

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 324
5575897

BETWEEN LIC AUTOMATION LIMITED
Applicant
A N D JOSE GUSTAVO GARZA RUIZ
Respondent

Member of Authority: Eleanor Robinson
Representatives: Andrew Scott-Howman, Counsel for the Applicant
Rob Towner & Liz Coates, Counsel for the Respondent
Investigation Meeting: 6 October 2015 at Auckland
Submissions of the parties 6 October 2015
Date of Determination: 16 October 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a Statement of Problem filed in the Authority on 25 September 2015, the Applicant, LIC Automation Limited (4956679) (LIC) sought an interim injunction until such time as the matter is determined at a substantive hearing against the Respondent, Mr Jose Gustavo Garza Ruiz (Mr Garza).

[2] The application for an interim injunction was accompanied by an undertaking as to damages and affidavits in support of the application by Mr Paul Whiston, Chief Executive Officer (CEO) of LIC.

[3] This determination addresses the application for an interim injunction, and the substantive matter, namely an application for an injunction restraining Mr Garza (i) for a period of 12 months following the termination of his employment with LIC from commencing employment with Waikato Milking Systems (WMS) and (ii) otherwise acting in breach of the restrictive covenants in his individual employment agreement,, which will be investigated by the Authority at a later date yet to be scheduled.

[4] At this interim application stage I have relied on the submissions of Counsel and on the, as yet, untested evidence in the affidavits which have been lodged by Mr Whiston, Mr Garza and Mr Dean Bell, CEO of WMS. Consequently the conclusions which have been drawn are tentative and not necessarily what will be decided at the substantive investigation after a full examination of all the evidence which will then be available has been undertaken.

Background facts

[5] LIC provides a range of services and solutions to improve the prosperity and productivity of farmers and livestock. Its central place of business is based in Hamilton.

[6] WMS sells milking systems and equipment to improve the efficiency of milking herds of cows.

[7] LIC and WMS are therefore participants in the New Zealand dairy industry. Each produces and markets specialised equipment for that industry. Each of the two companies derives significant revenue from the sales of their products and services. Each seeks to maximise its market share by exploiting its particular expertise, reputation and contacts. Each also seeks to expand its revenue by marketing its systems and products overseas.

[8] Dairy Automation Limited (1984349) (DAL) was an incorporated company primarily involved in the design, manufacture, sale and distribution of sensor technology for the real-time analysis of milk. Mr Garza was the CEO and a minority class B shareholder of DAL which was owned by DEC International NZ Limited.

[9] By way of a Sale and Purchase Agreement (SAP) dated 11 February 2014, Livestock Improvement Corporation Limited (357590) purchased the assets and business of DAL. DAL primarily patented 'Yieldsense' and 'Cellsense technologies. These products are currently only sold in New Zealand and Australia.

[10] Following completion of the SAP, Mr Garza was offered and accepted employment as CEO with LIC Ventures No.1 Limited (4956679) a company incorporated on 13 February 2014, which changed its name on 3 March 2014 to Dairy Automation Limited, which subsequently changed its name to LIC Automation Limited (LIC) on 2 June 2015.

[11] Mr Garza signed an individual employment agreement (the Signed Employment Agreement) on 21 February 2014 with LIC Ventures No.1 Limited. The Signed Employment Agreement contained the following clauses:

29.1 **Access:** *In your work as Chief Executive Officer you will have access to information and/or material, which is confidential to the company, its subsidiaries, associates, and customers.*

29.2 **Associates:** *“Associates” includes Livestock Improvement Corporation and its subsidiaries, associates and customers.*

29.3 **Confidential information:** *“Confidential information” includes, but is not limited to the following:*

- (a) *client and supplier lists;*
- (b) *information about clients;*
- (c) *financial information including prices, costs and margins;*
- (d) *information about business strategies and identified business opportunities;*
- (e) *intellectual property, policies and computer formats;*
- (f) *information which if disclosed might cause harm to the company’s business or advantage to a competitive;*
- (g) *information about the company’s administrative procedures and business;*
- (h) *the company’s know-how including trade secrets, computer programmes, market surveys, market analysis, competitor information, technology information, designs and copyrights.*

29.4 **Restriction:** *In respect of this confidential information:*

- (a) *You will have delegated authority to make statements to the media relating to aspects of the company or its business, provided such statements are aligned with the views of the Board.*
- (b) *You shall not disclose or discuss any confidential information about the company (including its associates) with other people either inside or outside the company, without the specific approval of the Board.*
- (c) *Any breach of confidentiality may provide grounds for dismissal or legal action.*

29.5 **Survives:** *This clause survives the termination of this agreement indefinitely.*

32. RESTRAINT OF TRADE AND NON-SOLICITATION

32.1 **Proprietary interest:** *The Company’s activities are specialised and the company wishes to protect its proprietary interest in these activities. You agree that this restraint of trade and non-solicitation clause is necessary to protect those interests. You further agree that your remuneration package has been calculated in*

consideration of your agreeing to this restraint of trade and non-solicitation clause.

32.2 Restrictions: *You agree for a period of twelve months following termination of your employment with the company, you will not:*

- (a) *Attempt to or actually encourage or persuade any of the company's customers to terminate their trade relations with the company.*
- (b) *Attempt to or actually encourage or persuade any of the company's employees or contractors to terminate their employment agreements or independent contract arrangements with the company.*
- (c) *Either directly or indirectly*
 - (i) *to be employed by;*
 - (ii) *have shares in; or*
 - (iii) *have any financial interest in*
any business, firm or company within any geographical location in which the company operates, that is in competition with any aspect of the company's business without the prior written consent of the company.

36. ENTIRE AGREEMENT

36.1 This agreement records the full agreement between you and the company about your employment and replaces any agreements, written or oral, that exist between you and the company at present.

37. INDEPENDENT ADVICE

37.1 You acknowledge that before entering into this agreement you were given a copy of the agreement, were advised of your right to seek independent advice about the agreement and were given reasonable opportunity to take advice.

[12] Mr Garza had initialled each page, and immediately above his signature dated 21 February 2014, there is a declaration by Mr Garza which read:

I, Gustavo Garza declare that I have read and understood the conditions of employment detailed above and accept them fully. I understand that by signing this agreement, I am bound by all the terms and conditions in this agreement.

[13] During late 2014 Mr Garza was notified of a proposal by LIC to restructure the DAL and Protrack businesses. As part of that restructuring it was proposed that his position as CEO of DAL be disestablished.

[14] Mr Garza applied for the position of CEO of LIC, but was not successful and in early April 2015, LIC disestablished his position.

[15] Following his unsuccessful application for the role of CEO of LIC, he was offered a position as Global Sales and Marketing Manager of LIC.

[16] On 15 April 2015 LIC presented Mr Garza with a proposed individual employment agreement for the new position of Global Sales and Marketing Manager (the Proposed Employment Agreement).

[17] Mr Garza accepted the position of Global Sales and Marketing Manager that he was offered but was concerned by a number of aspects of the Proposed Employment Agreement, including in particular proposed changes to his performance incentive scheme. Mr Garza's concerns regarding these matters were never resolved to his satisfaction, and he never signed the Proposed Employment Agreement.

[18] In late July 2015 Mr Garza verbally advised Mr Whiston that he was intending to leave and that he had been offered a role with WMS. Mr Whiston's understanding was that Mr Garza's employment with WMS would commence at the end of his period of notice with LIC

[19] On 27 July 2015 Mr Garza gave three months' notice of the termination of his employment in accordance with the Signed Employment Agreement. His last day of employment with LIC will be 27 October 2015.

[20] Following a discussion between Mr Whiston and Mr Garza, Mr Garza commenced garden leave on 10 August 2015. LIC took Mr Garza's company computer and security card from him and directed him to leave the premises.

[21] Mr Garza states in his untested affidavit evidence that he has not entered into any employment agreement with WMS.

Mr Whiston's untested affidavit evidence

[22] Mr Whiston states in his untested affidavit evidence that LIC was restructured in June 2015 to develop, manufacture, sell and distribute automation technologies to both the domestic and international dairy industry. LIC's core products are 'Cellsense' and 'Yieldsense' meters and the associated software acquired from DAL (the sensor technologies), "in-shed" drafting and herd management systems and heat detection technologies.

