

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 191/08
5123056 & 5123833

BETWEEN GLEN WALKLIN
 Applicant

AND CHUBB NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Rick Hargreaves, for Applicant
 Geoff Bevan and Anne Shirley, for Respondent

Investigation Meeting: 23 May 2008

Determination: 27 May 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In March 2008 Glen Walklin advised his employer Chubb that he had accepted a position with a competitor business. Mr Walklin's notice period ended by agreement on 22 April 2008 and he commenced employment with the competitor on 28 April 2008.

[2] On 30 April 2008 Mr Walklin filed an application in the Authority seeking declarations as to what restraining clauses form part of his employment agreement with Chubb and whether those clauses are reasonable and enforceable.

[3] On 9 May 2008 Chubb filed an application seeking injunctive relief ancillary to findings upholding the restraint of trade provisions. Chubb also alleges that Mr Walklin has breached the terms of the restraint.

[4] The applications have been granted urgency. The parties have attended mediation.

[5] The determination deals with two issues:

- (i) which, of three employment agreements, applies?
- (ii) is the restraining clauses contained in the applicable agreement enforceable?

[6] Counsel presented helpful arguments to the Authority which I have fully considered. In the interests of urgency I have not set those arguments out in full. No disrespect is intended.

Which clause applies?

[7] There are three contenders. They each contain different restraint clauses:

- (i) the 1999 employment contract;
- (ii) the 2005 bulk written employment agreement;
- (iii) the 2006 promotion written employment agreement

[8] Dealing with each in reverse order:

- (i) the 2006 promotion written agreement cannot bind the parties because the evidence was Mr Walklin had never seen it;
- (ii) the 2005 bulk written employment agreement cannot bind the parties because there was never any suggestion that it would. It is a proposed form individual employment agreement sent to 700 salaried employees with a covering letter advising that if it did not reflect current terms of employment it would be tailored to reflect those on contacting human resources to advise of such. This never occurred. Mr Walklin ignored the document and it was never followed up by human resources;
- (iii) the 1999 employment contract, executed by the parties, is the applicable agreement.

Is the restraint reasonable?

[9] The relevant clause provides:

Obligations of Employee

The employee shall not, for the duration of the termination notice period and for a period of three months thereafter, be involved directly or indirectly, whether as owner, partner, employee, agent, shareholder, contractor or in any other capacity whatsoever in any business the same as or similar to that carried on by the employer. This restriction shall apply to any activity of the employee in the greater Hawkes Bay area. Any variation shall be as set out in the Second Schedule.

The employee acknowledges that trade connections with principals, customers or clients of the employer, established or maintained in the course of employment are exclusively for the benefit of the employer. The employee convenants:

- (a) *Not to turn or attempt to turn such connections to (his/her) own advantage; and*
- (b) *Not to use or attempt to use such connections in any manner which may injure or cause loss either directly or indirectly to the employer or its business; and*
- (c) *Not to contact, solicit or accept business from any person or corporation who was a principal, customer or client of the employer at any time during the employee's employment by the employer until the expiry of:*
 - i) *The notice period which commences at the employee's terminations date including holidays; or*
 - ii) *Any contract between the employer and the principal or customer or client which was on foot during the employee's employment by the employer – whichever is the later.*

The parties to this Contract agree that the above Restraint of Trade provisions shall not apply where Employee is made redundant or where the Company ceases its business operations.

The Company shall also retain the sole discretion, on the termination of the employment of the Employee, to limit or release the employee's obligations as set out in this Contract.

[10] The law relating to restraining clauses is regarded as well settled. The starting point is that they are contrary to public policy and therefore void. However, a restraint will be enforced where it is no wider than the circumstances of the case reasonably require. That reasonableness is assessed in the circumstances of the case according to the legitimate interests of the parties to the restraint and the wider public interest. Reasonableness is assessed at the time the restraint is agreed.

(i) proprietary interest

[11] Mr Walklin was employed by Chubb (and its predecessors) in its Napier branch from 1995 until April 2008. Mr Walklin trained and worked as a mechanical engineer during his employment with Chubb progressing from cadet, through several promotions, ultimately holding the position of contracts manager. His area of specialty is heating and ventilation systems. His new employer is opening a Napier branch and he is employed as part of the team undertaking that project. Chubb is concerned about the potential negative impact this may have in its business in Napier and the wider Hawkes Bay.

[12] Chubb says it has a proprietary interest in the business and trade connections that Mr Walklin has built up during his employment. It also says Mr Walklin has intimate knowledge of its heating and ventilation business in Hawkes Bay.

[13] Mr Walklin denies Chubb has any legitimate proprietary interest in the knowledge he has build up during his employment. He says he has no strategic information or sensitive pricing information and that all tendering information is publicly available and/or shared among competing tenderers. He says jobs are tendered on a project by project basis and relationships play no role in it.

[14] I am satisfied that Chubb has a proprietary interest to protect its client relationships. The evidence shows Mr Walklin has built up strong relationships with customers and given the relatively small market it is likely he is able to exercise influence of over these customers. I am not satisfied, on the information received, that any other proprietary interest exists.

(ii) reasonableness

[15] Chubb may be able to protect the legitimate proprietary interest it has via the mechanism of restraining clauses. The application of those restraining clauses requires an assessment of reasonableness. Reasonableness is measured at the time the restraint was entered.

[16] In assessing reasonableness the following test is to be applied:

“In considering whether the restraint was reasonable in all the circumstances the Court has regard to the history of the employment, the nature of the employer’s interest to be protected, the likely effect on it of the former employee taking up a position with a competitor of the employer, the likely effect on the employee of the covenant being enforced, and any relevant considerations of public interest that suggest themselves.”¹

[17] When Mr Walklin entered the 1999 written employment contract with Chubb he was a cadet on a salary of \$39,000. Mr Walklin’s evidence was the contract was presented to him to sign. He said he was not given an opportunity to peruse the document or get independent advice prior to signing. Malcolm Aitkin, Chubb’s National Operations and Technical Manager, signed the 1999 employment contract on behalf of Chubb. He had no recollection of the event.

[18] There was no evidence as to why it was necessary to have restraining clauses in Mr Walklin’s 1999 employment contract. At this time Mr Walklin was a cadet on a modest salary. There is no evidence that he was responsible for or had any business or trade connections or had any business knowledge which it would be considered necessary to protect by way of a restraint. It cannot be inferred from the contract that it was entered in anticipation of Mr Walklin becoming the contracts manager or gaining the knowledge that now Chubb seeks to protect.

[19] I am satisfied the restraint was not reasonable at the time the employment contract was entered into.

(iii) consideration

[20] There is a distinction between a restraint agreed at the start of employment and one imposed during employment². In the later situation consideration would be expected. This remains the law³.

¹ *Radio Horowhenua Ltd v Bradley* [1993] 2 ERNZ 1085 at 1094, as quoted in *Royal v Axon Computer Systems Ltd* [1994] 1 ERNZ 312, 317

² *Radio Horowhenua* (above)

³ *Fuel Espresso Limited v Hsieh* [2007] NZCA 58

[21] Mr Walklin was already an employee when he signed the 1999 employment contract. There is nothing in the 1999 employment contract which refers to consideration and there were no discussions about that issue at the time the contract was entered. On the evidence received I can find nothing to reasonably infer that consideration was passed to Mr Walklin in return for the restraint.

Determination

[22] **The restraint of trade is unreasonable and not supported by valuable consideration. It is unenforceable.**

[23] It follows that no breach of the restraint clause is possible. The injunctive relief sought is declined.

[24] This finding does not extend to the remainder of the 1999 employment contract. I draw the parties' particular attention to the confidential information provisions in that agreement.

Costs

[25] Costs are reserved.

Marija Urlich

Member of the Employment Relations Authority