IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 165/10
5301894

	BETWEEN	OCS LIMITED Applicant
	AND	SHELLEY HAYNES Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	Paul McBride for Applicant No appearance for Respondent
Investigation Meeting:	9 April 2010
Determination:	12 April 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem concerns alleged breaches of express and implied terms of employment, including breaches of the duties of confidentiality and of fidelity. The applicant lodged the matter with the Authority on 8 April 2010 and requested that it be addressed with extreme urgency, preferably that day and on an ex parte basis.

[2] The basis of the request for extreme urgency was explained as follows. Since 2000 the applicant (or companies within the same group) had employed the respondent, Ms Haynes, in senior sales roles in the Waikato, Bay of Plenty and Auckland areas. Ms Haynes had extensive access to confidential information including pricing and contract information and client lists.

[3] On 30 March 2010 Ms Haynes resigned, telling the applicant that she was going to work for a competitor in the Bay of Plenty area. No issue was taken with the

new employment in itself, but in recognition of the potential conflicts arising out of going to work for a competitor it was arranged that after a handover had taken place Ms Haynes would not be required to work out the balance of her notice period and would be paid out all her remaining entitlements.

[4] It is the applicant's position that at the time this arrangement was made there was an express reminder to Ms Haynes that her employment would continue until the end of the notice period and she would not be free to take up her new position until the expiry of that period.

[5] Ms Haynes last attended work with the applicant, to complete the handover, on 1 April. On 6 April the applicant discovered that between 23 March and 30 March the respondent had sent an extensive body of confidential information to a private email address. This information was highly sensitive and included costings, details of services provided to specific clients, and pricing information. The emails had been deleted from her Outlook folders in what appeared to be an attempt to conceal her actions.

[6] At 3.30pm on 8 April Mr Clive Menkin, General Manager Human Resources for the applicant, telephoned the competitor for which it was understood Ms Haynes was going to work. He asked for her and was told that Ms Haynes had commenced work but was unavailable to take the call. He was told that she could be contacted there either later that day or the next.

[7] The applicant requested that the employment relationship problem be remedied by injunctive relief (in the first instance "interim" injunctions.) The application was accompanied by draft affidavits and by an undertaking as to damages. In seeking urgency, Counsel for the applicant submitted that extreme urgency was dictated by:

"the unlawful direct competition, coupled with the demonstrable misappropriation of highly sensitive confidential information. Unless the matter is addressed in that way then the damage to the Applicant will compound. The interests of justice in that respect require that the matter is addressed before the Respondent can undertake further unlawful activity."

[8] I declined to proceed on an ex parte basis. Even if it were open to the Authority to determine an application of this type without notice to the respondent (and I am not persuaded of that) I was not satisfied that the circumstances described in this case justified such an approach.

[9] I accepted however that the circumstances were such that the application for interim or interlocutory relief should be addressed on an urgent basis with the normal timeframes abridged. I therefore made directions regarding the scheduling of an urgent investigation meeting, and in relation to service on the respondent, in a Minute dated 8 April (attached.)

[10] On the morning of 9 April the Authority support officer reported to me that Counsel for the applicant had advised that personal service had been effected on the respondent in Mount Maunganui at 9.04 am that day. I asked that Counsel be informed that, in the event the respondent did not attend the meeting, proof of service would be required before the meeting proceeded.

[11] The respondent did not attend, nor make any other form of contact with, the Authority that day. At 1.00 pm I met with Mr McBride and two witnesses for the applicant who advised that the individual who had served the documents on the respondent (Mr Peter McDonald) was not present to give evidence in person (being in the Bay of Plenty as we spoke) but could be contacted on his mobile. I therefore questioned Mr McDonald over the telephone. He identified for me a set of documents he had received from Mr Menkin by email. This included the application and attachments, my Minute of 8 April and a covering email from Mr McBride. He told me he had printed them out early that morning and travelled to what he understood to be the respondent's new place of work (which he described as the "*NZ Hygiene Depot in Mark Road Mt Maunganui.")* There he waited for her to arrive. When she did he met her at the door and presented the documents to her and she accepted them. Mr McDonald told me he has known Ms Haynes throughout her employment with the applicant.

[12] I was satisfied that Ms Haynes was properly served and was on notice of the investigation meeting. I therefore proceed to determine the applications for urgent

"interim" relief on the basis of what I heard at the investigation meeting. I note that applicants for interim relief are given the benefit of an assumption that they will be able to prove their case when it comes to the substantive hearing. [1]

Issues

[13] Relying on the relevant provisions of the employment agreement, as well as the usual implied terms, the applicant seeks interim orders in the following terms:

1. "*Requiring that the Respondent deliver up to the Applicant all confidential information of the Applicant's including, (without limitation), all of that in or attached to the emails highlighted on document 4.1 to the Statement of Problem;*

2. *Requiring that the Respondent delete all copies of all such information from any computer system under her control;*

3. *Requiring that the Respondent disclose to the Authority and the Applicant full detail of any use or disclosure of that information, including, (without limitation), the provision of any of the confidential information to any third party, including New Zealand Hygiene Limited;*

4. *Restraining the Respondent by herself or her agents from having any business contact with any third party of a type which might enable her to use or misuse any of the Applicant's confidential information for a period of not less than three months;*

5. *Restraining the Respondent from undertaking any engagement, employment or other activity in conflict with the Applicant's interests and the Respondent's duties under the employment agreement";*

[14] The relevant clauses of the employment agreement provide as follows:

"*13.0* ***EMPLOYEE ACKNOWLEDGEMENTS***

3.1 The Employee acknowledges that:

[1] *NZ Stevedoring Co Ltd v NZ Waterfront Workers IUOW [1990] 3 NZLR 308*

*(a) the property of the Company and its subsidiaries includes and will include all trade and business secrets and other confidential information and documents relating to the affairs or business of the Company and its subsidiaries, or any person with whom the Employee comes into contact as a result of this Agreement, or which come into the Employee's possession in the course and by reason of the Employment, whether or not the same were originally supplied by the Company or its subsidiaries ("**Confidential Information**");*

(b) the Confidential Information has been and will be acquired by the Company at the Company's or the subsidiaries' initiative and expense; and

(c) the Company and its subsidiaries have spent and will spend effort and money in establishing and maintaining their customer base, employee skills and the Confidential Information.

Accordingly the Employee agrees that it is reasonable to enter into the representations and warranties contained in the Agreement, and, if the Employment is terminated, that the employee continues to be subject to clauses 14, 15 and 16.

14.0 CONFIDENTIALITY

14.1 The Employee represents and warrants that the employee will not either during the Employment or at any time thereafter, except in the proper course of the employee's duties under this Agreement or as required by law or by the Company, use or disclose to any person any Confidential Information, and will use his/her best endeavours to prevent the unauthorised use or disclosure of any confidential information by third parties.

…

16.0 NON-COMPETITION

16.1 During the Employment

The Employee represents and warrants that he/she will not without the prior written consent of the Company during the Employment either directly or indirectly in any capacity (including without limitation as principal, agent, partner, employee, shareholder unit holder, joint venturer, director, trustee, beneficiary, manager, consultant or adviser) carry on, advise, provide services to or be engaged, concerned or interested in or associated with any business or activity which is competitive with any business carried on by the Company or any of its subsidiaries, or be engaged or interested in any public or private work or duties which in the reasonable opinion of the Directors may hinder or otherwise interfere with the performance of the Employee under this Agreement…

16.2 After the employment

The Employee represents and warrants that he/she will not without the written consent of the Company, during the period of 3 months after termination of the Employment, however that termination occurs:

(a) anywhere within Hamilton directly or indirectly in any capacity, (whether as principal, agent, partner, employee, shareholder unit holder, joint venturer, director, trustee, beneficiary, manager, consultant or adviser) carry on, advise, provide services to or be engaged, concerned or interested in or associated with any business or activity which is competitive with any business carried on by the Company or any of its subsidiaries at the date of termination of the Employment…

(b) *canvass, solicit or endeavour to entice away from the Company any person who or which at any time during the Term or at the date of the termination of this Agreement was or is a client or customer of or supplier to the Company or any subsidiary of the Company or in the habit of dealing with the Company or any such subsidiary;*

(c) *solicit, interfere with or endeavour to entice away any employee of the Company or any of its subsidiaries; or*

(d) *counsel, procure or otherwise assist any person to do any of the acts referred to in clauses 16.2 (b) and 16.2(c).”*

[15] In a variation dated 5 August 2009 (entered into to reflect a move by Ms Haynes to an account manager’s role in Auckland) “*Restraint Coverage*” was amended to “*Greater Auckland area for 3 months*.”

[16] The applicant also relies on confidentiality provisions in its Employee Handbook, and Internet and Email policies which are consistent in their terms with the contractual provisions.

[17] The relevant considerations for the grant of interim or interlocutory relief are (as recently confirmed in *Allright v Canon New Zealand Ltd AC 47/08, 3 December 2008* at paragraph [14]):

i. Whether there is an arguable case for substantive relief;

ii. whether there is an adequate alternative remedy;

iii. if not, where the balance of convenience lies, and

iv. what the overall justice of the case requires, taking all aspects of the case into account.

[18] These are issues for determination in this matter. They are discussed below with reference to the alleged breaches of clauses 14 and 16 respectively.

(i) The alleged breaches of confidentiality

[19] The applicant has a strongly arguable case for asserting that the respondent was bound by duties of confidentiality, both implied and express (as set out in the employment agreement and other employment policies.)

[20] It also purports to have good evidence for asserting that these obligations have been breached. At the investigation meeting Mr Menkin produced copies of the

information which he said Ms Haynes had forwarded to an unauthorised email address (one which he believed she and her husband used for personal business.) He also showed me computer records to demonstrate that the documents in question were sent to that address.

[21] This material most definitely appeared to be the property of the applicant and furthermore to be of a highly sensitive and confidential nature. It is hard to see what basis Ms Haynes might have for asserting a right to the information she appears to have taken from the applicant. I am satisfied that the applicant has an arguable case that there has been a breach of clause 14. It also has an arguable case for permanent injunctive relief requiring the return of the information in question.

[22] I also accept that there can be no adequate alternative remedy besides the return of the property in question. In relation to the alleged breach of confidentiality the balance of convenience and the overall justice of the case clearly favour the applicant.

[23] Orders in the nature of proposed orders (1) to (3), with minor amendments, are granted as set out below.

(ii) The alleged breaches of the non-competition obligations.

[24] The basis of the case in relation to this alleged breach rests on the express and implied terms of employment as well as two factual assertions by the applicant.

[25] In relation to the alleged breach of clause 16.1, branch manager Ms Hartel gave evidence that she instructed the respondent that payment in lieu of notice did not mean that her employment ended at that point but rather that her employment (and its attendant obligations including those under clause 16.1) continued until the end of the notice period.

[26] The applicant also asserts that in breach of those obligations Ms Haynes has started work with her new employer and that this can be demonstrated by what Mr Menkin was told when he telephoned the organisation where he believes she now works.

[27] The applicant does not have such a clear cut case in relation to this allegation as it does in relation to the allegation that confidentiality has been breached. There are legal issues going to the question whether the employment, and its attendant obligations, continues until the end of the notice period. There are also associated factual issues. However, the applicant is entitled to the benefit of a presumption that it will be able to prove that it told Ms Haynes that her employment was ongoing until the end of April. On that basis, I accept that it has met the threshold of "arguable case."

[28] I am also satisfied that there is no adequate alternative to an injunction restraining Ms Haynes from working in competition with the applicant during the rest of what would have been her notice period. Ms Hartel explained to me that several contracts (including the biggest in the area) are due for renewal soon. She told me that it was critical that the applicant have the unimpeded opportunity, over the next three weeks, to meet with those clients to renegotiate its arrangements with them.

[29] I am also satisfied that the balance of convenience and the overall justice of the case favour a grant of injunctive relief. Ms Haynes has her pay for the balance of the notice period and will not suffer financial hardship by being restrained from taking up further employment during her notice period. Had it not been for her early release, she could not have commenced work with her new employer until her notice period expired. It would not appear likely that her new employment would be jeopardised by being deferred until the end of April.

[30] An order in the nature of proposed order (5), with minor amendment, is set out below (as final order (iv).)

[31] Turning to clause 16.2 I note that the non competition clause in Ms Haynes contract (as amended in late 2009) restrained her from taking up work with a competitor in the greater Auckland area for a period of three months after her employment ended. I am not satisfied that the applicant has an arguable case that the Bay of Plenty falls within the greater Auckland area. I do not therefore make an order in the terms of proposed order (4.)

[32] For completeness I note that Mr McBride suggested also that, notwithstanding the situation regarding the restraint provision, order (4) was justified to prevent further breach of the confidentiality provisions. I consider however that orders (1) to (3) are sufficient to address those issues, in the interim at least.

Summary of orders

[33] The orders sought by the Applicant have been subject to minor amendments. The Authority orders that until further orders of the Authority there is an interim injunction:

i. Requiring that the Respondent deliver up to the Applicant all confidential information of the Applicant's including, (without limitation), all of that in or attached to the emails highlighted on document 4.1 to the Statement of Problem (attached) with the exception of the Respondent's CV;

ii. Requiring that the Respondent delete all copies of all such information from any computer system under her control;

iii. Requiring that the Respondent disclose to the Authority and the Applicant full detail of any use or disclosure of that information, including, (without limitation), the provision of any of the confidential information to any third party, including New Zealand Hygiene Limited;

iv. Restraining the Respondent from undertaking any engagement, employment or other activity in conflict with the Applicant's interests and the Respondent's duties under the employment agreement, for the period until 30 April 2010.

[34] Costs are reserved.

[35] **Leave is reserved to any party to apply at short notice for further orders or directions.**

[36] In the meantime the parties should expect to proceed to mediation as soon as possible. A conference call will be scheduled at the parties' earliest convenience to discuss this, along with the scheduling of the substantive matters.

Yvonne Oldfield
Member of the Employment Relations Authority