IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA156/08
5138296

	BETWEEN	BAY AUDIOLOGY LIMITED Applicant
	AND	BERNARD MAGER Respondent

5138289

	BETWEEN	BAY AUDIOLOGY LIMITED Applicant
	AND	SYLVIA den BREEMS Respondent

Member of Authority:	Paul Montgomery
Representatives:	Marie Wisker, Counsel for Applicant Graeme Malone, Counsel for Respondents
Investigation Meeting:	14 October 20098 at Nelson
Submissions received:	15 October 2008 from both parties
Determination:	22 October 2008

INTERIM DETERMINATION OF THE AUTHORITY

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[1] On 8 October 2008, the Authority issued interim orders for relief in favour of the applicant pending the hearing of the application on 14 October 2008.

[2] In that hearing, the Authority heard considered submissions from counsel for the parties in support of and in opposition to the application. The applicant company seeks interim orders prohibiting either respondent from breaching their obligation of loyalty and fidelity to the applicant and to enforce restraints of trade.

[3] The applicable principles require the applicant to establish there is an arguable case, that no adequate alternative remedy is available, that the balance of convenience and the overall justice of the case also favour the orders being granted. In accordance with the Regulations, the applicant has provided an undertaking as to damages.

Arguable case

Loyalty and fidelity

[4] Mr Mager was employed as a specialist audiologist in January 2008 to operate and expand clinics in the Motueka and Richmond areas adjacent to Nelson. Ms den Breems was employed in April 2008 to work in the Nelson office and also to assist Mr Mager in developing the clinics and to follow up on clients in the region who had previously used the respondent's services but who had not contacted or utilised the company's audiology services for a number of years. Ms den Breems is Mr Mager's partner.

[5] Both respondents tendered their notice on 17 September 2008. Under the terms of Mr Mager's employment agreement, he was required to give three months' notice. Under her agreement, Ms den Breems was required to give four weeks' notice. A term of both agreements allowed the applicant to not require either respondent to attend work during their respective notice periods but would remain in the applicant's employment until the notice periods expired.

[6] While there are some factual disputes involving some of these issues, such need not be resolved at this time. At the time the application was lodged and at the time of the hearing in Nelson, Mr Mager was still employed by the respondent, Ms den Breems contests that she remained employed but in any event her four weeks' notice expired on 17 October 2008.

[7] In respect of the issue of loyalty and fidelity as an employee, Ms den Breems is no longer bound. In respect of Mr Mager however, there is an arguable case, despite his assertion the applicant has repudiated the employment agreement.

Restraint of trade

[8] The relevant clause (23) in Ms den Breems' agreement provides for a six months restraint from the date of termination of her employment. The restraint requires that Ms den Breems:

> *… will not (without the company's prior written consent) directly or indirectly, and whether on her own account or as agent, adviser, employee, contractor or consultant for another person organisation be engaged in any private audiology practice which competes with the business carried on by the company at the date of termination of the employee's employment.*

[9] Counsel for the respondents submits this restraint is overly harsh and therefore void. Mr Malone argues that, at the time of commencing her employment, Ms den Breems was not aware of the restraint and as they were included in the written agreement presented to her in early May 2008, they amount to a unilateral variation. Further, Mr Malone contends that restraints on employees after their employment has ended are unenforceable unless they can be shown to be necessary in protecting the former employer's proprietary interests. As he says, *a restraint of trade clause cannot be designed to prevent competition but rather* [to prevent] *unfair competition*.

[10] Ms Wisker concedes the terms of the restraint are too broad and urges the Authority to modify the clause rather than decline to enforce the contract. Mr Malone appears not to resist that suggestion however, submits that the applicant must establish that Ms den Breems was in a position to develop relationships with the company's clients during her employment and had access to confidential material such as client lists properly belonging to the applicant.

[11] In the affidavits originally lodged by the respondents, both denied they had had access to the applicant's database and client lists. Affidavits in response from the applicant clearly state that this was not the case. Ms Mitchell's evidence is that there are four methods by which the respondents were able to access client data and specifies at para.8 of her affidavit the circumstances under which Ms den Breems was given a download of all the Nelson clinic's clients on a memory stick to enable her to work on that list from any computer. Ms Mitchell says she has a copy of the list in the form of an MS Excel document containing almost 7,000 client names and details.

[12] Ms den Breems has given an undertaking that she does *not hold any documents (or electronic information) relating to the clients of the applicant.* That may offer some comfort to the applicant, however, Ms den Breems earlier denial that she had access poses a difficulty.

[13] I find the applicant has established it has an arguable case in this matter.

[14] Towards the end of the interim hearing, the respondents each tabled undertakings. In light of these, Ms Wisker lodged submissions in reply indicating the applicant has no confidence in the undertakings given. Counsel submits that, in the light of the respondent's initial denial of access to client information and Mr Mager's denial of any involvement in

discussions involving the Richmond lease, the applicant is concerned about the quality of the undertakings.

[15] Mr Malone, for the respondents, replied to Ms Wisker's submission. He says, inter alia, that the undertakings were given voluntarily and to give some comfort to the applicant pending hearing of the substantive issues. Further, he emphasises the rationale underpinning the undertakings in the light of the restraints contained in the respective employment agreements.

Determination

[16] This is a multi-faceted case with few issues agreed between the parties; issues which can be determined only in an investigation of the substantive matters. To maintain equilibrium between the parties until the substantive investigation, the undertakings given by Ms den Breems and Mr Mager become the interim orders of the Authority.

[17] In addition, I make the following interim order: Neither respondent is to use any information, regardless of how it was obtained, is held or known, relating to the applicant's clients until further order of the Authority.

[18] These interim orders replace those made by the Authority on 8 October 2008.

[19] A teleconference will be convened in the next few days to arrange a fixture date for the substantive matter and to schedule the exchange of evidence.

Costs

[20] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority