Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 107
5550196

	BETWEEN	OFFICEMAX NEW ZEALAND LTD Applicant
	AND	OLAF SEQUEIRA Respondent

Member of Authority:	Vicki Campbell
Representatives:	Rob Towner for Applicant Danny Gelb for Respondent
Investigation Meeting:	10 April 2015
Determination:	13 April 2015

DETERMINATION OF THE AUTHORITY

A. The application for an interim order is dismissed.

B. Costs are reserved.

Employment relationship problem

[1] OfficeMax New Zealand Limited (OfficeMax) seeks an interim order preventing Mr Olaf Sequeira from working in competition to it pursuant to a restraint of trade provision entered into by the parties at the time the employment relationship commenced. In particular OfficeMax is seeking to restrain Mr Sequeira from entering into an employment relationship with a new employer from which he has received an offer of employment.

[2] Mr Sequeira says the restraint of trade clause is illegal, punitive and not enforceable.

[3] During the investigation meeting OfficeMax applied for non-publication orders in relation to certain evidence which was disclosed during the investigation meeting. The evidence contains information which is commercially sensitive and which relates to a strategic initiative which was in planning during Mr Sequeira's employment.

[4] Mr Sequeira did not oppose the application and I accept that a non-publication order is both necessary and appropriate in this case, and that it is in the interests of justice to make such an order.

[5] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from OfficeMax and Mr Sequeira but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[6] Mr Sequeira entered into a written employment agreement with OfficeMax on 9 August 2010. Mr Sequeira moved from Australia to New Zealand at his own expense to take up the role of Merchandise Administration Manager.

[7] The employment agreement at clause 27(a)(i) states:

> **27. Restraint of Trade and Non-Solicitation**
> (a) In consideration of OfficeMax paying the employee the agreed salary hereunder, the employee covenants and agrees that after termination for whatever reason, of his/her employment with OfficeMax, he/she will not:
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> (i) For a period of **6 months**, be directly or indirectly interested or concerned, whether as an employee, independent contractor, shareholder, director, consultant, partner or in any other capacity, (except as the holder of not more than 5% of the issued capital of any company whose shares are listed on a recognised stock exchange) in the office products business in New Zealand or Australia; and
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> (ii) For a period of 6 months, solicit or endeavour to entice away from OfficeMax, any customer or client who has dealings with OfficeMax; and

(iii) For a period of 6 months, attempt to encourage or persuade any of OfficeMax employees or contractors to terminate or damage their employment agreements or independent contractor arrangements with OfficeMax.

(b) The employee acknowledges that:

(i) The value of the remuneration package and benefits contained in this agreement have been assessed and are dependent upon the employee agreeing to enter into the restraints contained in this clause; and

(ii) The restraints are fair and reasonable for the preservation of the goodwill of the business of OfficeMax.

(c) OfficeMax and the employee consider the restraints contained in clause 27(a) to be reasonable and intend the restraints to operated to the maximum effect. If the restraints in clause 27(a):

(i) Are void as unreasonable for the protection of OfficeMax; and/or

(ii) Would be valid if part of the wording was deleted or the period of restraint or area or activity was reduced,

Then the restraints will apply with the modifications necessary to make them effective.

The restraints in clause 27(a) are separate, distinct and several so that the unenforceability of any restraint does not effect the enforceability of the other restraints.

[8] The employment agreement defines confidential information as including:

- Pricing
- Sales
- Marketing
- Financial details
- Clients/customers
- Training and operation matters
- Technical processes
- About third party contractual arrangements
- Commercially sensitive material
- Computer programming and software
- Intellectual property

[9] Mr Sequeira says when he signed the employment agreement he took a firm line on the negotiations over his salary as he did not wish to accept a lesser equivalent salary than he had been receiving in Australia and he also wished his salary to take into account that he had funded his move from Australia himself. Mr Sequeira

acknowledges that his salary was above the market rate but that was due to him negotiating the improved salary based on his expectations and circumstances and had nothing to do with the restraint of trade.

Issues

[10] The issue for determination is whether an interim injunction should be ordered to prevent Mr Sequeira from taking up employment with a competitor until the end of the contracted restraint period.

The applicable tests

[11] In determining this application for interim orders, the Authority must have regard to[1]:

a) Whether there is an arguable case;

b) Where the balance of convenience lies between the parties in the period until the substantive application has been determined; and

c) The overall justice of the case.

[12] The remedy is discretionary. The purpose of interim relief is to protect an applicant against injury for which it cannot be adequately compensated in damages in the event that it succeeds at the substantive hearing.

[13] Protection for the applicant needs to be balanced against the damage that might be done to a respondent, through being prevented from exercising their rights if the applicant fails in its substantive hearing.

