

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 76
5373948

BETWEEN	PURE NEW ZEALAND FOODS LIMITED Applicant
AND	PREM PRAKASH Respondent

Member of Authority: Michele Ryan

Representatives: Don McKay, Counsel for the Applicant
Guido Ballara, Counsel for the Respondent

Investigation Meeting: 15, 16 May 2012 in Wellington

Determination: 5 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Prem Prakash worked as a chef in India specialising in tandoori cuisine prior to commencing work in New Zealand in 2005 in accordance with an Immigration New Zealand work permit. In 2008 he obtained residence in New Zealand under the Skilled Migrant Category as an ethnic chef.

[2] Mr Prakash started his employment with Pure New Zealand Foods Limited (Pure Foods) in November 2009. Pure Foods is a small to medium enterprise which manufactures a range of Italian and Indian frozen foods for local and national wholesalers and retailers.

[3] On 24 February 2012 Mr Prakash provided Pure Foods with a letter notifying it of his resignation on two weeks' notice, and advised that his last day of work would be 10 March 2012. Soon after his final day of work at Pure Foods he commenced employment as a naan bread chef with Tulsi, a business which operates a chain of

Indian restaurants in the greater Wellington area as well as a commercial kitchen/factory providing packaged foods to supermarkets.

[4] Pure Foods claims Mr Prakash has breached the covenant of restraint and notice period provisions contained in their employment agreement.

[5] Pure Foods requests the Authority order Mr Prakash to cease working for his new employer for three months following the date of the Authority's determination. It seeks to recover alleged loss of profits as a result of Mr Prakash's early termination in breach of the employment agreement and further requests the Authority award penalties against Mr Prakash for breach of his contractual notice period.

[6] Mr Prakash has made counterclaims alleging he was subject to unfair bargaining by Pure Foods during negotiations for an individual employment agreement in 2009.

[7] Mr Prakash says in circumstances of unfair bargaining the terms of the employment agreement are unenforceable and the Authority should, pursuant to s69 of the Employment Relations Act, (the Act) cancel the employment agreement and make orders for a penalty for breach of s63A of the Act and compensate him for unfair bargaining.

[8] Mr Prakash submits if his claim of unfair bargaining is not accepted, the restraint of trade provision contained in the employment agreement is unenforceable. He submits Pure Foods has not established a proprietary interest which requires protection. In the alternative he contends the covenant of restraint is unreasonable in scope, duration and geography and therefore remains unenforceable.

The issues and the investigation

[9] The application for an order to prevent Mr Prakash from working for his new employer was received by the Authority under urgency on 13 March 2012. Following a directions conference that parties were directed to mediation to, amongst other things, attempt in good faith to review the contractual provisions relating to restraint of trade for the purpose of reaching agreed modifications to it but were unsuccessful.

[10] In determining the claims made by Pure Foods and the counterclaims of Mr Prakash I was provided with written statements from Pure Foods' two directors as

well as two of their current employees. Mr Prakash, his wife, and his friend also provided written statements. Each of those witnesses gave additional oral evidence.

[11] Mr Prakash applied to have a Hindi language interpreter available for the Authority's investigation and the Department of Labour provided a skilled interpreter who translated questions and answers between the Hindi and English languages.

[12] Despite Pure Foods' agreement to produce evidence by 27 May 2012 in support of its claim of alleged losses following Mr Prakash's early termination, Pure Foods did not provide any financial information as to its losses until the morning of the first day of the Authority's investigation meeting. The information provided was limited and raises questions as to causation, quantum and apportionment. As a consequence it was agreed that if the restraint clause is determined to be enforceable and/or if Mr Prakash is found to be in breach of his contractual notice period then the parties will be referred to further mediation. An investigation as to losses will be scheduled only if the parties then fail to resolve the matter between them.

[13] The issues for determination by the Authority now are?

- Did Pure Foods at the time it was bargaining for an employment agreement with Mr Prakash, engage in unfair bargaining according to the provisions of s68 of the Act?
- Does Pure Foods have a proprietary interest which it is entitled to have protected?
- If Pure Foods does have a proprietary interest which should be protected, is the contractual provision which seeks to protect the interest reasonable and enforceable?
- Did Mr Prakash breach his employment agreement with regard to his notice period?
- Should orders for penalties be awarded?

Did Pure Foods engage in unfair bargaining according to the provisions of s68 of the Act?

[14] Mr Prakash claims there are three separate grounds pursuant to s68 of the Act by which the bargaining for his employment agreement was unfair at the time he was negotiating an individual employment agreement with Pure Foods. He says Pure Foods knew or ought to have known that:

- (i) he was unable to understand adequately the provisions or implications of the employment agreement by reason of a disability relating to communication,
- (ii) he relied on the skill, care and advice of Pure Foods at the time he entered into the employment agreement and
- (iii) he did not have sufficient information or the opportunity to seek advice as to the contents of the employment agreement.

[15] Section 68 of the Act provides that:

- (1) Bargaining for an individual employment agreement is unfair if-
 - (a) 1 or more paragraphs (a) to (d) of subsection (2) apply to a party to the agreement (**person A**); and
 - (b) the other party to the agreement (**person B**) or another persons who is acting on person B's behalf-
 - (i) knows of the circumstances described in the paragraph or paragraphs that apply to person A; or
 - (ii) ought to know of the circumstances in the paragraph or paragraphs that apply to person A because person B or the other person is aware of facts or other circumstances from which it can be reasonably inferred that the paragraph or paragraphs apply to person A,
- (2) The circumstances are that person A, at the time of bargaining for or entering into the agreement,-
 - (a) is unable to understand adequately the provisions or implications of the agreement by reason of diminished capacity due (for example) to-
 - (i) age; or
 - (ii) sickness; or

- (iii) mental or educational disability; or
 - (iv) a disability relating to communication; or
 - (v) emotional distress; or
- (b) reasonably relies on the skill, care, or advice of person B or a person acting on person's B's behalf; or
- (c) is induced to enter into the agreement by oppressive means, undue influence, or duress; or
- (d) where section 63A applied, did not have the information or the opportunity to seek advice as required by that section.
- ...
- (4) Except as provided in this section, a party to an individual employment agreement must not challenge or question the agreement on the ground that it is unfair or unconscionable.

[16] The onus is on Mr Prakash to establish on the balance of probabilities that unfair bargaining occurred.¹

[17] Mr Prakash lived and worked in Christchurch. In March 2009 his then employer indicated to him and other staff that the business was suffering a down turn in profits and if staff were offered a job by another employer they should take it.

[18] Mr Prakash remained in his job but in October 2009 he was told by a friend that Pure Foods, a business based in Wellington, may be looking for a chef to produce naan bread. Mr Prakash contacted Pure Foods by telephone and spoke to Mr Surinder Sandhu, a director of Pure Foods, to inquire if there was a vacancy. There is no dispute that at all times during the negotiations for an individual employment agreement Mr Sandhu was acting on behalf of Pure Foods.

[19] Mr Prakash and Mr Sandhu agree that they had five to seven telephone conversations over a relatively short period of time. The telephone conversations were largely in the Hindi language although Mr Sandhu says the first conversation began in English but when it was established that both men came from the same region in India their conversation progressed in Hindi. Mr Prakash says that they spoke in Hindi during all telephone discussions including the first.

[20] It is agreed that over the course of their conversations various terms and conditions of employment were discussed although there is considerable dispute between them as to what was said. Mr Sandhu's evidence is that he was very clear with Mr Prakash as to the terms of employment. In contrast, Mr Prakash disputes the

¹ *Warmington v Affco New Zealand Ltd* [2012] NZEmpC 19

level of detail as to terms of employment claimed by Mr Sandhu. He says he was not advised as to the restraint of trade provisions or to the notice period.

[21] As negotiations over terms of employment progressed the parties agreed to an annual salary although neither Mr Sandhu nor Mr Prakash gave any evidence as to what date this occurred.

[22] Mr Sandhu asked Mr Prakash to provide a copy of his curriculum vitae and educational certificates. Mr Prakash sent a copy of his curriculum vitae to Mr Sandhu on 16 October 2009 as an attachment to an email.

[23] Mr Prakash's curriculum vitae was written in English and provided detail of his employment history as a tandoori chef in India and New Zealand. It included the heading "*LANGUAGE KNOWN*" with "*Hindi*" and "*English*" listed beneath. The curriculum vitae also set out Mr Prakash's educational qualifications as "*High school, C.B.S.E. board, New Delhi*". Witnesses for both Pure Foods and Mr Prakash attest that CSBE schools in India teach either entirely in English or English is taught as a compulsory subject. The inference I take from this evidence is that if a student has received a CBSE education it is assumed he or she will have an understanding of English.

[24] It is clear Mr Sandhu found Mr Prakash's curriculum vitae and educational certificates acceptable and on or about 22 October 2009 Mr Sandhu sought to send Mr Prakash a copy of the proposed employment agreement by electronic mail. There was evidence that there was some uncertainty as to the correct email address of Mr Prakash and he asked Mr Sandhu to send the intended employment agreement to a third party email address. Mr Sandhu was reluctant to do so as he considered the intended employment agreement and related documents to be private. Mr Prakash had his friend Mr Mannish Vermani (also an Indian citizen with residence in NZ) speak to Mr Sandhu to ensure that the email address for Mr Prakash was correct. On 22 October 2009 Mr Sandhu sent Mr Prakash an email with the subject title "*employment documents*". The relevant excerpts from that email are as follows:

Attached please find your employment agreement, job offer letter and the job description. Please read these carefully and confirm to me by return email that you are okay with all the contents. We will then do the reference checks and send you the hard copy by post to sign.

...

Please feel free to contact me if you need any further clarification in this matter.

[25] The letter of offer attached to the email states, inter alia:

We are pleased to inform you that you have been successful in your application for the above position with our company, subject to a full reference check conducted with your present and past employers.

We would like to offer you this position with our company to start from 23 November 2009 as per our discussions. Enclosed please find a copy of your employment agreement with Pure New Zealand Foods Limited. Can you please read it carefully, sign it and send it to us at the earliest. Please feel free to contact me if you wish to discuss or clarify any parts of this agreement.

[26] Mr Prakash also had Mr Vermani review the provisions which related to salary and hours of work. Those provisions were recorded in the proposed employment agreement as discussed and Mr Prakash responded in reply to Mr Sandhu as follows:

Hello Sir. I have read the agreement and I am okay with that, plz send me the hard copy of that. Thanking you. Prem Prakash.

[27] The email in reply was sent 25 minutes after having been received by Mr Prakash.

[28] On 23 October 2009, Mr Prakash received a hard copy of the employment agreement in the mail. He signed and dated every page, (9 in total) and sent it back to Pure Foods the same day.

During bargaining for an employment agreement did Mr Sandhu know or ought to have known that Mr Prakash had a disability relating to communication?

[29] Mr Prakash claims Mr Sandhu knew, or ought to have known, that he was unable to understand the provisions or implications of the employment agreement because of Mr Prakash's limited understanding of English.

[30] It is accepted that Mr Prakash's level of proficiency in English was never discussed between Mr Prakash and Mr Sandhu at any time during their negotiations for an employment agreement. Mr Prakash says he does not purport to have no understanding of English but rather that his understanding of English is "basic".

[31] In support of Mr Prakash's claim it is submitted that Pure Foods was aware that Mr Prakash spoke Hindi as his first language and the negotiations for an individual employment agreement were conducted exclusively in Hindi over the phone. On behalf of Mr Prakash it is argued that in these circumstances there is a

reasonable inference that Pure Foods knew or would have known Mr Prakash's English language skills were minimal and it was incumbent on the employer to make further inquiries and satisfy itself that Mr Prakash understood the terms and conditions written in English as contained in the employment agreement.

[32] I do not accept this aspect of Mr Prakash's claim.

[33] The verbal negotiations held over the phone were held in Hindi. I do not accept that in circumstances where Mr Prakash and Mr Sandhu verbally negotiated terms of employment in a mutual first language, that a sufficient and reasonable inference can be made that Mr Prakash was unable to understand the implications of the terms of employment due to minimal understanding of the English language.

[34] Mr Prakash provided Pure Foods with a CV written in English, purporting an education where English was taught and recording English as a known language by Mr Prakash. The email correspondence between Mr Prakash and Mr Sandhu was also conducted in English. It emerged in evidence that Mr Prakash had arranged for his friend, Mr Vermani to draft his email correspondence in English. However Mr Sandhu was not advised of the arrangement and all email was signed off in Mr Prakash's name.

[35] I accept Mr Sandhu's evidence was that he was unaware of Mr Prakash's marginal grasp of English. I also find that Mr Prakash via his curriculum vitae and email communication held himself out to Pure Foods as understanding English. I do not accept that Pure Foods knew, or ought to have known that Mr Prakash was subject to a disability relating to a limited understanding of English or that in the circumstances of their negotiations it could be reasonably inferred that Mr Prakash was unable to understand the implications of the employment agreement due to basic understanding of English. This claim is rejected.

During bargaining did Mr Sandhu know or ought to have known that Mr Prakash had reasonably relied on the skill, care and advice of Mr Sandhu when he accepted the role?

[36] Mr Prakash asserts that he relied on the skill, care and advice of Mr Sandhu as provided to him during the negotiations held over the phone. He says Mr Sandhu knew, or ought to have known, of Mr Prakash's reliance on him in this regard.

[37] It is submitted on behalf of Mr Prakash that bargaining for the individual employment agreement was concluded at the end of the telephone discussions and prior to the email containing the employment agreement was sent to Mr Prakash. Mr Prakash claims he relied on and agreed to terms of employment as conveyed by Mr Sandhu during the telephone discussions.

[38] There is a stark division between the evidence of Mr Prakash compared to Mr Sandhu as to what terms and conditions were discussed. Mr Prakash denies he was advised of the restraint of trade or the three month notice period.

[39] Mr Sandhu says he explained in detail "*all the key elements of the employment agreement*". He further says that although did not express the detail of the employment agreement in legal terminology such as use of the phrase "*restraint of trade*", he was unwavering in his view that he had told Mr Prakash he would be unable to work for the "*competition*". He also says there were discussions about the length of notice Mr Prakash was required to give his employer in Christchurch which led to Mr Sandhu discussing the notice period required at Pure Foods.

[40] I accept that a substantial portion of the bargaining occurred during telephone discussions. However the evidence does not support the submission that bargaining was limited solely to the telephone discussions between Mr Sandhu and Mr Prakash.

[41] Mr Sandhu's email of 22 October 2009 requested Mr Prakash to read through the attached employment agreement carefully and advise if the contents were okay. Together with the employment agreement, a letter of offer and a job description were also attached to the email. The contents of the letter of offer also dated 22 October 2012 is self explanatory as to its purpose, and it too contains a statement which invites Mr Prakash to further discuss the proposed terms and conditions if he requires. I consider these written communications demonstrate that bargaining between Mr Prakash and Mr Sandhu was ongoing as at 22 October 2009 and the bargaining was not confined to verbal exchanges held over the phone.

[42] It is equally clear that Mr Prakash did not rely on Mr Sandhu's verbal advice as to terms and conditions of employment. Mr Prakash's evidence was that on receipt of the email containing the proposed employment agreement he was particularly concerned to ensure that the terms relating to salary and hours of work were recorded in the written employment agreement as had been orally agreed with Mr Sandhu. Mr

Prakash had Mr Vermani review the employment agreement and locate the provisions related to salary and hours of work. Mr Vermani reviewed the agreement and confirmed the contents relating to those specific terms as understood by Mr Prakash. Mr Vermani and Mr Prakash each agree that they did not discuss the contents of the intended employment agreement beyond the recorded hours of work and salary and Mr Prakash did not request his friend to review any other aspects of the employment agreement.

[43] Before the Authority Mr Vermani's testimony was that it was important for Mr Prakash to receive an employment letter so that "*his job was confirmed*" and to ensure that Mr Sandhu had told him the truth about salary and hours. Mr Prakash confirmed Mr Vermani's evidence and acknowledged he understood that the employment agreement was a binding legal document. He stated that it did not occur to him to have the remainder of the employment agreement checked by Mr Vermani at that time.

[44] I find Mr Prakash's claim that he relied on the skill, care and advice of Mr Sandhu's in accepting the terms of employment is not supported by the evidence. I also consider Mr Sandhu's request contained in the email of 22 October for Mr Prakash to read the agreement "*carefully*" before signing it precludes any suggestion that Mr Sandhu "*knew, or ought to have known*" that Mr Prakash was relying on Mr Sandhu's skill or advice to inform his decision as to whether to accept the employment agreement or not.

[45] I find that Mr Prakash was able to and did seek alternative advice as to the contents of the employment agreement and he did not rely on Mr Sandhu's advice. Mr Prakash made independent inquiries as to aspects of the employment agreement that were important to him and chose not to ascertain the entire contents of the employment agreement. I do not consider Pure Foods should be liable for Mr Prakash's omission in this regard. I also do not accept this claim.

In circumstances where the requirements of s63A of the Employment Relations Act apply, did Mr Sandhu know or ought to have known that Mr Prakash did not have information and an adequate opportunity to seek advice before entering into an individual agreement?

[46] The material sections of s63A of the Act are as follows:

(1) This section applies when bargaining for terms and conditions of employment in the following situations:

...

- (e) in relation to terms and conditions of an individual employment agreement for an employee if no collective agreement covers the work done, or to be done, by the employee;

...

(2) The employer must do at least the following things:

- (a) provide to the employee a copy of the intended agreement, or the part of the intended agreement, under discussion; and
- (b) advise the employee that he or she is entitled to seek independent advice about the intended agreement or any part of the intended agreement; and
- (c) give the employee a reasonable opportunity to seek that advice; and
- (d) consider any issues that the employee raises and respond to them.

(3) Every employer who fails to comply with this section is liable to a penalty imposed by the Authority.

(4) Failure to comply with this section does not affect the validity of the employment agreement between the employer and the employee.

...

(7) In this section, **employee** includes a prospective employee.

[47] There is no suggestion that Mr Prakash was a member of a union that may have had a collective agreement with Pure Foods or that Pure Foods was a party to any collective agreement.

[48] I have already found on the evidence that Mr Prakash was provided with a copy of the employment agreement which contained the terms of employment under discussion. The remaining focus of this aspect of Mr Prakash's claim is the allegation he was not provided with sufficient information or an adequate opportunity to seek advice before entering into an individual employment. He says Pure Foods knew or ought to have known of these circumstances.

[49] Mr Prakash says at no time during the telephone discussions was he advised to obtain independent advice. He refers to the absence of such advice in both the email and letter of offer (both dated 22 October 2009) as confirmation and evidence that he was not advised of a right to seek independent advice as to the contents of the employment agreement.

[50] Mr Prakash further asserts that he advised Mr Sandhu of his agreement to the proposed employment agreement (contained in 22 October 2009 email) 25 minutes after having received it. The following day, on receipt of the hard copy of the agreement, he immediately signed the document and returned it. Mr Prakash says he executed the employment agreement according to the written instructions of Mr Sandhu contained in correspondence of 22 October 2009. He says given the limited passage of time between Pure Foods sending him the employment agreement and Mr Prakash's agreement, it should have been apparent to Pure Foods that no independent advice had been obtained.

[51] The employment agreement contains an '*Employment Acknowledgement*' clause which provides, amongst other things, (a) that the employee has been advised of their right to independent advice in the terms of the agreement, (b) that they have been provided with a reasonable opportunity to take that advice, and (c) they have read the terms of employment and understand the terms and their implications.

[52] The evidence is Mr Prakash recorded his signature and the date at the bottom of each page of the employment agreement including the page containing the '*Employment Acknowledgement*' provision. Mr Prakash also inserted his name into the '*Declaration*' clause at the end of the agreement so as to record:

I, *Prem Prakash*, declare I have read and understand the conditions of employment detailed above and accept them fully. I have been advised of my right to seek independent advice in relation to this agreement, and have been allowed reasonable time to do so.

[53] Counsel for Mr Prakash referred to the Employment Court decision of *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152 as authority for the proposition that an acknowledgment by a prospective employee that s/he has received an opportunity to obtain independent advice does not act as a warranty when the employee has not, in reality, been given that opportunity.

[54] Mr Sandhu strongly denies Mr Prakash's evidence on this aspect of his claim. He states that although he did not use the term "*independent advice*", he strongly maintains he told Mr Prakash he "*should show [the employment agreement] to anyone you trust*". He says he wanted Mr Prakash to understand that the role at Pure Foods

was different to a chef at a restaurant, and encouraged him to have the agreement checked.

[55] It was difficult to assess whose evidence should be preferred on this point in circumstances where Mr Prakash's evidence was obtained via an interpreter. However on balance I prefer the evidence of Mr Sandhu. Mr Sandhu told the Authority he was frequently criticised for talking too much and this personality trait was borne out by his testimony during the Authority's investigation meeting. I consider it likely that in a situation where Mr Sandhu was approached by a prospective employee wishing to discuss the possibility of employment, he would have tended towards providing an abundance of information. I accept his evidence that he advised Mr Prakash to talk to someone else about the contents of the employment agreement. However I do not consider my assessment of the evidence of Mr Sandhu and Mr Prakash relating to their telephone discussions to be exclusively determinative on the matter and I have considered the surrounding evidence.

[56] I have already found that the information about the proposed employment agreement provided to Mr Prakash was not limited to telephone discussions but was also contained in the correspondence sent to him. Mr Prakash acknowledged in two separate areas of the agreement, by insertion of his signature, and printing of his name, that he had an opportunity to obtain independent advice. Mr Prakash also agreed that there was no pressure placed on him by Mr Sandhu to have the employment agreement executed by a certain date or time and there is no evidence to suggest otherwise. I regard the circumstances of Mr Prakash as significantly different to those described in *Blackmore v Honick Properties Ltd*². In that case the applicant was required by his new employer to sign an employment agreement within an hour or so of first sighting the document and was given no opportunity to obtain advice.

[57] I find Mr Prakash was sufficiently advised by Mr Sandhu verbally of his right to obtain independent advice although this advice was not characterised in legal terminology. This right was referred to in two separate parts of his employment agreement. Although there was a short time between Mr Prakash's assent to the proposed employment agreement attached to the email of 22 October 2009, and his execution of the agreement having received it in the post, his agreement to the terms

² *ibid* at para [53]

and conditions of employment at that time was not due to any demand placed on him by Pure Foods. The reality is Mr Prakash did seek independent advice to the extent that was important to him. I do not accept Pure Foods failed to comply with its obligations pursuant to s63A of the Act and therefore the claim of unfair bargaining pursuant to s68(d) also fails.

The application for an order to enforce the restraint of trade covenant

[58] A restraint of trade covenant is different to other contractual obligations. As a matter of public policy such restraints are generally considered unenforceable if the purpose of the restraint is to prevent an employee from exercising his or her right to work in their area of expertise and compete in the free-market. However a restraint of trade may be enforced if it can be shown that the provisions of the restraint are reasonably necessary to protect the proprietary interest claimed and where the restraint provision(s) goes no wider than the interest(s) it seeks to protect.

[59] The employment agreement between Pure Foods and Mr Prakash contains a '*Confidential Information*' provision which proscribes an employee of Pure Foods from using or disclosing confidential information acquired during the term of the agreement or after its termination.

[60] The relevant excerpt of the restraint of trade provision is as follows:

When this contract is terminated for any reason by either party of this agreement then the following clauses will apply:

1. -...
2. if they are New Zealand residents and want to work elsewhere within New Zealand, then they are not to work for any other business which may be in any way related to the supply or manufacture of food products to the retail market or wholesale markets; direct or indirectly for up to 24 months.

[61] Pure Foods' original application to the Authority was for an order requiring Mr Prakash to comply fully with the terms of the restraint. However Mr Sandhu in his written evidence advised that having received legal advice Pure Foods now seeks the restraint of trade to be upheld for three months from the date of this determination.

Does Pure Foods have a proprietary interest?

[62] In determining whether a restraint of trade is reasonable with reference to the interest of the parties, it is first necessary to determine whether the employer has a propriety interest which is entitled to protection or whether the covenant is merely an attempt to limit or reduce competition³.

[63] The written statements on behalf of Pure Foods asserted proprietary interests in its entire operational processes, including recipes, production processes, kitchen and packaging room design and dispatching procedures. However during the investigation it became apparent that 95 percent of Mr Prakash's work duties were confined to the production and processing of naan bread. As a consequence Pure Foods narrowed its proprietary interest claims as against Mr Prakash to proprietary interests in: (a) its recipe which is egg and milk free, and (b) the processes Pure Foods uses in freezing and packaging the naan.

[64] By way of background, in mid 2009 Pure Foods wished to commence large scale production of naan bread, having secured a contract with a major client. Mr Prakash says that it took time to develop a recipe and process to produce naan in bulk, and so that when the naan was defrosted and reheated it would be soft for the end user. Mr Sandhu says that proprietary interests are in the recipe and in the processes used by Pure Foods to achieve that result.

[65] Mr Prakash did not challenge Mr Sandhu's evidence that most chefs have their own ways and techniques for producing naan bread. Mr Prakash says he has not acquired any confidential information relating to the recipe and production of Pure Foods naan. He attests that a basic naan recipe does not usually include eggs and/or milk and he noted his new employer also uses a recipe which also does not include milk or eggs. He says all supermarket naan breads are either fresh or frozen and are packaged in the same way. The inference from his testimony is that there is not anything unique in the way Pure Foods produces naan bread that would give rise to a proprietary interest that Pure Foods is entitled to protect via a covenant of restraint.

³ Airgas Compressor Specialists Ltd v Bryant [1998] 2 ERNZ 42

[66] Mr Sandhu's evidence prevaricated as to when exactly Pure Food perfected the naan bread recipe and processes in which it claims proprietary interests. On initial questioning Mr Sandhu attested that the recipe for the bulk production of naan bread was perfected and ready for production in mid to late December 2009, approximately three to four weeks after Mr Prakash had commenced employment. Later during re-examination he said the recipe and process were finalised in or about June/July 2011 when a predominant client agreed to future purchasing of the product. I find Mr Sandhu's first response in relation to this line of questioning is likely to be the most reliable and is consistent with evidence that Mr Prakash used his own recipe for the first few weeks of his employment. My understanding is that Pure Foods sought to combine its recipe with Mr Prakash's and there was some experimentation as to which recipe was preferred which resulted in Mr Sandhu reintroducing his recipe with modifications.

[67] Both directors of Pure Foods gave evidence of their considerable investment into developing Pure Foods' products. Each attested to perceived negative effects on Pure Foods' market placing if its recipes and processes were known to competitors. Both witnesses made reference to Mr Prakash's "*attempts to harm the business*" however their evidence focussed on losses due to difficulties in meeting client orders as a result of Mr Prakash terminating his employment. I was not provided with evidence of harm or loss relating to breach of restraint or confidentiality provisions.

[68] In *Nedax Systems v Waterford Security Ltd*⁴ Goddard CJ stated:

To qualify as confidential information, the material in question must be information as opposed to skills, techniques, knacks, and know-how generally, learned, assimilated or enhanced during the employment. Once acquired, these become a part of the employee who may do with them as he, or she pleases.

[69] I am not persuaded that the information relating to Pure Foods' naan recipe is confidential. In this regard I prefer Mr Prakash's evidence and do not consider Pure Foods' naan recipe is unique on the basis that it does not include eggs and milk. When Mr Sandhu was questioned as to the degree of uniqueness of Pure Foods' naan recipe he agreed that naan bread can and is made without eggs and milk but that that naan bread is "*generally*" made with eggs and milk.

⁴ [1994] 1 ERNZ 494

[70] On balance I find that Pure Foods' naan recipe is not sufficiently exclusive to it to attract a proprietary interest.

[71] As to Pure Foods process of chilling, freezing and packaging naan bread, Mr Sandhu advised that Pure Foods' methodology in these activities gave its products a superior quality in the market. However I was not provided with evidence to characterise those actions as anything more than what is self-evident by those descriptors. I am not able to classify this information as confidential and outside the public realm.

[72] No further information was provided which suggests that any aspect of the way Pure Foods made its naan bread is distinct from the general skill, experience and knowledge Mr Prakash holds as an experienced tandoori chef and he was not advised that Pure Foods' manufacturing processes are regarded as unique or private. I find Pure Foods does not have a proprietary interest in its naan bread recipe and/or the way it chills, freezes and packages naan bread which should be protected by the restraint of trade clause.

Is the restraint reasonable?

[73] Alternatively, if I am wrong in my conclusion and Pure Foods does have a proprietary interest which should be protected I consider the restraint of trade unreasonable in terms of its scope.

[74] The scope of the restraint provision "*not to work for any other business which may be in any way be related to the supply or manufacture of food products to the retail market or wholesale markets; direct or indirectly*" goes well beyond protecting the proprietary interests Pure Foods claim. Mr Sandhu says it is "*not [his] intention to prevent Mr Prakash from seeking work elsewhere, such as a restaurant so long as that is not a business that is in direct competition with my business supplying frozen product with a long shelf life and using my recipes and trade secrets*". Whatever Mr Sandhu's intentions are, a plain reading of the words contained in the restraint provision leads to an almost inevitable conclusion that if enforced Mr Prakash is

prevented from working as a chef by almost any means including a restaurant. I regard the clause as unreasonable in its scope and therefore unenforceable.

[75] Pursuant to s8 of the Illegal Contracts Act 1970, the Authority was invited to modify the restraint so as to reflect the more limited proprietary interest Mr Sandhu said Pure Foods had intended to protect.

[76] While the Authority does have discretion to modify a restraint pursuant to s8 of the Illegal Contracts Act 1970 there is no presumption to do so. I consider the modifications needed to reflect what Pure Foods now says is its proprietary interest would be considerable and if undertaken creates a potential secondary risk that the remedy used to prevent one ill would inadvertently create another. As a consequence I decline to modify or vary the provision.

[77] I note the restraint of trade provision also purports to prevent Mr Prakash from working anywhere in New Zealand for a period of 24 months although Pure Foods sought to amend the duration of the restraint to three months following the date of this determination. Given that I have already concluded that the restraint of trade provision is unreasonable on the basis of its scope I consider it unnecessary to consider and determine the reasonableness of either the geographical restraint or the duration of it and decline to do so.

Claims associated with alleged breach of notice period

[78] Pure Foods alleges Mr Prakash breached his contractual notice period of three months by providing only two weeks' notice. It requests the Authority to award an appropriate penalty for breach of the employment agreement.

[79] The relevant provision within Mr Prakash's employment agreement is as follows:

General Termination

The Employer may terminate this agreement for cause, by providing 15 working days notice in writing to the Employee. Likewise the Employee is required to give 3

months notice of resignation. The Employer may at its discretion, pay remuneration in lieu of some or all of this notice period.

....

[80] On 24 February 2012 Mr Prakash provided Pure Foods with written notice of his resignation which advised he was giving two weeks' notice and his last day of work would be 10 March 2012.

[81] A considerable portion of evidence put before the Authority focussed on aspects of Mr Prashash's employment duties which he had over the course of his employment become increasingly unhappy about. Mr Prakash says that whenever he raised matters of concern, Mr Sandhu would tell him if he did not like it he could leave on two weeks' notice. On this basis he says his notice period was two weeks.

[82] Two current employees of Pure Foods both gave evidence that although Mr Sandhu quite often told employees if they were unhappy they were free to leave on notice, both employees denied that Mr Sandhu had ever said it was "*two weeks*" notice.

[83] On balance I do not accept that Mr Sandhu had previously told Mr Prakash that he could leave on two weeks' notice and had therefore varied the term of the notice period. I consider it more likely that Mr Prakash was simply unaware that his employment agreement contained a three month notice period until he was informed of it by Mr Sandhu on the day he tendered his resignation. I reach this view on the basis that Mr Prakash gave evidence that in his two previous jobs in New Zealand his notice period had been for two weeks and therefore he believed two weeks was the standard requirement. Mr Prakash's wife testified that she and her husband first reviewed the contents of the employment agreement on the evening of 24 February 2012 after Mr Prakash had given written notice.

[84] During the Authority's investigation it was submitted that the actions of Pure Foods were such that Mr Sandhu had no other option but to leave his employment with Pure Foods. I do not accept the inference that in these circumstances Mr Prakash was entitled to treat his notice period as unenforceable in the circumstances. The evidence is Mr Prakash left his employment by choice. His letter of resignation stated:

I Prem Prakash presently working in your company as a Chef wants to inform you that due to better opportunity I am resigning from the job as I am giving a 2 weeks notice. My last working date will be 10/03/2012. It was a great experience to work with your company.

Thanking you

...

[85] Mr Prakash also says the employment agreement is unenforceable because it was obtained as a result of unfair bargaining. He submits that a reasonable term of two weeks' notice should be implied as a term of the employment agreement.

[86] I have already found that the employment agreement was not bargained for unfairly and do not accept that the agreement is therefore void. I consider, with the exception of the restraint of trade provision, the employment agreement was valid throughout the employment relationship between Mr Prakash and Pure Foods and was enforceable at the time Mr Prakash gave written notice.

[87] On receipt of Mr Prakash's notice of resignation Mr Sandhu sought to verbally discuss with Mr Prakash the restraint of trade provisions and his concern about the period of notice given. It was not disputed that Mr Prakash would not engage in discussions on the matter so Pure Foods sent a letter marked 'without prejudice' to Mr Prakash on the afternoon of 24 February 2012 with reiterated Mr Sandhu's concerns.

[88] With the consent of Mr Prakash privilege in relation to that letter was waived by Pure Foods prior to the Authority's investigation. Amongst other things the letter stated:

We will do our best endeavours to employ a suitable candidate to replace you at the earliest and if that happens before the end of your 3 month notice period then we can in good faith move your termination date forward at our discretion.

...

You are more than welcome to sit down and discuss with me if you want me to clarify any of this, or you are also welcome to take independent legal advice if you wish.

...

[89] Mr Sandu gave unchallenged evidence that the following day, 25 February 2012, he sought to discuss the situation with Mr Prakash in the hope of reaching a solution however he says Mr Prakash again would not enter into discussion on the

matters other than to say the employment agreement did not mean anything and it was unreasonable of Pure Foods to expect notice beyond two weeks.

[90] Whist I consider Mr Prakash's the notice period was unusually lengthy for a non-professional employment role, a specified period of notice in an employment agreement cannot be overturned by notions of what might be reasonable notice in a particular case⁵.

[91] The law as it applies to the Authority's jurisdiction to order penalties is contained at sections 133 and 134 of the Employment Relations Act. The onus is on the applicant to prove beyond reasonable doubt that the action for which a penalty is requested has occurred⁶.

[92] In the circumstances of this case it is clear Mr Prakash terminated his employment with Pure Foods on two weeks' notice and the requirement to prove beyond reasonable doubt that the term of his notice was breached had been satisfied.

[93] The maximum penalty for an individual in breach of their employment agreement is \$10,000 (s135 of the Act). The power to award penalty actions should only be invoked as an act of last resort where there has been a wilful breach or default.⁷ The wilful failure by an individual to give a reasonable period of notice without a defence can give rise to a penalty being imposed.⁸

[94] I regard Mr Prakash's breach of his three month notice period was wilful in so far as he was aware of the contractual term at the time he left his employment with Pure Foods and chose to continue with the breach despite Pure Foods attempts to discuss a compromise. However I also find that Mr Prakash had a genuinely held but mistaken belief that the notice provision was unenforceable based on his inexperience in a New Zealand industrial environment. In the circumstances I consider any penalty awarded for his breach should be nominal. Pursuant to s135(2) of the Act I impose a penalty of \$500 against Mr Prakash, whereby \$250 is to be paid to the Crown and \$250 to Pure Foods.

⁵ *Brighouse v Bilderbeck* (1993) 4 NZELC 95,615; [1993] 2 ERNZ 74 (EMC)

⁶ *Otago Clerical Workers IUOW v McLeod Bros Ltd* [1988] NZILR 1308.

⁷ *Ruapehu District Council v Northern Local Government Officers Union* (unreported) 16/11/92, Castle J WEC 54/92.

⁸ *PPP Industries Ltd v Doggett* [1996] 2 ERNZ 234.

Claim for recovery of losses

[95] In its statement of problem Pure Foods also sought recovery of alleged losses as a result of Mr Prakash's early termination of employment. However at the time of the Authority's investigation Pure Foods was unable to accurately quantify the losses alleged and it was agreed this matter would be dealt separately, dependent on the findings of this determination.

[96] Perhaps on this basis Pure Foods did not advance well its claim for losses. The onus lies with Pure Foods to establish its losses as being caused by Mr Prakash's breaches. Pure Foods evidence was that it usually employed three chefs to fulfil its naan bread orders. There was evidence that production orders for naan bread were unable to be fulfilled and it is alleged that as a result Pure Foods experienced some losses. Against that contention there is evidence that two employees left Pure Foods for varying reasons at short notice during Mr Prakash's contractual notice period and another employee was on leave. There was also conflicting statements contained in Mr Sandhu's brief of evidence that there is a shortage of ethnic chefs but that Pure Foods "*gets calls from chefs all the time, looking for work...*". The Authority was not provided with evidence as to how Pure Foods sought to mitigate its alleged losses other than it found a replacement chef on 7 May 2012.

[97] While I am unable to decide the claim for losses in this determination, the evidence as presented during the Authority's investigation did not establish that the alleged losses were directly attributable to Mr Prakash's actions, as opposed to a series of events which led to a turnover of staff which resulted in Pure Foods' inability to fulfil some orders. Should Pure Foods wish to advance its claims for losses it will need to overcome significant evidential hurdles related to causation and remoteness. Even if it can be established that there is a sufficient link between Mr Prakash's breach and the Company's losses then there are difficult questions as to quantification of loss. On the information received to date this claim is unlikely to succeed.

[98] Costs are reserved.

Orders

(a) Pursuant to s135(2) of the Act, Mr Prakash is ordered to pay \$500 as a penalty. Half of the penalty is to be paid to Pure New Zealand Foods Limited and the remaining half to the Crown.

(b) Should Pure New Zealand Foods Limited wish to pursue its claims for loss of profits the parties are required to attend mediation in good faith within six weeks of this determination. If the parties are unable to resolve the matters at mediation between them the claim for losses will be set down for investigation by the Authority.

Michele Ryan
Member of the Employment Relations Authority