IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 447
5431548

	BETWEEN	UPS POWER SOLUTIONS LIMITED Applicant
	AND	AARON GILLON Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Mike Gould, Counsel for Applicant Bridget Smith, Counsel for Respondent
Investigation Meeting:	24 September 2013 at Auckland
Determination:	30 September 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a Statement of Problem filed in the Authority on 9 September 2013 the Applicant, UPS Power Solutions Limited (UPS) sought an interim injunction against the Respondent, Mr Aaron Gillon, a former employee.

[2] The application for an interim injunction was accompanied by an undertaking as to damages, and an affidavit in support of the application by Ms Nicola Blackmore, Administration Manager, Director and a Shareholder of UPS.

[3] This determination addresses the application for interim injunctions, and the substantive matters will be investigated by the Authority at a later date as yet to be scheduled.

Background Facts

[4] UPS provides sales and service of uninterruptible power supplies. In particular UPS specialises in uninterruptible power supplies products which are engineered solutions that involve providing customers with uninterruptible power supplies products that require installation and servicing by specialist registered electricians.

[5] UPS's primary supplier of uninterruptible power supplies products is Eaton Industries Company (Eaton), and UPS sales of Eaton products and services comprise 95-98% of its revenue.

[6] Eaton products are sold in New Zealand through two channels. The first channel (PVAD channel) is for the sale of large scale uninterruptible power supplies products which require engineered solutions for their installation, operation and servicing (Engineered Solution Product).

[7] The second channel is for the sale of small scale uninterruptible power supplies products, which generally do not include providing an engineered solution (non-PVAD channel).

[8] With effect from February 2013 UPS had been the sole Eaton appointed distributor in New Zealand for the PVAD channel. By virtue of its PVAD distributorship UPS provides large scale uninterruptible power supplies products to hospitals, supermarkets and the like.

[9] Another company, Ingram Micro Limited, operates in the non-PVAD channel, which primarily provides products to the IT market.

[10] UPS's understanding of the New Zealand distributorship landscape was that if a third party wanted to supply:

- an Engineered Solutions Product to an end user it would have to first obtain the product from UPS and then on-sell it to the end user, thereby becoming a customer of UPS

- a non-Engineered Solutions Product, it would have to first obtain the product either from UPS or Ingram Micro Limited, thereby being unable to compete with UPS on price.

Employment of Mr Gillon

[11] Mr Gillon was offered employment as a Sales Engineer with UPS on 12 April 2010, which offer he accepted that same day. The commencement date contained in the offer letter dated 12 April 2010 was to be no later than 17 May 2010.

[12] In his untested affidavit evidence Mr Gillon stated that at the time of applying for the sales role with UPS he had advised Mr Graeme Blackmore, a Director and a Shareholder of

UPS, that his employment agreement with his previous employer contained a restraint of trade provision, however Mr Blackmore had informed him that it was unenforceable.

[13] Mr Gillon was provided with the proposed individual employment agreement (the Employment Agreement) by email on 15 April 2010. The Employment Agreement stated at clause 2.1 that Mr Gillon's job title was UPS Sales Engineer, and at clause 2.2 set out his duties which included:

> *a) Promote, sell and support Eaton Powerware UPS range to the Auckland regional market to generate sales and support revenue for the company.*
>
> *…*
>
> *i) To manage the company stock holding in Auckland.*
>
> *j) To manage the company office facility in Auckland and future Engineering staff.*

[14] The Employment Agreement also contained restraint of trade clauses at clause 11 which stated:

> ***11.1 Confidential Information***
>
> *The Employee shall not, whether during the currency of this agreement or after its termination for whatever reason, use, disclose or distribute to any person or entity, otherwise than as necessary for the proper performance of their duties and responsibilities under this agreement, or as requested by law, any confidential information, messages, data or trade secrets acquired by the Employee in the course of performing their services under this agreement. This includes, but is not limited to, information about the Employer's business.*
>
> ***11.6 Non-Competition***
>
> *The Employee agrees that for a period of Six months following the termination of their employment for whatever reason, they shall not, either personally, or as an Employee, consultant or agent for any other entity or Employer, carry on business in competition with the Employer within a radius of 100 kilometers from the Employer's premises.*

> *The Employee acknowledges that the restrictive provisions in this non-competition clause are reasonable and necessary in order to protect and maintain the Employer's proprietary interests and other legitimate interests of its business.*
>
> ***11.7 Non-Solicitation of Clients***
> *The Employee agrees that for a period of Six months following the termination of their employment for whatever reason, they shall not, either personally, or as an Employee, consultant or agent for any other entity or Employer, seek to solicit or carry out work of the same nature for any client or customer of the Employer with which the Employee had any contact or dealings whilst employed by the Employer.*

[15] In her untested affidavit evidence Ms Blackmore stated that Mr Gillon had raised with UPS some queries regarding the Employment Agreement in an email dated 16 April 2010, however these queries did not include any in relation to the restraint of trade clauses.

[16] Mr Gillon signed the Employment Agreement on 26 April 2010, and Ms Blackmore signed it in behalf of UPS. Preceding the signatures of the parties the Employment Agreement contained the statement:

> *The parties acknowledge that this agreement was negotiated fairly. The Employer acknowledges that he has read this agreement and understands and accepts it. The Employee confirms that he has been given the opportunity and had had sufficient time to take independent advice about this agreement and has raised and settled with the Employer any issues he has about it.*

[17] Ms Blackmore in her untested affidavit evidence started that when Mr Gillon commenced employment with UPS on 17 May 2010 he had been the only UPS employee located in the Auckland region, and was one of only two Sales Engineers employed by UPS, the other being Mr Blackmore who is based in Wellington. This situation did not change throughout Mr Gillon's period of employment with UPS.

[18] Mr Gillon had been given the responsibility for managing all current and future Auckland client accounts, thus that he was the key person for establishing and maintaining the key relationships with all of the UPS Auckland based clients and customers.

[19] Ms Blackmore stated that during his employment Mr Gillon had been provided with financial incentives to grow the Auckland Branch turnover for which he received incentive payments which were additional to his annual salary.

[20] Ms Blackmore's untested affidavit evidence is that Mr Gillon was fully conversant with UPS's accounting system and could run reports of sales made to any customer for any period, and that he had emailed to himself just prior to his leaving UPS's employment a spreadsheet of all open current and not paid invoices.

[21] In his affidavit evidence Mr Gillon confirmed that he had emailed to himself a spreadsheet of all open current and not paid invoices for the purpose of checking commission payments due to him in the event of a dispute.

[22] Ms Blackmore further stated in her affidavit that in his position Mr Gillon had significant knowledge of UPS's business which would be of value to a competitor including knowledge of :

- UPS's purchase prices from Eaton, including payment terms and sales targets;
- the Marketing Development Fund agreement between UPS and Eaton;
- specific details including terms, purchase prices and costs of both Distribution and Service Agreements with Eaton;
- the specific price structure agreements in place with Eaton to allow for discounted prices to specific Eaton approved clients;
- how the rebate scheme to a large Electrical Wholesale chain in New Zealand is structured and funded and the key customer managers;
- the names of all UPS customers particularly in the Auckland area;
- the year on year sales turnover of UPS; and
- all current business opportunities currently being worked on by UPS in the Auckland area including key customer contacts, the costs and margins targeted for the opportunities..

Mr Gillon's Resignation

[23] Mr Gillon had emailed Mr and Ms Blackmore, who were on leave, on 9 July 2013 to inform them that he was resigning from his position with UPS, and that his last day of work

would be 9 August 2013. The email also advised that his new employer would be YHI Limited (YHI).

[24] Mr Gillon stated in his untested affidavit evidence that Mr Blackmore had telephoned him upon receipt of his email, at which time he had offered to travel with Mr Blackmore on visits to the UPS clients based in Auckland, however Mr Blackmore had not accepted this offer.

[25] In her untested affidavit evidence Ms Blackmore stated that she had listened to the telephone conversation between Mr Gillon and Mr Blackmore and had heard Mr Gillon, upon being questioning by Mr Blackmore as to the role he would be undertaking at YHI, advising that it would be a pure sales role in which he would be selling the 'Benning' range of products, solar power solutions, batteries and the occasional uninterrupted power supplies product because YHI was a reseller of a range of UPS brands.

[26] Mr Gillon had further advised that he did not foresee UPS encountering him in the YHI market. On this basis Ms Blackmore stated that Mr Gillon had given UPS comfort and enforced its view that YHI was not in competition with UPS.

[27] Mr Gillon stated that Mr Blackmore attended the Auckland office on 8 and 9 August 2013 during which time he supervised Mr Gillon deleting UPS information from his personal laptop computer and made representations to him that the restraint of trade clauses in the Employment Agreement were not enforceable.

[28] UPS submits that the alleged representations that the restraint of trade clauses in the Employment Agreement were not enforceable were not made by Mr Blackmore.

[29] Ms Blackmore in her untested affidavit evidence stated that Mr Gillon had been reminded of, and asked to adhere to, his obligations in respect of the restraint of trade clauses contained in the Employment Agreement by a letter dated 9 August 2013, which had set out in full clauses 11.6 and 11 7 of the Employment Agreement.

[30] On 12 August 2013 Mr Gillon commenced working for YHI.

Eaton Distributorship and subsequent events

[31] Ms Blackmore stated in her untested affidavit evidence that on 12 August 2013 she and Mr Blackmore had met with Mr Jeff Hansen, General Manager of Eaton PQ products for Australia and New Zealand, and with Mr Chris Moore, Manager of Engineered UPS/PQ Distribution in Australia and New Zealand.

[32] During this meeting Mas Blackmore stated that UPS had been advised that Eaton was holding discussions with YHI with a view to appointing it as a second distributor in New Zealand in the engineered solutions market.

[33] On 26 August 2013 Ms Blackmore stated that she had received a telephone call from Mr Hansen advising UPS that YHI had been appointed as a second distributor of Eaton products, the effect of which would be to provide Mr Gillon working for YHI with the same Eaton support and purchase price he had had when working at UPS.

[34] On 26 August 2013 UPS provided a quotation to Downer Engineering Limited (Downer) for a large 3 phase uninterrupted power supplies opportunity. Ms Blackmore stated in her affidavit that Downer had been previously supplied with uninterruptible power supplies products and services by UPS, and that Mr Gillon had been involved in providing those uninterruptible power supplies products and services.

[35] Ms Blackmore stated that on 27 August 2013 UPS had been provided with a copy of a YHI quotation to Downer for the same large 3 phase uninterrupted power supplies opportunity as quoted for by UPS.. The quotation, a copy of which was provided to the Authority, had been prepared by Mr Gillon whilst working for YHI, and represented YHI as a distributor of Eaton products. Ms Blackmore stated that the YHI quotation price was far below the UPS wholesale price.

[36] On 28 August 2013 UPS wrote to Mr Gillon asking for an undertaking that he would comply with the restraint of trade provisions in the Employment Agreement.

[37] Despite correspondence and communication between the parties' legal representatives, UPS did not receive the assurances sought and filed an urgent application seeking injunctive relief with the Authority on 9 September 2013.

Orders sought by UPS

[38] Orders sought by UPS against Mr Gillon include:

a. An interim injunction restraining Mr Gillon until after 9 February 2014 from either personally, or as an employee, consultant or agent for any other entity or employer, carrying on business in competition with the employer within a radius of 100 kilometres from UPS's Auckland Branch.

b. An interim injunction restraining Mr Gillon until after 9 February 2014 from either personally, or as an employee, consultant or agent for any other entity or employer, seeking to solicit or carry out any work of the same nature for any client or customer

of UPS with whom Mr Gillon had any contact or dealings with whilst employed by UPS.

Interim injunctive application: investigation

[39] I granted UPS' application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim injunction and also because of the possibility of both financial loss and damage to UPS's Auckland based client relationships and its trade relationships, and due to the risk of inadvertent disclosure of confidential UPS information by Mr Gillon to YHI.

[40] As is usual in urgent applications, the Authority made directions for the parties to attend urgent mediation. The matter did not resolve at mediation and a telephone case management conference was held on 18 September 2013 to schedule an investigation meeting date to deal with the interim application for injunctive relief and included the lodging of an affidavit in opposition by Mr Gillon.

[41] At the Investigation Meeting on 24 September 2013 I heard submissions from counsel in relation to the interim injunction application and tested these by questioning how the available evidence related to the relevant principles for determining an interim injunction application. Those principles fall to be addressed by the answers to the following questions:

1. Is there an arguable case that UPS will succeed at the Authority's substantive investigation in establishing that Mr Gillon had breached and would continue to breach the terms of employment agreements binding upon him and that the restraint of trade clauses in the Employment Agreement are reasonable and enforceable against him;

2. If not, where does the balance of convenience lie between the parties, this question to encompass the associated question of whether there an adequate alternative remedy available to UPS, specifically an award of damages to be paid by Mr Gillon, such that an interim injunction is not necessary at this stage; and

3. Thirdly, where does the overall justice of the case require that an interim injunction be granted?

[42] I have relied on the submissions of counsel and on the, as yet, untested evidence in the affidavits which have been lodged by the parties in answering these questions. Consequently the conclusions which have been drawn are tentative and not necessarily what will be decided at the substantive investigation after a full examination of all the evidence which will then be available has been undertaken.

[43] Pursuant to s 162 of the Employment Relations Act 2000 (the Act), the Authority has power to grant an interim injunction regarding a restraint of trade, confidentiality or a non-solicitation clause, being an order that the High Court or the District Court may make under particular enactments and rules of law[1]

[44] The starting point for any determination regarding a restraint of trade application is as stated by Judge Inglis in *Pottinger v Kelly Services (New Zealand) Limited*[2]

> *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.*

Is there an arguable case?

(i) Binding Terms of Employment

[45] Mr Gillon had entered into employment with UPS subject to the Employment Agreement. The Employment Agreement had been signed on 26 April 2010 by Mr Gillon and Ms Blackmore.

[46] Mr Gillon in his untested affidavit evidence has claimed that UPS made verbal representations about the unenforceability of restraint of trade clauses on which he relied at the time of entering into employment. In this respect I note that clauses 16.1 and 16.3 of the Employment Agreement are specific about variations to the Employment Agreement and state:

> *16.1 Variation of Agreement*
> *The parties may vary this agreement, provided that no variation shall be effective or binding on either party unless it is in writing and signed by both parties.*

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[1] *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205
[2] [2012] NZEmpC 101 at para [16]

> *16.3 Entire Agreement*
> *Each party acknowledges that this agreement contains the whole and entire agreement between the parties as to the subject matter of this agreement.*

[47] Accordingly I find that even if such verbal representations were made by UPS, which UPS denies, they would not have any effect or be binding on either party to the Employment Agreement.

[48] I find it significant in considering this issue that beneath the restraint of trade restrictions set out in clause 11.6 of the Employment Agreement, there is an acknowledgement stating that the restraint of trade provisions are reasonable and necessary.

[49] I also note the statement which precedes Mr Gillon's signature on the Employment Agreement which acknowledges that he had read it, understood and accepted it. Further that he had sufficient time to take independent advice about it, in which respect I observe that that Mr Gillon had 11 days between being provided with the Employment Agreement on 15 April and signing it on 26 April 2013.

[50] I further consider that given Mr Gillon's untested affidavit evidence that his employment agreement with his previous employer also contained restraint of trade provisions, he would have been familiar with the incorporation of such non-solicitation clauses into employment agreements.

[51] I find that whether or not UPS made verbal representations to Mr Gillon which it denies and the evidence on which has still to be tested, it is consistent with UPS's position on this subject that it provided a letter to Mr Gillon on his final day of work reminding him of his restraint obligations.

(ii) Consideration

[52] Mr Gillon argued that there had been no additional consideration for the non-solicitation clause.

[53] A principle relating to restrictive covenants referred to in *Gallagher Group Ltd v Walley*[3] is that consideration is necessary, but may be satisfied by the mutual promises intrinsic in the offer and acceptance of employment.

[3] [1999] 1 ERNZ 490 (CA)

[54] The Court of Appeal considered the issue of adequacy of consideration for a restraint in *Fuel Espresso Ltd v Hsieh*[4]. The Court observed[5]:

> *What we are dealing with here is the initial (and only) agreement of the parties. The traditional definition of consideration requires that there be something of value which must be given, and that consideration is either some detriment to the promiisee or some other benefit to the promisor. But the law does nor inquire into the adequacy of the consideration, nor, as the Judge seems to have thought, does it require an extra "premium" for a restraint of trade clause. It is also a very well settled principle of contract law that even mutual promises can be consideration for each other. As Treitel G.H, Law of Contracts (9th Ed), London, Sweet & Maxwell, 21995, al p 66 puts it:*
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> > *"A person who makes a commercial promise expects to have to perform it … correspondingly, one who receives such a promises expects it to be kept. These expectations can properly be called a detriment and a benefit and they satisfy the requirement of consideration in the case of mutual promises."*

[55] Consideration is necessary, but may be satisfied by the mutual promises intrinsic in the offer and acceptance of employment as expressly stated in an employment agreement, which is clearly the case in this instance.

[56] I find that UPS have an arguable case that Mr Gillon entered into an employment relationship with it knowing that the Employment Agreement contained the restraint of trade clauses.

(iii) Appropriateness of restraint clause

[57] Mr Gillon argues that the restraint of trade clauses are inappropriate given his salary level of $78,000.00 per annum at his date of leaving his employment with UPS, and his level of seniority.

[58] Ms Blackmore's untested affidavit evidence is that although Mr Gillon was on a basic salary of $70,000.00 per annum, he was entitled to, and did receive, commission payments in accordance with the commission structure guidelines as set out at clause 8.2 of the Employment Agreement.

[59] Ms Blackmore stated that during the 2012-2013 tax year Mr Gillon earned a total of $106,443.78 in base salary, commission, bonuses and a small amount of overtime. During

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[4] [2007] 60
[5] Ibid at para 18

this period Mr Gillon was credited with and earned sales commission on 80% of the invoices generated by the UPS Auckland branch with a value of $1.6 million, of which only 3% were not related to the sale or servicing of Eaton products.

[60] In terms of his level of seniority, I note that Mr Gillon was the only UPS Sales Engineer based in Auckland. He was the key person for establishing and maintaining the key relationships with all of the UPS Auckland based clients. In accordance with the duties as set out in clause 2.2 of the Employment Agreement I find that Mr Gillon acted in a capacity similar to that of Branch Manager.

[61] In this position he was able to, and did, directly influence sales to UPS's clients as indicated by his commission payments. In the High Court case of *Broadcasting Corporation of New Zealand v Nielsen*[6] Hardie Boys J stated:[7]

> *The employer's interest in maintaining his trade connection does not entitle him to obtain protection against every employee who deals with his customers, but only against those who because of the nature of their employment are likely to have personal knowledge of or influence over the customers and hence over where they place their custom to such an extent that it is within their power to entice them away.*

[62] I find that Mr Gillon's position did provide him with influence over UPS's clients such as to allow him to influence where they placed their custom, or to entice them away from UPS.

(iv) Restraint reasonable and enforceable?

[63] Mr Gillon will not have breached the terms of the restraint of trade clause if is found to have been an unreasonable and consequently unenforceable term.

[64] The law in this area has been summarised by the High Court case of *The Broadcasting Corporation of New Zealand v Nielsen (Nielsen):*in which Hardie Boys J stated:[8]

> *Such a covenant is prima facie unlawful, but will be upheld to the extent that the employer is able to establish that it is reasonably necessary for the protection of the proprietary interest which the law recognises he has in what may be called his trade secrets and his trade connections: and provided further that the covenant is not*

[6] (1988) 2 NZELC 96,040
[7] *Neilsen at pg 19*
[8] *Nielson at pg 14*

> *unreasonable from the point of view of the employee and that it is not in conflict with appropriate considerations of public interest.*

[65] I find that UPS Services has established an arguable case that during the course of his employment Mr Gillon had access to significant UPS customer information and that he had been in a position to influence the customer's purchasing decisions.

[66] I further find that Mr Gillon had access during the course of his employment to classes of information capable of being protected by restraint of trade provisions including supplier and pricing information[9], marketing strategies and plans[10], distribution systems and business connections[11].

[67] I find that UPS has an arguable case that it has a legitimate proprietary interest in its business information.

[68] In terms of geographical coverage Mr Gillon is prohibited during the six month time period from working for a competitor within a 100 kilometre radius. This geographical area is restricted only to the Auckland area for which Mr Gillon was responsible during his employment with UPS. As such I find it is reasonable.

[69] In terms of the six month time duration I accept UPS submissions that the duration is reasonable in terms of the length of time required by UPS to establish its commercial offerings which were in train at the time of Mr Gillon's resignation. Further that it is reasonable to allow UPS time to reconsider its pricing policy and commercial model in connection with Eaton.

(v) Sufficiency of confidentiality clause to protect UPS's legitimate proprietary interest

[70] Mr Gillon argues that the confidentiality provisions set out at clause 11 1 of the Employment Agreement are adequate to protect UPS's legitimate proprietary interest in its business information.

[71] In The Employment Court case *Allright v Canon New Zealand Limited*[12] Judge Couch stated:

> *[27] It is not possible to say as a matter of principle that, where the key interest of the party seeking to enforce a restraint is to protect its confidential information, that a restraint of trade will not be*

[9] *Medic Corporation v Barrett* [1992] 2 ERNZ 1048
[10] *Kone Elevators v McKay* (1997) ATPR 41-464
[11] *New Zealand Office Products Ltd v Howard* 13 September 2001, AA 124/01
[12] AC1/09

> *reasonable in addition to an express commitment to confidentiality. Inevitably that will depend on the particular facts of the case …*
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> *[28] In this case, it seems to me that there is a very real weight in the submissions Mr Hood has advanced regarding innocent disclosure and, particularly, inadvertent use of the defendant's' confidential information. This is 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 is a case where the departing employee, through the importance of his position, has a very extensive knowledge of the employer's business at all levels. That knowledge includes a myriad of detailed information, some of which is confidential and some of which is not but which, in many cases, will be intertwined. That information comprises not only facts but also opinions and plans of possible action.*

[72] In the particular circumstances of this case, I find that during his employment Mr Gillon acquired knowledge comprising plans for possible actions as well as facts. I accept that knowledge of this information is directly relevant to the position he now holds with YHI, and that he may, whether directly or inadvertently, be influenced by such knowledge when carrying out his duties for YHI.

[73] In this situation I consider that the confidentiality provisions set out at clause 11.1 of the Employment Agreement would not be sufficient to adequately protect UPS's legitimate business interest in its business information.

(vi) Breach of Restraint Provisions

[74] YHI submitted a tender to Downer on 26 August 2013, a customer of UPS and with whom Mr Gillon had had dealings when employed by UPS.

[75] The quotation provided to Downer had been prepared by Mr Gillon and the price quoted was below the UPS buy price.

[76] It is submitted for Mr Gillon that there had been an error in the pricing information supplied by YHI to Mr Gillon, and further that the tender had not as yet been awarded by Downer.

[77] I consider that the circumstances of Mr Gillon's having knowledge of the UPS pricing structure such as to enable him to prepare a quotation on behalf of YHI which

undercut that of UPS, it is reasonable for UPS to conclude that a breach of Mr Gillon's restraint of trade obligations under the Employment Agreement has occurred.

[78] In all the circumstances I find that UPS has an arguable case for the reasonableness and enforceability of the restraint of trade provisions in Mr Gillon's Employment Agreement.

Where does the balance of Convenience Lie?

[79] The balance of convenience considers the relative hardship resulting to each party from whether or not an interim injunction was to be imposed on Mr Gillon.

Delay

[80] Mr Gillon submits that UPS knew that he intended to work for YHI with effect from his resignation on 9 July 2013; however it did not act with any urgency in respect of the enforcement of the restraint of trade provisions in the Employment Agreement. In support Mr Gillon points to the fact that UPS allowed him to work out his notice period rather than placing him on 'garden leave' in accordance with the provision in clause 14.1 b) of the Employment Agreement.

[81] UPS submits that in light of its understanding that YHI was not in competition with it, and Mr Gillon's representations to it which enforced this understanding at the time of his resignation, it was not unreasonable to allow him to work out his contractual notice period.

[82] I find that UPS acted in a timely manner once made aware on 26 August 2013 that YHI had been appointed as a competing distributor by Eaton despite the fact that UPS understood that such appointment would not be effective until 26 November 2013. I also find that on 27 August 2013 when UPS had been provided with a copy of a YHI quotation made to Downer for the same large 3 phase uninterrupted power supply opportunity for which UPS were quoting, UPS reasonably concluded that YHI was already in active competition with it with the assistance of Mr Gillon's knowledge and expertise of UPS business.

Have the terms been breached with resulting losses to UPS?

[83] The untested affidavit evidence of Ms Blackmore establishes an arguable case that Mr Gillon breached the restraint of trade clauses set out at clause 11 of the Employment Agreement as a result of the provision of the quotation made by YHI to Downer on 26 August 2013.

[84] It is submitted for Mr Gillon that UPS has not been able to provide any evidence or damage or loss.

[85] Judge Inglis observed in *Pottinger v Kelly Services (New Zealand) Limited* [13]:

> *[85] While the plaintiffs submit that damages could be assessed by an account of profits from any business successfully solicited, I accept that such an approach does not account for client business lost following on from breaches not yet apparent at the substantive hearing and which many never come to light. I accept too that it would be difficult, if not impossible; to put the defendant back in the position it would have been in but for the breach, as any established benefit lost is the customer relationship, and ongoing future business.*

[86] I accept that in this case whilst there may be a quantifiable loss of profits to UPS resulting from the loss of the Downer project, if such a loss is attributable to the YHI tender, it would be difficult to put UPS back in the position it would have been in but for breaches of Mr Gillon's restraint of trade provisions due to the loss of customer relationships and on-going future business opportunities.

Is there an alternative remedy available?

[87] UPS have provided an undertaking as to damages.

[88] Mr Gillon has provided details of his financial position which do not support his being in a position to meet any award of damages. I find accordingly that there is no evidence that Mr Gillon would be able to meet any award of damages UPS might gain when its claim was fully investigated, quantified and determined

[89] I conclude that an award of damages would not be an adequate alternative remedy to the issuing of an interim injunction.

[90] I find the balance of convenience lies with UPS.

Overall Justice of the case

[91] The overall justice consideration requires me to stand back from the detail and consider the case from a more global view. Having done so, I consider that the overall justice supports an interim injunction enforcing the restraint of trade clauses contained in Mr Gillon's Employment Agreement.

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[13] [2012] NZEmpC 101 at para [85]

[92] In reaching this conclusion I have balanced the respective public interest considerations regarding UPS's commercial property rights and the parties' adherence to contractual terms freely entered into against the freedom of Mr Gillon to earn a living[14].

[93] In this respect I note that Mr Gillon is not prevented from earning a living, or from continuing to be employed by YHI, he is prevented only from carrying out or influencing business in competition with UPS.

Orders

[94] Accordingly in reliance on the undertakings lodged by UPS I make an order that Mr Gillon is restrained from either personally, or as an employee, consultant or agent for any other entity or employer:

a. Carrying on business in competition with UPS within a radius of 100 kilometres from UPS Auckland Branch.

b. Seeking to solicit or carry out any work of the same nature for any client or customer of UPS with whom Mr Gillon had contact or dealings with whilst employed by UPS.

c. The term of this order is from the date of this determination until after 9 February 2014 (unless varied before that date by further order of the Authority or the Employment Court).

Next Steps

[95] The Authority will shortly convene a case management conference to set timetable directions for the investigation of UPS's substantive claims.

Costs

[96] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

Eleanor Robinson
Member of the Employment Relations Authority

[14] *Fuel Espresso Limited v Hsieh* [2007] ERNZ 60 at [21] (CA)