportunity to consider the restraint of trade in the new employment agreement he was presented with. He should have had that opportunity. He should have had the opportunity to get legal advice. He had previously been working effectively for the same employer with a very similar employment agreement and the only significant difference was the restraint of trade provision in the second agreement. In those circumstances, a good and fair employer would have ensured that the employee had an opportunity to consider what they were being asked to sign.

[58] What is more, the fact that Mr Kena is adamant that he was not given a copy of the signed agreement and had to subsequently ask for a copy from Mr Carter, all tends to confirm my conclusion that Mr Kena was not properly treated by ISO when he signed the new agreement.

[59] It follows that even if I had been persuaded that ISO was entitled to protect its proprietary interests with the restraint, the way in which the employment agreement was executed was so unreasonable as to invalidate any right of ISO to be protected, assuming that protection was necessary.

Is there scope to restrict the provision?

[60] Given my categorical rejection of the need for protection, this question becomes otiose.

[61] However, I do observe that the time restriction sought by counsel of four months, on any computation, has long since expired by now so even if I was persuaded that the restraint was necessary but too expansive, there would be no point in a reduction in the time proposed by ISO.

[62] Nor do I consider there is any other basis on which the restraint could be redrafted to make it comply with the law and with the findings that I have made in this determination. The short point is that I have not been persuaded that a restraint is necessary at all, and on that basis, there can be no redrawing of the restraint so as to limit it.

Are remedies due?

[63] For reasons that are self-evident, there are no remedies available to ISO because it has failed to persuade me that the restraint of trade complies with the law and is therefore able to be enforced.

Determination

[64] ISO's various claims for relief all fail for the reasons enunciated in this determination.

Costs

[65] Costs are reserved.

James Crichton
Member of the Employment Relations Authority