[23] A key driver for the acquisition by Livestock Improvement Corporation Limited of DAL in 2014 was the sensor technologies and IP that was held by DAL to complement the 'in-shed' automation technologies held by Livestock Improvement Corporation Limited as a complimentary extension of an automation and herd management solution for farmers. The sensor technologies acquired allow for the yield analysis of milk yield by volume and component and the cell analysis of the milk.

[24] Mr Whiston states that LIC had developed the in-shed automation technology branded as 'Protrack' which contributes farm management information to a central database from which farmers make herd management decisions. He states that the acquired DAL technologies are a value added and complementary enhancement from both an automation and farm management perspective.

[25] Mr Whiston states in his untested affidavit evidence that Livestock Improvement Corporation Limited purchased the proprietary rights to technology which was developed and marketed by Mr Garza in his role as CEO of DAL. Mr Garza continued in his role as CEO of DAL following its acquisition by LIC, and in that position was intimately involved in the product development, business strategy and direct engagement with customers and industry partners.

[26] Post the establishment of LIC, Mr Garza held the role of Global Sales and Marketing Manager in which capacity he was responsible for business development, product marketing and sales activity of LIC and held direct commercial relationships with key partners and distributors.

[27] Mr Whiston states that any company which employed Mr Garza would potentially gain a significant advantage not only in competing against LIC in a specialised market but could also build its own expertise by leveraging off LIC's proprietary information.

[28] Mr Whiston states that WMS which manufactures sells and distributes milking systems to dairy farmers both in New Zealand and internationally has a national salesforce and national network of distributors. It develops Milking platforms, Milking technologies such as cup removal systems, yield sense meters and electronic milk meters which he claims in his untested affidavit evidence are similar to LIC's Cellsense products.

[29] Further, he states that WMS has customers both direct and via distributors in New Zealand, USA, China, Mainland Europe and South Africa and that LIC has business in all of these territories and intends to distribute to these markets in future.

[30] He notes that WMS does not compete in the milking of milk harvesting technologies, but does compete in the Yieldsense and Cellsense technologies.

[31] Mr Whiston states in his untested affidavit evidence that LIC and WMS are close competitors in a specialised market in which each derive significant incomes from their sales of high technology products.

[32] Mr Garza is a key player and specialist in a key area, in which specialists are few in number. Mr Garza has depth of knowledge and years of experience in addition to considerable goodwill within a limited number of potential purchasers of relevant product. He is well connected and well known.

[33] Whilst Mr Whiston accepts that WMS is involved in some aspects of business in which LIC is not involved, and may also be interested in marketing its competing products in different overseas markets to those pursued currently by LIC, he states that this does not give LIC the comfort it needs in that the potential risk to which LIC is exposed is substantial. The competition in the industry is intense, and worth many millions of dollars.

[34] Mr Whiston states that LIC purchased the proprietary rights to technology which was developed and marketed by Mr Garza in his role at DAL. Mr Garza received substantial consideration for that property by way of the SPA, and that what is at risk for LIC is the very proprietary information which LIC purchased from DAL.

Mr Bell's untested affidavit evidence

[35] Mr Bell states in his untested affidavit evidence that WMS is not a direct competitor of LIC. It sells milking systems and equipment whereas LIC sells a range of milk sensors and herd management software tools.

[36] He states that WMS and LIC work together in some areas, specifically:

- i) To produce a herd test meter for LIC's herd testing business;
- ii) Some WMS products are integrated into LIC's herd management system;
- iii) WMS and LIC are currently in discussions regarding other opportunities for collaboration in the market

[37] Mr Bell states that WMS and LIC have realised that, whilst there is potential to compete, it is better business sense for each company to treat the products as being complementary to each other rather than competing.

Mr Garza's untested affidavit evidence

[38] Mr Garza states in his untested affidavit evidence that the versions of the Cellsense and Yieldsense products currently being sold by LIC were finalised in December 2009 and December 2010 respectively by DAL, which was prior to his employment with DAL. Whilst he was involved in that marketing and sales of the products, he did not play any part in their technical design or development.