Arguable case

[14] The question of whether OfficeMax has an arguable, but not necessarily certain, prospect of success at the Authority's investigation of the substantives issues focussed on the enforceability of the Restraint of Trade provision in the Employment Agreement.

[1] *Pottinger, Nine Dot Consulting limited & Carew v Kelly Services (New Zealand) Limited* [2012] NZEmpC 101.

Restraint of trade

[15] OfficeMax seeks an order that Mr Sequeira be restrained from taking up his new employment until the period of the restraint has passed on 4 June 2015.

[16] Contractual provisions restricting the activities of employees after termination of their employment are, as a matter of legal policy, regarded as unenforceable unless they can be justified as reasonably necessary to protect proprietary interests of the employer in the public interest.[2]

[17] The onus of establishing that a restrictive covenant is reasonable is on the employer.[3] Such a provision should be no wider than is required to protect the party in whose favour it is given.[4]

[18] Restraints are enforced only to the extent required to protect a proprietary interest of the employer. The nature of the employee's role and the employer's business, the geographical scope of the restraint, and its nature and duration are relevant factors in assessing whether a restraint is reasonably necessary.

[19] The issue for the Authority in the context of this application is whether an arguable question arises as to the likely enforceability of the covenants at issue in relation to Mr Sequeira.

Proprietary interest

[20] Mr Richard Meares, Director, Merchandise and Marketing gave evidence that in his position Mr Sequeira was privy to and had access to confidential and commercially sensitive information in the nature of trade and business secrets. This included:

- The terms of trade of suppliers
- The identity of overseas suppliers

[2] *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 (CA) at [20] citing *Mason v Provident Clothing & Supply Company Ltd* [1913] AC 724 (HL) at 733.
[3] Ibid at [28].
[4] *Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 NZLR 731, [2001] ERNZ 46 (CA) at [28].

- All pricing information including price structure and methodology and pricing margins
- Rebate information
- Confidential purchasing information including historical information and trends
- Strategic plans for initiatives

[21] Mr Sequeira says he took on the project of working with the Buyers to commence negotiations with Suppliers on Terms of Trade and within 6 months of starting he had signed up close to 200 suppliers.

[22] Mr Sequeira says that when he commenced his employment at OfficeMax an audit undertaken prior to his commencement reflagged the document which throughout the investigation meeting was referred to as the "rebate tool". Mr Sequeira says he amended the rebate tool using knowledge that he had gained from working in the sector for over 20 years. There is no doubt the development of the rebate tool has become a feature of OfficeMax's management tools. Mr Sequeira says there is nothing new or ground breaking about how the rebate system works.

[23] Mr Meares' evidence was that the rebate tool and the methodology underpinning it are commercially sensitive and confidential and require protection.

[24] Mr Sequeira says he is bound by a confidentiality clause of the employment agreement and he has no intention of breaching that obligation. With respect to Mr Sequeira, his promises give little comfort to OfficeMax given that he was dismissed in December 2014 for sharing confidential company documents with his ex-partner, in breach of the confidentiality provisions he now says he will abide by.

Duration and nature of restraint

[25] The duration for the restraint of trade is 6 months. The restraint provision prohibits Mr Sequeira from being directly or indirectly interested or concerned as an employee in the office products business in New Zealand or Australia.

[26] Mr Towner submitted on behalf of OfficeMax that at the time Mr Sequeira entered into the restraints he acknowledged through his acceptance of the employment

agreement that the restraints were reasonable. To now render the Restraint unenforceable would be contrary to the intention of the parties at the time the employment agreement was entered into.

[27] Mr Sequeira told the Authority that he signed the agreement on his first day at work and that he had not read it thoroughly. I do not accept that as being an accurate portrayal of how the agreement was entered into. What Mr Sequeira signed on his first day of work was a copy of an agreement he had received in early July 2010. The covering letter to the original agreement made it clear to Mr Sequeira that when he signed the agreement he was confirming that he fully understood the terms and conditions of employment and their implications.

[28] The copy signed by Mr Sequeira on his first day of work had only one change, and that was to the amount of salary he would receive. This change was made at Mr Sequeira's request.

[29] Further on 22 March 2015 Mr Sequeira emailed Mr Meares requesting that he be released from the restraint. In that email Mr Sequeira stated that he fully understood the legal side of the contract and that normally he would not have requested to be released.

[30] Mr Sequeira submitted that the restraint was unlawful because the geographic boundary and the 6 month time period are unreasonable.

Consideration

[31] The Court of Appeal in *Fuel Espresso v Hiesh*[5] held the underlying principle that consideration must be given for a subsequent contract remained and the existence of consideration may be inferred from the contractual terms.

