

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

**[2020] NZERA 61
3084512**

BETWEEN	DAVIS TRADING COMPANY LIMITED Applicant
AND	VINNIE UELESE Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Charlotte Grice, Counsel for Applicant Jeff Goldstein, Counsel for Respondent
Investigation Meeting:	7 February 2020 at Auckland
Determination:	13 February 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a Statement of Problem filed in the Authority on 17 January 2020 the Applicant, Davis Trading Company Limited (Davis Trading) sought an interim injunction in addition to a number of other orders against Mr Vinnie Ueese, former employee.

[2] The application for an interim injunction was accompanied by an undertaking as to damages, and affidavits in support of the application by Ms Kerianne Ogden, General Manager, and Mr John Rhodes, Project and Planning Manager.

[3] This determination addresses the application for an interim injunction, and the substantive matters which include alleged breaches of the terms of employment agreements and penalty claims will be investigated by the Authority at a later date as yet to be scheduled.

Note

[4] Interim injunction applications are determined on the basis of the statement of problem, statement in reply, affidavit evidence from the parties, relevant documentation lodged and submissions from the parties.

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

Background Facts

[6] Davis Trading is a New Zealand owned business which sources, supplies and distributes food and other FMCGs to businesses around New Zealand. It acquired the business of Provida Foods Limited during 2018, and at that time issued the previous Provida Foods Limited employees with individual employment agreements.

[7] Mr Vinnie Ueese had been previously employed on or about September 2002 in the position of Storeman/Driver by Waikato Foods Limited. Waikato Foods Limited was acquired by Provida Foods Limited and Mr Ueese was subsequently employed by Provida Foods Limited in the position of Night Shift Supervisor.

[8] In 2018 Davis Trading acquired Provida Foods Limited and continued to employ Mr Ueese as Night Shift Supervisor in a division of Davis Trading called Provida. Mr Ueese's key responsibilities were resource allocation including staff management, assigning tasks to warehouse employees and truck allocations, and reporting absences.

[9] Mr Ueese had been issued with an independent employment agreement by Davis Trading dated 12 June 2018 (the Employment Agreement) which he had signed and dated 18 June 2018. The Employment Agreement contained the following clauses:

4. HOURS OF WORK

4.1 The position in which you have been employed is a full-time position at least 40 – 45 hours a week. ...

5. WAGE

5.1 Your wage is \$24.00 per hour paid fortnightly into a bank account of your choice.

12 LONG SERVICE

12.1 For employment agreements signed with Provida Foods Limited prior to 14/06 the employment agreement provided for 15 days annual leave plus an additional one weeks leave after completing ten years continuous service. Under the Holidays Act 2003 from 14/07 the annual holidays are increased from three to four weeks. This does not oblige the employer to increase the holidays of long service employees from 3 +1 to 4 + 1 week's holidays.

12.4 In respect of employees with 10 years of more service on the completion of the 11th and subsequent year ... the employer may at its absolute discretion may elect to:

- a. Grant the employee an additional week holiday to be taken on the same terms in respect of determination of timing as annual holidays.

15 TERMINATION

15.1 In the event that either you or we wish to terminate this agreement, one months notice in writing must be given to the other party.

29. CONFIDENTIALITY

29.1 During your employment you will obtain, or have access to, confidential and commercially sensitive information concerning us or our related companies, their business affairs, marketing strategies, finances, property, customers, suppliers, clients, directors and employees. You must not, during your employment or thereafter, may use of, publish or disclose to any person this confidential information without the company's express written approval. This clause continues to apply after your employment has ended.

32 NON SOLICITATION

32.1 The employee shall not at any time during the period of employment or for a period of six months after termination of employment, for whatever reason, either on the Employee's own account or for any other person, firm, organisation or company, solicit, endeavour to entice away from or discourage from being employed by the Employer, any other employee or actual client/customer or prospective client/customer of the employer.

32.2 The Company's consent to the above shall not be unreasonably withheld.

33 OTHER EMPLOYMENT/CONFLICT OF INTEREST

33.1 In order to protect Davis Trading's commercially sensitive information, intellectual property and commercial reputation, and in order to prevent a conflict of interest, you will not, during the period of employment without Davis Trading's prior consent:

- Engage in any other employment; or
- Hold a financial interest in a business which competes with us or with any of our related companies, or
- Take on any business or other interests which may have the effect of infringing to any significant degree on your attention and commitment to your duties under this agreement or which may be in direct or indirect competition with us.

34 RESTRAINT OF TRADE

34. 1 Employees shall not at any time during the term of this agreement with the employer establish, purchase or obtain an interest in, including as an employee, either directly or indirectly any business in relation in any way to the employer within a radius of 100 kilometres, without the express written consent of the employer, provided that such consent shall not be unreasonably withheld.

34.2 Should this clause be held invalid for any reason, the remainder of the agreement shall continue in force and effect as if the invalid provision had been deleted, provided however that the parties to this agreement may negotiate a valid and enforceable provision in replacement of the invalid provision.

[10] Mr Ueese signed the Employment Agreement on 18 June 2018 after the statement that he had read, considered and agreed to the terms contained in it.

[11] On or about 2 December 2019 Mr Ueese gave notice in writing of his resignation to Davis Trading with his last day of employment being 30 December 2019. This was subsequently brought forward to 13 December 2019.

[12] In the letter of resignation Mr Ueese advised Davis Trading that he had accepted an offer of employment from Bidfood Limited (Bidfood) which is a national wholesale food distributor and carries on business in direct competition to Davis Trading less than four kilometres away from where Mr Ueese worked at Davis Trading's Hamilton branch.

[13] Davis Trading did not consent to Mr Ueese giving less than the contractual notice period and Mr Ueese therefore continued working for Davis Trading until 3 January 2020.

[14] Mr Ueese stated in his untested affidavit evidence that as a result of the alteration in his leaving date with Davis Trading he was unable to commence employment on the date arranged with Bidfood for the Night Shift Supervisor role which carried a wage of \$28.50 per hour. Upon commencement of employment with Bidfood on the later date of 6 January 2020 he was employed in the position of Storeman on an hourly rate of \$25.50. This represented a \$1.00 per hour increase on his hourly rate with Davis Trading.

[15] Davis Trading alleges that Mr Ueese has breached the non-compete restraint in the Employment Agreement and during his employment with Bidfood during the restraint period, will, intentionally or advertently, share Davis Trading's confidential information with Bidfood.

[16] Orders sought by Davis Trading against Mr Ueese include:

- i. A compliance order requiring Mr Ueese to comply with the confidentiality, non-solicitation and non-compete restraint provisions in the Employment Agreement;
- ii. An order modifying the duration of the non-compete restraint of trade contained in clause 35 of the Employment Agreement from six months to three months;
- iii. An injunction restraining Mr Ueese from breaching the non-compete restraint in the Employment Agreement, and in particular from competing against Davis Trading prior to July 2010 (or such modified time as the Authority deems fair and reasonable);
- iv. An interim injunction restraining Mr Ueese from breaching the non-compete and non-solicitation restraints in the Employment Agreement and/or disclosing any of Davis Trading's property, including its confidential information;

- v. penalties against Mr Ueese for each breach of the Employment Agreement and his obligation to act in good faith and be responsive and communicative.
- vi. That all penalties be paid to Davis Trading.

[17] In light of the time involved before this matter could be heard, Davis Trading were seeking to have the non-compete restraint clause modified from six to four months, not to three months as previously stated.

Interim injunctive application: investigation

[18] I granted Davis Trading's 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.

[19] A case management conference was held by telephone on 6 January 2020 when the Authority heard from counsel for the parties and made directions for the parties to attend mediation. The matter did not resolve at mediation.

[20] At the investigation meeting on 7 February 2020 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.

[21] The approach to be followed has been set out by the Court of Appeal in *NZ Tax Refunds Ltd v Brooks Homes Limited* in which it stated:

[12] The approach to an application for an interim injunction is well established. The applicant must first establish that there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous. Next, the balance of convenience must be considered. This requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. Finally, an assessment of the overall justice of the position is required as a check.

[13] The grant of an interim injunction involves, of course, the exercise of a discretion. This is subject to the qualification, however, that whether there is a serious question to be tried is an issue which calls for judicial evaluation rather than the exercise of a discretion.¹

[22] The principles therefore fall to be addressed by the answers to the following questions:

¹ *NZ Tax Refunds Ltd v Brooks Homes Limited* [2013]NZCA 90

- a. Is there an arguable case that Davis Trading will succeed at the Authority's substantive investigation in establishing that Mr Uelese breached and is continuing to breach the terms of employment agreements binding upon him and that the non-solicitation clause in those agreements is reasonable and enforceable against him;
- b. Where does the balance of convenience lie between the parties? This question to encompass the associated question of whether there is an adequate alternative remedy available to Davis Trading
- c. Does the overall justice of the case require that an interim injunction be granted?

[23] 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.

[24] 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 or a non-solicitation clause, being an order that the High Court or the District Court may make under particular enactments and rules of law²

[25] I am aware that, given the short duration of the restraint, it will effectively have a more than temporary injunctive effect.

[26] And have taken this into consideration when determining this issue.

Is there an arguable case?

Is the Restraint of trade valid and reasonable?

[27] Mr Uelese had been provided with the Employment Agreement on 12 June 2018 and he signed it on 18 June 2018 after the statement that he had read, considered and agreed to the terms contained in it.

[28] Davis Trading submits that it has a legitimate proprietary interest to protect the confidential information, including details of its

- a) Operational practices and policies, technologies and processes

² *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205

- b) Key suppliers, and key equipment service providers
- c) Key customers and arrangements with those customers key operations personal including both the number and the skillset of its personnel; and
- d) Areas in which Davis could benefit from some improvement and the steps Davis is taking to improve.

Consideration

[29] Davis Trading submits that there was consideration for Mr Ueese agreeing to the restrictive covenants in the Employment Agreement as contained in clause 12 which provided him with an additional one week of long service leave.

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

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 promisee or some other benefit to the promisor. But the law does not 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, at p 66 puts it:³

[31] Mr Ueese employment was transferred to Davis Trading from Provida Foods Limited when Davis Trading acquired it. At the time Mr Ueese entered into the Employment Agreement, his employment was treated as being continuous. The previous employment agreements provided to the Authority do not contain restrictive covenants, although they do contain confidentiality clauses.

[32] Davis Trading submits that there was consideration for Mr Ueese agreeing to the restrictive covenants in the Employment Agreement as contained in clause 12 which provided him with an additional one week of long service.

³ *Fuel Espresso Ltd v Hsieh* [2007] 60 at [18]

[33] The consideration of an additional weeks leave in respect of long service, was to be provided solely: “at the absolute discretion” of the employer. I find that it did not therefore confer an entitlement on Mr Uelese.

[34] On that basis I am not persuaded that consideration for the acceptance of the restrictive covenants was adequate.

[35] Balanced against that consideration is the fact that Mr Uelese signed the Employment Agreement after having read it and when he would have had sufficient time to query the clauses or seek independent advice on them.

[36] I find that Davis Trading has an arguable case that Mr Uelese entered into an employment relationship with it knowing that the employment agreements contained the non-solicitation clauses. However I do not find that it is a strongly arguable case in light of the paucity of consideration.

Was the restraint reasonable and enforceable?

[37] Mr Uelese will not have breached the terms of the non-solicitation clause if it is found to have been an unreasonable and consequently unenforceable term.

[38] The law in this area was stated by the Employment Court in *Pottinger v Kelly Services (New Zealand) Limited*:

Restraints are enforced only to the extent required to protect a proprietary interest of the employers. The nature of the employees role in the employers business, the geographical scope of the restraint, and its nature and duration are relevant factors in assessing whether a restraint is reasonably necessary.⁴

[39] I find that Davis Trading has established an arguable case that during the course of his employment Mr Uelese would have developed some knowledge of the client and supplier base by virtue of his role over many years as Night Shift Supervisor.

[40] However to present as a strongly arguable case clause 34 of the Employment Agreement must be enforceable only so far as is reasonably necessary. In this case it is submitted for Mr Uelese that examining the working of the clause it is extremely wide in that

⁴ *Pottinger v Kelly Services (New Zealand) Limited* [201] NZEmpC 101 at [17]

it seeks to prevent Mr Uelese from being employed in: “ directly or indirectly any business in relation in any way” to Davis Trading.

[41] I find that the omission of the word ‘competing’ as defining ‘business’ renders the clause prohibitively wide. I further accept the submission that it would be extremely difficult, if not impossible, for Mr Uelese to know whether or not a business was connected in any way to Davis Trading.

[42] The clause also prevents Mr Uelese working: “ directly or indirectly any business in relation in any way” to Davis Trading within a radius of 100 km. This is a significant geographical restraint on an hourly paid employee whose home, and that of his family, is in Hamilton.

[43] I find that the logical inference of the clause as written, even if not so intended, is to prevent Mr Uelese working in any business in the Hamilton area. I find this is not reasonable or enforceable as being against public policy.

Sufficiency of confidentiality clause to protect Davis Trading’s legitimate proprietary interest

[44] Mr Uelese confirmed to Davis Trading that he was prepared to honour the terms of clause 29 of the Employment Agreement. Davis Trading submits that the confidentiality provisions are inadequate to protect its legitimate proprietary interest in its business information on the basis that Mr Uelese might either intentionally or inadvertently, share its confidential information with Bidfood.

[45] In *Allright v Canon New Zealand Limited* 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 reasonable in addition to an express commitment to confidentiality. Inevitably that will depend on the particular facts of the case ...

[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.⁵

[46] In the particular circumstances of this case, I find that during his employment Mr Ueese will have acquired knowledge including of Davis' clients and suppliers, practices and policies, and that he might, whether directly or inadvertently, be influenced by such knowledge when carrying out his duties for Bidfood.

[47] Offset against that consideration is the fact that Mr Ueese is currently employed as a Storeman at Bidfood, having been unable to take up the more senior position of Night Shift Supervisor.

[48] I find that Davis Trading does not have a strongly arguable case for the reasonableness and enforceability of the non-compete clause.

Where does the balance of Convenience Lie?

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

[50] Davis Trading submits that it is not relevant that Mr Ueese holds a junior position at Bidford because that is no guarantee that he will not change his position at Bidfood now or at some time in the future.

[51] As such there is a real risk to Davis Trading that the confidential and sensitive information gained by Mr Ueese in the course of his long employment may, whether deliberately or inadvertently used, be highly likely to damage Davis Trading's business.

[52] It is submitted for Mr Ueese that imposing an interim injunction and/or permanent injunction will have a significant financial effect on him and his family as attested to in his untested affidavit evidence.

[53] It is further submitted that the impact of clause 34 of the Employment Agreement would mean that Mr Ueese would be prevented from seeking alternative employment in the Hamilton area.

⁵ *Allright v Canon New Zealand Limited* AC 47/08

[54] I am not persuaded that there is sufficient basis for me to conclude that Mr Uelese will, within the short remainder period of the restraint, be in a position of great influence within Bidfood.

[55] I do not find that there is more than a barely arguable case that the future harm or damage is indeed arguably probable or likely.

[56] I find that the balance of convenience lies with Mr Uelese.

Overall Justice of the case

[57] The overall justice consideration requires me to stand back from the detail and consider the case from a more global view.

[58] Having done so, I consider that the overall justice does not support the issuing of an interim injunction.

[59] In reaching this conclusion I have balanced the respective public interest considerations regarding Davis Trading's commercial property rights and the parties' adherence to contractual terms freely entered into against the freedom of Mr Uelese to earn a living⁶.

[60] In this respect I note that the logical outcome of the wording of clause 34 of the Employment Agreement would be that Mr Uelese is effectively prevented from earning a living.

Next Steps

[61] The Authority will shortly convene a case management conference to set timetable directions for the investigation of Davis Trading's claims.

⁶ *Fuel Espresso Limited v Hsieh* [2007] ERNZ 60 at [21] (CA)

Costs

[62] 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