[39] Mr Garza states that at the time of the sale and assets of DAL to LIC he was a B-type shareholder in DAL and did not have any influence in the decision to sell the business. He received the sum of \$150,000.00 as consideration of his share of the business when DAL was sold. He was additionally offered involvement in an LIC performance incentive scheme. He was aware that the SPA included a restraint of trade provision but as he was not a party to the SPA he had no involvement in negotiating the terms of the agreement.

[40] Mr Garza stated that he had accepted an offer of employment from LIC Ventures No. 1 and executed the Signed Employment Agreement. Mr Garza states in his untested affidavit evidence that he did not recall any specific discussions regarding the restraint of trade at the time of entering into the Signed Employment Agreement, and now believes the scope of the restraint is far more onerous than what is needed given his role in a small part of LIC's overall business.

[41] When advised on 8 April 2015 that his application for the position of the CEO of LIC had been unsuccessful and he was being offered the position of Global Marketing and Sales Manager, Mr Garza states that he raised his concerns about the restraint of trade in the SPA and the Signed Employment Agreement, which he felt should no longer apply to him since he was no longer the CEO of DAL.

[42] Mr Garza stated that he had accepted the position of position of Global Marketing and Sales Manager but did not sign the Proposed Employment Agreement as there were aspects of it that he wished to negotiate further, in particular the terms of the performance incentive payment.

[43] No agreement was subsequently reached in relation to the performance incentive payment, and in a letter dated 27 July 2015, Mr Garza advised LIC that he considered he remained bound by the terms of the Signed Employment Agreement as the Proposed Employment Agreement terms were never concluded.

[44] Mr Garza states in his untested affidavit evidence that LIC has secured broad intellectual property protection for the Cellsense and Yieldsense products. Cellsense is

patented worldwide and Yieldsense enjoys copyright and design right protection. Both products are only sold in New Zealand.

[45] He states that whilst he is aware that LIC hopes to sell the Cellsense and Yieldsense products more widely overseas, it is not yet in a position to do so immediately in that it would require the establishment of offices and staff and would require regulatory approval.

[46] In addition, since merging the DAL and Protrack businesses on 1 June 2015, LIC's business also includes Protrack products which were not part of the LIC business at the time he was employed by LIC following the purchase of the DAL business.

[47] Mr Garza states that the role he tentatively discussed with Mr Bell would involve him selling WMS's milking system technology internationally. He would not be selling any products which are the same as Cellsense or Yieldsense, and could not do so without breaching LIC's patent and copyright protection.

Interim injunction application: investigation

[48] I granted LIC's application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim injunction.

[49] A case management conference was held by telephone on 28 September 2015 when the Authority heard from Counsel for the parties to schedule an investigation meeting date and the lodging of documents, including affidavits and the Statement in Reply from Mr Garza.

[50] At the Investigation Meeting on 6 October 2015, I heard submissions from Counsel in relation to the interim injunction application and tested these by questioning how the available evidence related to the relevant principles for determining an interim injunction application. Those principles fall to be addressed by the answers to the following questions:

- (a) Is there an arguable case that LIC will succeed at the Authority's substantive investigation in establishing that Mr Garza will breach the contractual restraint of trade by becoming employed by a competitor, namely WMS?
- (b) If not, where does the balance of convenience lie between the parties, this question to encompass the associated question of whether there is an adequate alternative remedy available to LIC, specifically an award of damages to be paid by Mr Garza, such that a declaration that Mr Garza will breach the contractual restraint of trade by becoming employed by WMS is not necessary at this stage; and

- (c) Where does the overall justice of the case lie requiring that a declaration be made?

[51] I have relied on the submission of counsel and on the, as yet untested, evidence in the affidavits which have been lodged by the parties in answering these questions. Consequently, the conclusions which have been drawn are tentative and not necessarily what will be decided at the substantive investigation after full examination of all the evidence which will then be available has been undertaken.

Determination

Is there an arguable case?

[52] It is accepted that contractual provisions restricting the activities of employees following the termination of their employment are regarded, on the grounds of public policy, as unenforceable¹: “*unless they can be justified as reasonably necessary to protect proprietary interests of the employer*”.²

[53] Mr Garza is party to the Signed Employment Agreement which contains a contractual restraint of trade clause. Although there was a Proposed Employment Agreement, that was not signed by Mr Garza and his untested affidavit evidence is that he advised LIC that he considered himself bound by the terms of the Signed Employment Agreement.

Restraint of Trade

[54] In turning therefore to consider the Signed Employment Agreement as being the relevant document for the purposes of this interim application, Mr Garza states that he does not recall any specific discussions about the restraint of trade clause at the time he entered into the Signed Employment Agreement, and that he now regards it as far more onerous than what is needed.

[55] I observe that Mr Garza at the time of entering into the Signed Employment Agreement was appointed to the role of CEO of LIC Ventures No. 1 Limited. Prior to that appointment, he had been CEO of DAL, a business with an annual turnover of \$4m. I consider therefore that Mr Garza was an experienced businessman with a knowledge of contracts and their binding nature at the time he entered into the Signed Employment Agreement,

[56] I note that the Signed Employment Agreement contains the following:

¹ Cf. *Pottinger v Kelly Services (NZ) Ltd* [2012] NZEmpC 101

² Ibid at [16]

- an acknowledgement at clause 37 that Mr Garza had been advised of his right to seek independent advice, and had been given a reasonable opportunity to do so before entering into it.
- Mr Garza has initialled each page of the Signed Employment Agreement including that containing clause 32, and
- above his signature, acknowledged that he had read, understood and accepted fully the conditions of employment outlined, and that he understood that by signing, he would be bound by all the terms of conditions in the Signed Employment Agreement

[57] Whilst Mr Garza states that he now did not realise how onerous the restraint of clause provisions were at the time he entered into it, I find that Mr Garza had the opportunity to read the Signed Employment Agreement and carefully consider its implications before he signed it.

Protection of Proprietary Interests

[58] In respect of the proprietary interests, at clause 32.1 of the Signed Employment Agreement it refers to the Company's activities as being specialised and that it wishes to protect its proprietary interest in those activities.

[59] The clause contains the statement: "*You agree that this restraint of trade ... is necessary to protect those interests.*" Mr Whiston has identified the proprietary interests in his untested affidavit evidence as being technology which was developed and marketed by Mr Garza in his role at DAL, specifically the sensor technologies and IP that was held by DAL

[60] There is no evidence that Mr Garza queried the nature of the proprietary interests referred to at any time prior to his stated intention to leave the employment of LIC in late July 2015, and the inference is therefore that he accepted there were proprietary interests meriting protection in the activities of LIC. Indeed Mr Garza, stated in his untested affidavit that the sale or marketing of competing products would infringe the copyright protection owned by LIC.

[61] Further Mr Bell in his untested affidavit evidence acknowledges that there is potential for competition, and that he would not, in the event that WMS employs Mr Garza, encourage him to breach any confidentiality provisions to which he was a party with LIC.

[62] Whilst I would expect far more information regarding the nature of the proprietary interests to be provided at the substantive hearing, I find at this interim stage that there is

evidence on the basis of the untested affidavit evidence that there are proprietary interests in the sensor technologies and IP held by LIC.

Consideration for the Restraint

[63] Clause 32.1 of the Signed Employment Agreement states: “*You further agree that your remuneration package has been calculated in consideration of your agreeing to this restraint of trade and non-solicitation clause*”.

[64] Mr Garza in his untested affidavit evidence states that he did not receive “*considerable consideration*” as part of the SPA. However I note he received the sum of \$150,000.00 as consideration for his shareholding in DAL. He also states that he was offered involvement in an LIC performance incentive scheme, although he did not reach agreement with LIC on the terms of that scheme.

[65] A principle relating to restrictive covenants referred to in *Gallagher Group Ltd v Walley*³ is that consideration is necessary, but may be satisfied by the mutual promises intrinsic in the offer and acceptance of employment.

[66] The Court of Appeal considered the issue of adequacy of consideration for a restraint in *Fuel Espresso Ltd v Hsieh*⁴. The Court observed⁵:

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 promisee or some other benefit to the promisor. But the law does not inquire into the adequacy of the consideration, nor, as the Judge seems to have thought, does it require an extra “premium” for a 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. As Treitel G.H, Law of Contracts (9th Ed), London, Sweet & Maxwell, 21995, at p 66 puts it:

“A person who makes a commercial promise expects to have to perform it ... correspondingly, one who receives such a promise expects it to be kept. These expectations can properly be called a detriment and a benefit and they satisfy the requirement of consideration in the case of mutual promises.”

³ [1999] 1 ERNZ 490 (CA)

⁴ [2007] 60

⁵ Ibid at para 18

[67] I find that Mr Garza received financial consideration from LIC at the time of the SPA which was signed on 11 February 2014 and contained the Non-Competition warranties and restraint of trade provisions at clause 21.

[68] In addition, the Signed Employment Agreement containing the restraint of trade provisions at clause 32 was signed by Mr Garza on 21 February 2014. Consideration is necessary, but may be satisfied by the mutual promises intrinsic in the offer and acceptance of employment which I find to have been established in the Signed Employment Agreement.

Reasonableness of the Restraint

[69] The restraint is for a period of twelve months following the termination of employment and encompasses any: “*business, firm or company, within any geographical location in which The Company operates, that is in competition with any aspect of The Company’s business ...*”

[70] Mr Garza submits that the restraint is unreasonable in duration and geographic ambit. He further submits that any period of garden leave should be taken into consideration when determining the issue.

[71] I accept the submission as regards the imposition of garden leave on Mr Garza, and the time he has correspondingly spent out of LIC’s business since 10 August 2015.

[72] The reasonableness of the restraint in both duration and geographical ambit is a matter which necessitates further examination before a determination is made. I also accept that the extent of the restraint restriction may be the subject of modification should this be determined to be appropriate

[73] However at this interim stage I find that whilst the restraint period is properly a matter for evidence at the substantive hearing, this could be held well within the 12 month restraint period, and therefore any declaration can be made on the basis of a period binding until the determination of the substantive hearing takes place.

Proprietary Interests and WMS

[74] At the central heart of this matter is the issue concerning the similarity and functionality of the Cellsense and Yieldsense technology to the yield sense meters marketed by WMS.

[75] Mr Whiston states in his untested affidavit evidence that WMS is a competitor of LIC, citing similar technology, namely Yieldsense meters and electronic milk meters which compete with the LIC Yieldsense and Cellsense technologies. LIC has customers in all the

territories in which WMS operates and intends to distribute in the future. The competition is in a specialised market of high tech products in which Mr Garza is a key player with knowledge, experience and considerable goodwill.

[76] Mr Bell acknowledges in his untested affidavit evidence that whilst WMS is not at present a competitor to LIC, there is potential to compete. He also states that the two companies treat their products as complementary rather than working in competition.

[77] Mr Garza in his untested affidavit evidence points out that LIC has broad intellectual property protection in the Cellsense and Yieldsense products, and that replicating these products could not take place without WMS breaching the patent and copyright protection of the products. Further that LIC is not in a position to sell these products more widely overseas in the immediate future.

[78] I note that Mr Garza is a qualified Electronics Engineer, and that during his 9 years of employment with WMS, prior to working for DAL, one of his roles was as Research and Development Manager. Prior to that he held technical manager positions with GEA Farm Technologies in Mexico and New Zealand. I consider on that basis that Mr Garza has both the technical ability and experience to offer substantial technological benefit to WMS to the detriment of LIC.

[79] The substantive hearing will address in greater detail the issues involved in this matter, including the technologies involved, however at this interim stage I find there is an argument in LIC's favour regarding the proprietary interests referred to in the restraint of trade provisions which might be affected should Mr Garza become employed at WMS.

Confidentiality clause protection

[80] Mr Garza states that he has no intention of breaching the confidentiality provisions set out at clause 29 of the Signed Employment Agreement. In the Employment Court case *Allright v Canon New Zealand Limited*⁶ Judge Couch stated:

[28] In this case, it seems to me that there is a very real weight in the submissions Mr Hood has advanced regarding innocent disclosure and, particularly, inadvertent use of the defendant's' confidential information. 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

⁶ AC1/09

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.

[81] I accept that Mr Garza was not a member of the Senior Leadership Team at LIC. I also accept his statement that he is aware of his duty of confidentiality to LIC, and that Mr Bell states that he would not encourage Mr Garza to breach that duty.

[82] However I find that during his employment as CEO and subsequently as Global Sales and Marketing Manager for products including Cellsense and Yieldsense, Mr Garza would have acquired knowledge relevant to a position with a competing business, and particularly to WMS, and may inadvertently, if not intentionally, breach his duty of confidentiality.

[83] In this situation I consider that the confidentiality provisions set out at clause 29 of the Signed Employment Agreement would not be sufficient to adequately protect LICs Proprietary interests.

Summary of arguable case

[84] I find that LIC has established an arguable case that during the course of his employment Mr Garza had knowledge of the proprietary interests which LIC has in specialised sensor technology products which he may not have developed, but of which I consider it more likely than not that he has an excellent understanding of the technology involved, and that he has marketed and sold such products, whilst developing customer contacts and good will in the process.

[85] There are of necessity limitations inevitable upon determining interim injunction applications: the evidence is untested by questioning from me, or by cross-examination. The However I find, accepting those inevitable limitations, that should Mr Garza accept an offer of employment with WMS (which I accept has not occurred at present), he would be in breach of the restraint of trade provisions in the Signed Employment Agreement.

Where does the balance of Convenience Lie?

[86] That balance of convenience considers the relative hardship resulting to each party in this situation.

[87] In the case of Mr Garza I find that damages would be an adequate remedy in that there is no doubt that LIC could meet any damages award.

[88] In the case of LIC, it is submitted that the potential risk to which it will be exposed should Mr Garza take up employment with WMS is substantial on the basis that it operates in an intensely competitive market with potential sales worth millions of dollars.

[89] LIC submits that damages may be inadequate compensation in the event that it loses protection from unfair competition. Moreover damages may be difficult to assess and not fully compensate for its loss of market advantage. Further given the extent of the potential monetary damage to be suffered by it, LIC is concerned that Mr Garza would not have the ability to make good any payment for damages.

[90] Once he leaves the employment of LIC, Mr Garza states he will have no source of income, unless he becomes employed by WMS. In those circumstances it is difficult to see how he would be able to meet any award of damages to LIC should such an award be made.

[91] Considering these submissions, I conclude that an award of damages would not be an adequate alternative remedy to LIC.

[92] Mr Garza has resigned from LIC and states he has no immediate intention to take up employment with WMS. On that basis there is no discernible loss to him if a declaration were to be issued in regards to his potential employment with WMS.

[93] Against this circumstance must be balanced the fact that once Mr Garza leaves the employment of LIC at the end of his notice period on 27 October 2015, he will have no source of income and he is the main breadwinner for his family. However, I find it significant that Mr Garza chose to leave his employment with LIC without the certainty of employment elsewhere, or even applying for vacant posts, other than by contacting WMS.

[94] Mr Garza is not prevented by the restraint of trade provisions in the Signed Employment Agreement from applying to and being employed by any business which is not in competition with LIC's business.

[95] In practice Mr Garza states that in the current economic situation affecting the dairy industry, the job market is restricted and opportunities are sparse. In support it is submitted that other senior members of LIC affected by the recent restructuring have been unable to find alternative employment. Despite Mr Garza's negative comments, given his technical

qualifications and experience in specialised technology areas, I consider that he would no doubt have taken this into account when resigning from LIC.

[96] Evaluating all the factors to be taken into consideration, I find the balance of convenience to rest with LIC.

Overall Justice of the case

[97] The overall justice consideration requires me to stand back from the detail and consider the case from a more global view.

[98] I have found on the untested affidavit evidence available at this interim stage, that by becoming employed by a business, firm or company in competition with any aspect of LIC's business, including WMS, within the terms of the restraint of trade provisions in the Signed Employment Agreement Mr Garza will be in breach of those provisions.

Declaration

[99] Accordingly I make a declaration that Mr Garza is prevented in accordance with the restraint of trade provisions set out at clause 32 of the Signed Employment Agreement from taking up employment with any business, firm or company in competition with any aspect of LIC's business, including WMS.

[100] The term of this declaration is from the date of this determination for a period until a substantive hearing on the matter takes place.

Next Steps

[101] The Authority will shortly convene a case management conference to set timetable directions for the investigation of LIC substantive claims.

Costs

[102] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

Eleanor Robinson
Member of the Employment Relations Authority