[32] The employment agreement signed by the parties acknowledges that the value of the remuneration package was dependent on Mr Sequeira agreeing to enter into the restraint.

Conclusion as to arguable case

[33] I am satisfied an arguable case about whether the restraint of trade provision is enforceable has been established.

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[5] [2007] ERNZ 60 (CA).

Balance of convenience

[34] The Employment Court has described the balance of convenience as the balance of the risk of doing an injustice.[6] The Authority is required to balance the potential injustice that will be caused to OfficeMax if the injunction is not granted, against the potential injustice to the respondent if the injunction is granted.

[35] Factors that are relevant to an assessment of where the balance of convenience lies includes the adequacy of damages for all parties, the relative strength of each party's case, and the conduct of the litigants. Also relevant is the position of the parties pending substantive determination of the claim and whether an award for damages would be an adequate remedy as this is relevant in assessing where the balance of convenience lies.[7]

[36] Mr Sequeira's employment with OfficeMax came to an end on 4 December 2014 after OfficeMax found Mr Sequeira had conducted himself in a manner that constituted serious misconduct.

[37] Mr Sequeira has attempted to find work with non-competing companies but has been unsuccessful. Mr Sequeira has applied for over 100+ jobs and has had only two interviews, both without success. As a result of not being able to find work with non-competing companies Mr Sequeira has been compelled to find work in the industry in which he has over 20 years' experience.

[38] It has been four months since Mr Sequeira was dismissed. The restraint of trade is for a period of 6 months. Mr Sequeira's evidence is that he lives in rental accommodation and looks after his 80 year old mother. He has used savings to live on but if he is unable to work for the next two months his funds will be completely exhausted and he will have to leave the rental property. Mr Sequeira says he will become destitute and he and his mother will have nowhere to live.

[39] There has not been any delay in bringing these proceedings to the Authority. On 23 March 2015 Mr Sequeira made a written request to be released from the

[6] Supra n 1 at [76].
[7] *American Cyanamid Co Ltd v Ethicon Ltd*[1975] AC 396.

restraint. On 29 March 2015 OfficeMax declined the request. These proceedings were lodged and served the following Monday.

[40] I have considered whether damages would be an adequate remedy if Mr Sequeira commences employment and subsequently breaches the confidentiality and non-solicitation provisions of the employment agreement. Based on the evidence Mr Sequeira gave of his financial position it is highly questionable whether he could pay significant damages to the applicant currently. That is largely due to the fact that he is currently not earning and is living off his savings.

[41] It is not clear whether that position would change if Mr Sequeira is able to commence employment and thus be in receipt of a salary. The employment offer is, however, of limited duration, being three months. It is possible that at the end of the three months Mr Sequeira may be in a similar position and at that stage unable to pay damages.

[42] OfficeMax is most concerned about its new initiative which is due to be implemented in or about July 2015. Mr Meares says that if Mr Sequeira commences with the competition before 4 June 2015 he may disclose the details of the initiative to his new employer which might then put steps in place to react to the initiative which may cause damage to OfficeMax.

[43] OfficeMax has been working on the initiative for over 12 months and has been executing a roll out of the plan over the last six months. For the majority of the time OfficeMax has been executing the roll out of the plan Mr Sequeira has not been employed by OfficeMax and therefore has not been privy to many of the details of the actual execution of the plan including whether changes have been made and the impact of any alterations to the original plan.

[44] A large proportion of the suppliers used by OfficeMax also supply to the company from which Mr Sequeira has received an offer. The evidence indicates that the rebate systems in place in both companies are different. The company from which Mr Sequeira has received an offer according to Mr Meares uses an advanced computer system. Further, Mr Meares was unable to confirm whether the rebates achieved by OfficeMax were higher or lower than the competing company.

[45] Taking into account all of the information available the Authority is satisfied it is unlikely significant damages will result if there is inadvertent disclosure of confidential information. The value of any information Mr Sequeira was privy to during his employment has lessened during the four months since his dismissal. This weighs in Mr Sequeira's favour in terms of an assessment of where the balance of convenience lies.

Overall justice

[46] The Authority is required to stand back and determine where the overall justice of the case lies until the substantive investigation and determination. On balance, the effects on Mr Sequeira of not working are far more severe than on OfficeMax if Mr Sequeira is allowed to work.

[47] The overall justice requires that this application be dismissed.

Comment

[48] I am sure Mr Sequeira is now in no doubt as to his obligations regarding the confidentiality of all OfficeMax business information. Mr Sequeira is reminded that all information regarding OfficeMax's new business initiative is now covered by a non-publication order and any breaches of this order will be viewed very seriously.

Costs

[49] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Sequeira shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. OfficeMax shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority