

- c. The enforceability of the restraint of trade clause B.13 in the individual employment agreement.

[3] The only element of the claims in the Statement of Problem for which the applicant wishes to have an interim injunction relates to the enforcement of the garden leave provisions.

[4] On 25 March 2009 the respondent filed an application for removal of the matter to the Employment Court.

[5] The application was made on the following grounds:

- a. One or more important questions of law are likely to arise other than incidentally, namely, whether despite an express provision, a period of garden leave can:
 - i. Amount to an unreasonable or unlawful restraint; and/or
 - ii. Be held to be unenforceable to any extent; and/or
 - iii. Give rise to a breach of good faith where the employer fails to consult about the decision to place the employee on garden leave.

- b. The case is of such a nature and of such urgency that it is in the public interest that it be removed to the Court, in that:
 - i. The respondent's period of notice expires on 4 June 2009;
 - ii. The case raises novel issues regarding garden leave that are of broader public interest, in that there are likely to be many employment agreements in New Zealand that provide for garden leave, and the outcome of this case may affect the manner in which employers apply those provisions;
 - iii. The issues in this case are of a novel nature and worthy of comment by the Court, so that the Authority can be guided when making its own determinations on similar issues in future cases;

- iv. Due to the novel nature of the issues in this case it is likely that regardless of the outcome of the Authority's determination either party may wish to challenge the determination; and
- v. A smooth transition to the respondent's new employer, Lab Tests Auckland Limited, taking over the provision of community laboratory services from 7 September 2009 is in the interests of the Auckland region District Health Boards and the public of Auckland.

[6] The respondent has indicated he would undertake to abide by the terms of the interim orders sought until the application for interim injunction was heard by the Court, should the matter be removed.

[7] On 27 March the applicant filed a notice of opposition to the removal application and also submissions. The applicant contends that the prerequisites for removal under sections 178 (2) (a) and (b) are not made out. The application and enforceability of the garden leave and/or restraint clauses do not raise an important question of law and the unique factual matrix of this case would render any decision of limited precedent value. Further, the nature of the case does not require the Employment Court to consider it in the public interest. Nor is the matter able to be dealt with more urgently by the Court, a fixture having been allocated in the Authority on 1 April 2009.

[8] Ms Meechan noted that the matter was not novel: *Rank Xerox New Zealand Ltd v UBIX Copiers (NZ) Ltd and Morton*, unreported, Auckland High Court, A1407/85, 4 December 1985. The employee was required to give three months' notice and the employment agreement contained a restraint of trade. The employee was placed upon garden leave immediately upon receipt of resignation. Barker J concluded it was reasonable for the plaintiff to withhold work from the employee provided it was prepared to keep on paying him. Barker J also concluded that type notice and restraint periods should not be telescoped.

[9] The issue of a duty of fidelity persisting during the notice period has been dealt with in *Ogilvy v Mather (NZ) Ltd v Darroch* [1993] 2 ERNZ 58. Ms Meechan submitted that the present case dealt with the same situation as the applicant had

applied to enforce the notice provision and was seeking an order requiring the respondent to honour his obligations of confidence, fidelity and good faith during the notice period.

Determination

[10] Removal may be ordered pursuant to s 178 (2) (a) if an important question of law is likely to arise other than incidentally. The principles to be applied in such an application were discussed by the Chief Judge in *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1. The importance of a question of law could be gauged by factors such as whether its resolution would affect large numbers of employees or employers or both, or whether the consequences of the answer to the question were of major significance to employment law generally. An important question of law is not required to be novel or difficult. It will be important if it will be decisive of the case or some important aspect of it or strongly influential in bringing about a decision of the case or a material part of it. Importance must be measured in relation to the case in which it arises and whether it was likely to arise other than incidentally. A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it. The Chief Judge noted that every question of law that needed to be resolved in deciding a case was important in the sense that the outcome of the case might depend upon the way in which the question of law was resolved. That per se was insufficient to render it an important question of law.

[11] This matter involves interpretation of the employment agreement, an assessment of the validity of the restraint of trade and a consideration of the application of good faith. No important question of law arises.

[12] Turning to a consideration of s 178 (2) (b) – that the matter is of such a nature and of such urgency that it is in the public interest that it be immediately removed to the Employment Court – while I accept that the matter is urgent as far as the respondent is concerned a hearing can be accommodated shortly in the Authority. I agree with the applicant that this issue turns on a particular factual matrix and it is difficult to see how a public interest arises.

[13] I decline the application for removal.

[14] Costs are reserved.

Dzintra King

Member of the Employment Relations Authority