

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 536
5360606
5360614

BETWEEN

SHAUN O'NEILL
Applicant in 5360606

LANCE WARMINGTON
Applicant in 5360614

AND

AFFCO NEW ZEALAND
LIMITED
Respondent

Member of Authority: Dzintra King

Representatives: Diccon Sim, Counsel for Applicants
Mary Wilson, Counsel for Respondent

Investigation Meeting: 1 December 2011

Submissions received: 9 December 2011 from Applicants
9 December 2011 from Respondent

Determination: 16 December 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants, Mr Lance Warmington and Mr Shaun O'Neill, are bound by a restraint of trade which they say is not enforceable.

[2] The applicants also say that at the time they entered into the restraints certain representations regarding the enforceability of the restraints were made by the respondent and that those representations render any subsequent agreement unfair and unconscionable.

[3] The respondent, Affco New Zealand Limited (“Affco”) says the applicants into the restraints freely and the restraints are enforceable.

Background

[4] Mr O’Neill commenced employment with Affco as Plant Manager at the Imlay Plant in October 2007. He signed an individual employment agreement (“IEA”) which contained a restraint of trade. In April 2011 he negotiated a salary increase and signed a new IEA, which also contained a restraint of trade.

[5] Mr O’Neill was intending to resign in April 2011 but Affco offered him more money to stay. Mr O’Neill advised Mr Graeme Cox (the HR Manager) that the only change he would accept to his new contract would be an alteration in the salary. The new contract, however, contained an express provision that part of the salary was related to the restraint. Mr O’Neill said he would not sign a contract with that provision in it.

[6] When he did not hear back, he told Mr Cox that if it was not sorted by Friday 15 April he would be revising his decision to stay. At that stage he had a conversation with Mr Ogg and the clause to which Mr O’Neill objected was removed from the contract.

[7] Silver Fern Farms offered Mr O’Neill a position as Plant Manager of its Pacific Beef Plant in Hastings, a position he accepted.

[8] Mr Warmington commenced employment with Affco as Plant Manager of Rangioru Plant at Te Puke in March 2008. He was offered a salary package of \$100,000 but successfully negotiated an increase to \$110,000. He also signed an IEA with a restraint clause.

[9] The Rangioru Plant processes beef, venison, mutton, lamb, calf and goat.

[10] Silver Fern Farms offered Mr Warmington the position of Plant Manager of its new Te Aroha plant. This plant processes beef.

[11] The restraint clause in the individual employment agreements of both applicants reads:

9.0 Restraint of Trade

9.1 In order to protect the Employer's proprietary interests, for three months after the termination of this agreement the Employee agrees not to engage to work for or on behalf of an organisation in direct competition with the Employer, nor establish their own business in competition with the Employer.

9.2 For three months after the termination of this agreement the Employee agrees not to solicit in competition with the Employer the custom of any person who has at any time during the period of the Employee's employment by the Employer been a customer of the Employer as a result of any tender, negotiations, arrangements or proceedings made or taking place at the date of such termination.

9.3 Consideration for this restraint is included in the remuneration package provided in clause 5 of this agreement.

9.4 It is acknowledged that in view of the Employee's position with the Employer and the Employee's direct association with the customers of the Employer during your employment, the restraint provided for in sub-clause 9.1 is fair and reasonable and does not inhibit the Employee's ability to earn a reasonable living.

Enforceability of the Restraint

[12] The Imlay Plant processes lamb. As Plant Manager Mr O'Neill was responsible for the efficient running and profitability of the plant to optimise capacity and yields and ensure excellence in customer delivery. He had access to confidential information including details regarding procurement, pricing, sales, comprehensive information about customer requirements and orders, and suppliers.

[13] Like Mr O'Neill, Mr Warmington had access to a variety of confidential information about plants throughout New Zealand, pricing, sales and suppliers.

[14] Covenants in restraint of trade are, as a matter of policy, regarded as unenforceable unless they are reasonably necessary to protect a proprietary interest and are in the public interest. The reasonableness of the restraint is determined at the time it was entered into: *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490.

[15] The onus to establish reasonableness is upon the party seeking to enforce the restraint.

[16] An employer may possess a proprietary interest in trade secrets, confidential information and business or trade connections: *Air Compressor Specialists Ltd v Bryant* [1998] 2 ERNZ 42.

[17] Restraints may be reasonable in addition to an express commitment to confidentiality and whether that is so will depend upon the particular facts of the case: *Allright v Canon* (2006) 6 NZELR 367.

[18] In *Allright* Couch J concluded that the position Mr Allright was to take up with a competitor was virtually the same as that he had held with Canon and that the information he had derived from his employment at Canon would be likely to be directly relevant to his duties at Fuji Xerox. At para [28] Couch J stated that it was 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 was a case where the departing employee, through the importance of his position, had a very extensive knowledge of the employer's business at all levels.

[19] There was therefore a real possibility that Mr Allright would be influenced in the views he expressed and in any decisions he might make by the information he had acquired at Canon, some of which was confidential information. Couch J concluded that in such circumstances a restraint in addition to the express confidentiality provisions was not unreasonable.

[20] Both applicants have had access to confidential information. Both accepted that they had access to most of the information detailed by Mr Ogg as being confidential. Both applicants understandably minimised the importance of the information. Whether or not the applicants used the information, they had access to it. Both accepted that the yield data was used as an important tool.

[21] In *Littlewoods Organisation Limited v Harris* [1978] 1 All ER 1026 it was held that at times it was not satisfactory merely to have a stipulation against the disclosure of confidential information. This was because it was difficult to draw the line between information which was and was not confidential. The only practicable solution may be to have a restraint of trade which may well be held to be reasonable if limited to a short time period.

[22] Three months is not an unreasonable time period. The restraint is not geographically limited to a specific area. However, given the nature of the industry that is understandable and not unreasonable.

[23] The restraints of trade are reasonable and enforceable.

Unfair Bargaining

[24] The applicants rely upon s 68 (2) (b) and (c). Section 68 (2) (b) provides that bargaining is unfair where person A, at the time of bargaining “*reasonably relies on the skill, care, or advice of person B or a person acting on person B’s behalf*”.

[25] Section 68 (2) (c) provides that bargaining is unfair where person A “*is induced to enter into the agreement by oppressive means, undue influence, or duress.*”

[26] This part of the argument is based upon a representation allegedly made by Mr Rowan Ogg, the Director of Operations for the respondent. Mr Ogg purportedly stated that the restraint clauses were unenforceable. Mr Ogg denies having said that.

[27] Messrs O'Neill and Warmington deposed that they had a great deal of trust in Mr Ogg and relied upon his representations regarding the lack of enforceability of the restraint clauses.

[28] I do not need to make a finding as to whether or not Mr Ogg made the comments attributed to him. Both men successfully negotiated salary increases. Even if he did, both the applicants are people experienced in negotiations. They are not people who are in any sense vulnerable or lacking the requisite knowledge regarding appropriate courses of action in terms of contested contractual provisions. If, as they say they did, they relied upon the skill, care or advice of Mr Ogg, then they did not do so reasonably.

[29] Neither Mr O'Neill nor Mr Warmington was induced to enter the agreement by oppressive means.

Consideration

[30] Mr Sim submitted that there was no evidence of any consideration being supplied for the restraints. However, clause 9.3 of each of the applicant's individual employment agreements expressly refers to consideration for the restraint.

Costs

[31] Costs are reserved. If the parties are unable to resolve the issue of costs, the respondent should file a memorandum within 32 days of the date of this determination. The applicants should file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority