IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 96A/09
5156048

	BETWEEN	DIAGNOSTIC MEDLAB LIMITED Applicant
	AND	RICHARD LLOYDD Respondent

Member of Authority:	Dzintra King
Representatives:	Christine Meechan, Counsel for Applicant Sheridan Cook, Counsel for Respondent
Hearing:	1 April 2009
Determination:	8 April 2009

DETERMINATION OF THE AUTHORITY

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[1] This is an application for an interim injunction to enforce the garden leave provisions in the respondent's individual employment agreement.

[2] Diagnostic Medlab Services Ltd ("DMSL") performs services for its parent company, Diagnostic Medlab Ltd ("DML"). DML currently provides community laboratory services under a contract ("the DML contract") with the Auckland, Waitemata and Counties District Health Boards – the Auckland Region District Health Boards ("ARDHBs").

[3] Following a number of Court proceedings, on 6 March 2009 the ARDHBs gave six months' notice of termination of the DML contract. Lab Tests is due to take over the provision of community laboratory services on 7 September 2009 and will provide those services exclusively until 30 June 2015.

[4] Dr Lloydd commenced employment with DMSL in November 2000 as a pathologist. Towards the end of 2008 DMSL and Dr Lloydd agreed to a new employment agreement which accommodated Dr Lloydd's wish for reduced hours.

[5] Dr Lloydd's new employment agreement provided for the giving of three months' notice. The agreement states:

> *Should either party fail to give the required notice (other than summary termination and serious misconduct circumstances) three months' Base Salary shall be paid or forfeited as the case may be. Should you give the required notice, the company may, however, at its sole discretion, elect to pay a sum equal to your ordinary Base Salary (including any outstanding annual leave balance) for all or any balance of the notice period not to be worked which shall be deemed to be in full accord and satisfaction of the entitlements due on termination. Notice requirements may be waived by mutual agreement. Annual leave or conference leave may not be taken during the notice period unless otherwise agreed.*
>
> *The company may its sole discretion place you on Garden Leave during a notice period and may at its sole discretion not require you to discharge your normal duties during any notice period.*

[6] The employment agreement also contains a restraint of trade, the reasonableness and enforceability of which are not the subject of these interim proceedings.

Resignation and Placement on Garden Leave

[7] On 4 March 2009 Dr Lloydd accepted an offer of employment as Medical Director for Lab Tests. He was to take up the position on the termination of his employment with DMSL.

[8] On the morning of 5 March 2009 Dr Lloydd gave verbal notice to Dr Arthur Morris, DML's Chief Executive. Dr Morris asked Dr Ockelford to met with Dr

Lloydd, Dr Morris had told Dr Ockelford that Dr Lloydd had told him the resignation was confidential between himself, Dr Morris and Lab Tests.

[9] Dr Lloydd also provided written notice of termination.

[10] On the same day, without any discussion with Dr Lloydd, DMSL cut off his access to DMSL's email system.

[11] At about 11.30am that morning Dr Lloydd met with Dr Mee Ying Yeong, Clinical Director of Histology/Cytology at DML and Dr Paul Ockelford, the Director of Clinical Services at DMSL. Dr Ockelford had been surprised to find an article announcing Dr Lloydd's appointment on the New Zealand Doctor website. Dr Ockelford said it appeared that Dr Lloydd had made comments which were intended to entice staff to work for Lab Tests.

[12] The passage at issue in the media release reads:

> *"I have a great deal of sympathy for the staff of DML, all facing the same decisions about their futures. We have all gone through a long period of uncertainty and change is often difficult to accept. All I can ask is that the DML staff engage with us, visit the Lab and meet the people so they can make an informed decision. Obviously we recognise that all staff will have to make their own decisions about their individual futures and we respect that."*

[13] Dr Ockelford deposed that the question of whether or not Dr Lloydd would be required to work out his notice had been discussed between Dr Morris and Dr Lloydd with Dr Lloydd telling Dr Morris that he understood that according to his employment agreement it was up to DMSL. The exact nature of what was said is in dispute.

[14] At that meeting Dr Ockelford gave Dr Lloydd a letter acknowledging receipt of his resignation. The letter stated:

> *Clause B12.1 of your employment agreement gives Diagnostic Medlab the discretion to place you on Garden Leave during your three month notice*

> *period. We wish to exercise that discretion and place you on garden leave for the whole of the notice period. You will not be required to attend work or discharge your duties as from today Thursday 5 march. Your garden leave will expire on 4 June 2009.*

[15] Dr Ockelford told Dr Lloyd he was not to come into the DML laboratory for the remainder of the notice period. Dr Lloydd says his views were not sought on this matter.

[16] On 18 March 2009 Dr Lloydd, through his solicitors, wrote to DMSL asking that DMSL agree to the early termination of Dr Lloydd's employment. DMSL responded by applying for an interim injunction and directing him to continue to observe his obligations of fidelity, confidentiality and good faith during the notice period. DMSL says that the rationale for this is that Dr Lloydd has attempted to advance the interests of Lab Tests by assisting in the recruitment of staff.

Interim Injunctions

[17] The principles applying to interim injunctions are well settled: *American Cyanamid v Ethicon Ltd* [1975] AC 396 (HL); *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (HC & CA). The granting of interim relief is a discretionary matter. After forming a provisional view of the facts, the Authority applies a three stage test.

Is There an Arguable Case?

[18] In *X v Y Ltd and New Zealand Stock Exchange* [1992] 1 ERNZ 863 at 872 the Court said:

> *What the Court is concerned with, as far as the evidence goes, is to see whether, assuming the plaintiff can prove all the facts which he alleges, he then has an arguable case.*

[19] The issues are whether there is a serious question to be tried that DMSL has validly exercised its discretion to place Dr Lloydd on garden leave for the duration of

his notice period; and whether he has breached his obligations to act in DMSL's interests and to observe his obligations of good faith, fidelity and confidentiality during his notice period.

[20] The respondent maintained that there was not an arguable case. Dr Lloydd's employment agreement contains an express provision permitting the respondent to place him on garden leave at its discretion. This was a recently negotiated clause in a revised employment agreement. The applicant says that there is an important distinction between notice/garden leave provisions and restraints of trade: the starting point with restraints is that they are unenforceable whereas notice provisions simply make simply make explicit the mechanism for termination. Whether the applicant has exercised its discretion fairly and whether Dr Lloydd has breached his obligations will be the subjects of substantive proceedings. There is an arguable case.

Balance of Convenience

[21] This requires a weighing up and balancing of the inconvenience to Dr Lloydd of having to bear the burden of an injunction before the substantive case is heard, given that the respondent may win that case, against the inconvenience to the applicant, who may have a just case, of having to bear the detriment of an unjustifiable action until the case can be heard.

[22] The applicant has provided an undertaking as to damages and is in a position to meet that undertaking should that be necessary.

[23] The applicant says the issue is whether damages would be an adequate remedy for the respondent's failure to observe his duties of good faith and fidelity during the notice period. It is clear that there is a duty of fidelity during the subsistence of the employment agreement which prevents the employee from working in opposition to the employer's interests: *Ogilvy & Mather (NZ) Ltd v Darroch* [1993] 12 ERNZ 58

[24] The applicant says that damages would not be an adequate remedy as it is almost impossible to calculate the damage that may be done to DMSL in the event that Dr Lloydd is free to take up his position immediately in spite of a clear notice provision. This may impact on other employees in that Dr Lloydd will be unfettered

in attempting to advance the interests if Lab Tests; that other staff may leave without giving notice, inspired by the notion that they are not bound to observe the notice period. I think the latter scenario is highly speculative and it is not disputed that Dr Lloydd did give the requisite notice.

[25] Ms Meechan said that the loss of other staff would place in jeopardy DMSL's ability to maintain its service standards during the period up to the change to Lab Tests.

[26] She questioned how the loss of chance if DML had to step into the breach with a full complement of staff should the transition not succeed be valued. This is speculative and unlikely.

[27] Ms Meechan referred me to *Rank Xerox NZ Ltd v UBIX Copiers Ltd & Morton*, unreported, Auckland High Court, A1407/85, 20 December 1985, Barker J. The Court granted an application for an interim injunction in circumstances where the departing employee has been placed on garden leave for the three months of his notice period and where there was also a three month restraint. There was no clause expressly permitting placement on garden leave. This case was decided prior to the passage of the Employment Relations Act 2000 with its good faith obligations. Despite having to provide three months' notice Mr Morton initially gave no notice but said he was leaving immediately to work for a competitor. He subsequently agreed to work out the notice and was then placed on garden leave. The circumstances differ in many regards from the instant case.

[28] Dr Lloydd has been denied access to his workplace and to its facilities including use of its library. The applicant says he can use the Medical School's library. The respondent says he will be prejudiced by not being able to carry out his CME requirements. He has no cell phone or access to the laboratory, equipment, computers or other resources. He has not had access to email since it was cut off and cannot access that email from home. At the applicant agreed to allow some access.

[29] There is little evidence of any damage that might be suffered by the applicant whereas there may be negative effects upon Dr Lloydd, which I am not satisfied can be met by an award of damages.

[30] It is difficult to ascertain what, if any, damages DMSL will suffer. This is not a situation where Dr Lloydd would be working for a competitor.

[31] Dr Lloydd, while admitting to contacting two former staff members and speaking to two current staff members denies that he attempted to entice the current staff to work for Lab Tests. Significantly, Dr Lloydd has sworn that he intends to observe his duties and obligations for the balance of his notice period.

[32] The respondent says that the Authority should not enforce a garden leave provision for any greater period than would be covered by a justifiable covenant in restraint of trade and that as DMSL has no legitimate proprietary interest to protect, no such covenant would be justified. Furthermore, DMSL has transferred Dr Lloydd's workload to other employees and has in effect found a replacement or replacements for Dr Lloydd.

[33] Mr Cook submitted that the orders, if granted, would unnecessarily disadvantage Dr Lloydd because he risks being unable to meet his ongoing obligations with respect to continuing medical education ("CME") requirements; and that a three month break from performing pathology services is likely to be detrimental to Dr Lloydd's ongoing skill and accuracy levels as a pathologist. There are conflicts in the evidence regarding the CME issue.

Overall Justice of the Case

[34] Dr Lloydd gave the requisite notice; he subsequently asked for a variation.

[35] Dr Lloydd told Dr Ockelford that he would not make any further statements to the press after Dr Ockelford raised the issue with him; he has abided by that.

[36] It is difficult to see what the applicant is seeking to protect by an interim injunction when the respondent has agreed he will not breach his obligations. The detriment to the respondent if an interim injunction were made would be greater than

that suffered by the applicant and an award of damages is unlikely to compensate the respondent for any detriment he might suffer.

[37] Standing back and looking at the overall justice of the case I decline to make the orders sought.

Costs

[38] Costs were reserved. If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority