

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 231
3139061

BETWEEN

LIFTX LIMITED
Applicant

AND

JONATHAN JAMES MUSSON
Respondent

Member of Authority: Philip Cheyne

Representatives: Mark Henderson, counsel for the Applicant
Paul Brown, advocate for the Respondent

Investigation Meeting: 26 May 2021, at Christchurch

Date of Determination: 28 May 2021

DETERMINATION OF THE AUTHORITY

A. Subject to LiftX Limited's undertaking as to damages dated 13 May 2021, Jonathan James Musson is prohibited from being employed or engaged within the South Island of New Zealand by EPSNZ Limited, pending further order of the Authority or 31 July 2021, whichever is the sooner.

B. I reserve costs, subject to the set timetable for submissions if required

Employment relationship problem

[1] Jonathan Musson worked for LiftX Limited. He gave notice of resignation on 30 April 2021, so his employment will end on 28 May 2021. LiftX says that Mr Musson has breached the restraint of trade provision in the employment agreement by taking up employment with a competitor (EPSNZ Limited). LiftX seeks a permanent injunction. It also

seeks an interim injunction prohibiting Mr Musson from working for a competitor, pending further order of the Authority or until 28 November 2021, whichever is the sooner.

[2] Mr Musson has given assurances of compliance with confidentiality and non-solicitation provisions in his employment agreement. However, he says that the restraint provision is unenforceable.

[3] There is a statement of problem, affidavits in support, an undertaking as to damages, the statement in reply and affidavits in opposition. Both sides made submissions supporting the respective positions. This determination draws on the untested affidavit evidence and the submissions to decide whether LiftX has shown a serious case to be determined, where the balance of convenience between the parties lies prior to a substantive determination and whether the overall justice supports that outcome. Final findings must await a fuller investigation meeting. For that reason and because of the need to advise the parties about the interim outcome, I will try to say as little as is needed

[4] Although the problem is advanced as an application for injunctive relief, in substance it is a dispute about the enforceability of clause 24 of the employment agreement. Materially, it reads:

24. Restraint of Trade

24.1 The Employee shall not, without the express written consent of the Employer, at any time during their employment and for 6 months thereafter ...be employed by ...any business that is in competition with the Employer within the South Island of New Zealand and the Employee acknowledges that the remuneration paid to them under this agreement includes an element of consideration for entering into this clause.

[5] The following issues arise:

- (a) Has LiftX established a serious issue to be tried?
- (b) Does the balance of convenience favour an interim injunction?
- (c) What is the overall justice of the case?
- (d) If grounds are made out, what interim order should be made?

Has LiftX established a serious issue to be tried?

[6] The restraint states that Mr Musson must not “be employed or engaged by” a competitor. The statement of problem includes the assertion that Mr Musson told LiftX that he had accepted employment by the competitor and would be moving to that company at the end of the LiftX notice period. Mr Musson in his letter of resignation said he was moving on to further his skills in the elevated work platform industry. Mr Dix says in his affidavit that when Mr Musson resigned he said he was going to the competitor. Mr Musson’s representative in correspondence later said that the restraint was unenforceable and would be ignored. However, in his affidavit, the General Manager of the competitor says that the company has not offered employment to Mr Musson and he has not signed an employment agreement. However, he is “hoping to employ” Mr Musson.

[7] The evidence indicates that Mr Musson is not employed by the competitor and is not yet a person intending to work for the competitor. However, the evidence does not rule out an arguable case that Mr Musson is a prospective employee to whom s 63A of the Employment Relations Act 2000 might apply. There is also sufficient evidence to establish that the risk of Mr Musson being “employed or engaged by” a competitor is reasonably imminent, giving rise to the possibility of a *quia timet* injunction.¹ I accept it is arguable that Mr Musson has been or will imminently be “employed or engaged by” a competitor.

[8] The starting point is that a covenant in restraint of trade in an employment agreement is regarded as unenforceable, unless justified as reasonably necessary to protect the employer’s proprietary interest and in the public interest. Reasonableness is determined at the time the agreement was entered into.²

[9] Mr Musson was first employed as a “Workshop Hand” in October 2016 as a school-leaver. The signed agreement included confidentiality, non-solicitation and restraint of trade provisions. From May 2018, Mr Musson was engaged as a “Rebuild Technician”. The signed agreement included confidentiality, non-solicitation and restraint of trade provisions.

¹ See *Kumar v Elizabeth Memorial Home Ltd* [1998] 2 ERNZ 61.

² *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252.

In August 2020 Mr Musson was appointed as a “Service Technician”. Again, the signed agreement included confidentiality, non-solicitation and restraint of trade provisions.

[10] There is a disagreement in the evidence about the circumstances under which Mr Musson signed the August 2020 agreement. However, for present purposes, I should take LiftX as arguably having met its obligations to Mr Musson to bargain in good faith.

[11] LiftX is a supplier, repairer and certifier of specialist elevated working platform machinery and equipment. From 2020 Mr Musson reported to a Service Manager and his role involved electrical and mechanical maintenance and servicing of machinery and the certification of machinery owned or leased by LiftX clients.³

[12] There is a dispute in the evidence about the extent to which Mr Musson, as a “Service Technician” employed to maintain, repair and certify clients’ equipment, had access to and/or used LiftX’s intellectual property, knowledge and information relating to its business or its customers which is confidential or commercially sensitive, details of LiftX’s equipment, pricing structure, financial records, internal policies, operations, customer information, business and development opportunities, or other matters relating to the business and affairs of LiftX. This is the information that the employment agreement says Mr Musson may receive and handle. LiftX says it is its proprietary information. At this stage, I must take LiftX as being able to show an arguable case that Mr Musson received and handled trade secrets or other confidential information about its business or trade connections amounting to information in which it has a proprietary interest.

[13] There is a dispute in the evidence about the extent to which Mr Musson was engaged to establish and maintain business relationships with LiftX’s clients, so would have customer connections amounting to a proprietary interest capable of protection by a restraint of trade provision. The evidence at this points falls short of the personal customer connection apparent in cases like *Fuel Espresso Ltd v Hsieh*.⁴ However, I accept that LiftX arguably can establish that Mr Musson was employed to establish and maintain customer connections, giving rise to a proprietary interest.

³ See the Job Description attached to the employment agreement.

⁴ *Fuel Espresso Ltd v Hsieh* [2007] ERNZ 60 (CA).

[14] Assessing reasonableness extends to consideration of the duration and geographical extent of the restraint of trade. The 6 month duration is sought to be justified on the basis that machinery must be certified every 6 months. LiftX says that there is a risk that clients, coming up to the new certification, might approach Mr Musson directly or Mr Musson (on behalf of a new employer) might approach a client in advance of the re-certification requirement.

[15] There appears to be little risk that LiftX's clients would approach Mr Musson directly. Clients had Mr Musson's LiftX mobile phone number. The phone and number are in LiftX's possession.

[16] I accept there is arguably a risk that Mr Musson might inadvertently disclose to a new employer the name, contact details or service schedule of a LiftX client. At least some of that information is arguably proprietary information capable of protection. LiftX also refers to the possibility that a new employer might require Mr Musson to divulge that information. That touches on the competitive relationship between LiftX and another company that offers maintenance and certification services. There is an affidavit from the General Manager of that company, disputing many of LiftX's assertions. LiftX is also protected against these risks through the confidentiality provision that endures post-employment and the non-solicitation provision that persists for 6 months after employment.

[17] Almost all of the arguably proprietary information about which LiftX expresses a concern will already be known to the competitor, several of whose principals had worked for LiftX. One was formerly LiftX's General Manager. However, I accept that LiftX is arguably entitled to some form of post-employment restraint against Mr Musson, protecting it in respect of its proprietary client information since the last of those persons left LiftX.

[18] At this point, there appears little strength in an argument that a restraint preventing Mr Musson from working for a South Island competitor for 6 months might reasonably be required to protect LiftX's proprietary information, in addition to the continuing confidentiality and 6 month non-solicitation obligations. I am mindful of the Authority's power to modify the terms of a restraint, so as to make it reasonable at the time it was entered into. On that basis, I accept that LiftX has established an arguable case that it might be entitled to a restraint for a lesser period.

[19] It is not necessary to canvass the geographical scope of the restraint at this point in any depth. The prospective competitor employer is based in Christchurch, so Mr Musson being employed there would arguably infringe even a narrowly drawn restraint.

[20] There is no evidence to establish it is reasonably imminent that Mr Musson will be employed by another competitor. I need only consider the matter in respect of employment by EPSNZ Limited.

Does the balance of convenience favour an interim injunction?

[21] The scale of prospective losses, in the event that LiftX was found to have an enforceable right to a restraint in breach of which Mr Musson worked for a competitor, is at large. However, Mr Dix for LiftX is arguably correct when he says that Mr Musson is unlikely to be in a financial position to sustain an award of damages. There is no information about Mr Musson's financial circumstances apart from his rate of pay at LiftX, apparently to be matched by the prospective employer.

[22] There is a submission that harm to LiftX's business is not readily addressable by way of damages. I am referred to several cases. I accept the point about Mr Musson being unlikely to have the means to meet an award, if damages of any substance are caused. However, it should not be overly difficult for LiftX to identify clients who have not utilised its services for 6 monthly certifications. The detail and value of any work done by Mr Musson's prospective employer for those ex-clients of LiftX is likely to be information obtainable in some form of proceedings. Attributing the cause of such losses to a breach by Mr Musson would then require some attention. The complexities of quantification referred to in *DBM Grange v Parker* and *Tyre Collection Services Limited v Le Roy & Ors* are much less apparent here, and the circumstances are substantially different.⁵ However, it remains the case that damages might not be adequate as a remedy.

[23] It is not disputed that LiftX is a company of financial substance. Any losses sustained by Mr Musson, if restrained from being employed in his trade by a competitor, are quantifiable and recoverable against LiftX on the basis of its undertaking, should the restraint not be upheld.

⁵ *DBM Grange v Parker* [2005] 2 NZELR 523 and *Tyre Collection Services Limited v Le Roy & Ors* [2016] NZHC 403.

[24] There is no evidence from or for Mr Musson covering any other harm he is likely to suffer if he is wrongly prevented from being employed by a competitor, pending resolution of the substantive claim.

[25] I conclude that the balance of convenience favours upholding the restraint, pending the substantive determination of the claim.

What is the overall justice of the case?

[26] I address only some of the points raised by counsel.

[27] While LiftX is entitled to protect its confidential and commercially sensitive information, it may have sufficient protection through the confidentiality and non-solicitation provisions binding on a person in a position such as Mr Musson, so as to make it unreasonable for there to be a restraint of trade applicable for 6 months.

[28] A restraint of trade has always been included in Mr Musson's employment agreements. Mr Musson was aware of it, before his resignation. There is a public interest in enforcing the sanctity of agreements. However, applying the principle that "In general, the legal position ... that any such contractual restraint of trade provision is *prima facie* unlawful..."⁶ might involve not enforcing an agreed provision.

[29] I canvassed dates with the parties for a substantive investigation meeting. I am able to offer dates, for which the parties are available, prior to the end of July. While Mr Musson may be able to sustain his position that the restraint of trade when it was entered into was unreasonable and so is unenforceable, the better position is to require him to put his plan to work for a competitor on hold at least until the matter has been subject to a substantive investigation.

Summary

[30] There will be an interim order restraining Mr Musson from being employed by a competitor.

[31] There is a claim for costs. Counsel refers me to clause 25.2 of the 2020 agreement:

⁶ *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153 at [1].

The Employee shall pay all costs and expenses, including legal fees on a full indemnity basis, incurred by the Employer as a result of any action or proceeding commenced to enforce the covenants ... in clauses relating to ... restraint of trade.

[32] Liability under the contractual indemnity presupposes the enforceability of the current restraint of trade provision. That point is not yet resolved. The proper approach is to reserve costs, whether under clause 25.2 or otherwise, to be dealt with following determination of the substantive issues.

[33] No specific submissions were directed at the specific form of order to be made. I will amend the words proposed by LiftX in its statement of problem. The precise wording remains subject to change on application.

[34] A case management conference will be convened shortly to confirm the proposed investigation dates, set other arrangements and consider whether there should be a further direction to mediation.

Philip Cheyne
Member of the Employment Relations Authority