

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 114
3005591

BETWEEN HP NEW ZEALAND
 Applicant

A N D JAMES KEOGAN
 Respondent

Member of Authority: Rachel Larmer

Representatives: Rob Towner, Counsel for Applicant
 Chris Patterson, Counsel for Respondent

Investigation Meeting: 12 April 2017 at Auckland

Date of Determination: 13 April 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] This matter involves an urgent substantive investigation into whether or not the non-compete restraint in Mr Keogan's individual employment agreement with HP New Zealand (HP NZ) should be modified by the Authority to reduce it from 12 months to 6 months' duration, or some other period as determined by the Authority, pursuant to s.8 of the Illegal Contracts Act 1970 (ICA).

[2] HP NZ also seeks an injunction restraining Mr Keogan from breaching the non-compete restraint in the IEA, should a modification to its duration be granted.

[3] HP NZ claims that it requires the non-compete restraint to protect highly confidential information that it says Mr Keogan was privy to in addition to its important and key customer relationships. HP NZ says that this highly confidential

information includes (but is not limited to) HP NZ's strategic marketing, sales and launch strategies for a new product it is about to launch.

[4] Mr Keogan says that the non-compete restraint is not reasonably necessary because he and his new employer Fuji Xerox New Zealand Limited (Fuji Xerox) have provided sufficient undertakings to ensure that any risk of an inadvertent disclosure of HP NZ's confidential information is highly unlikely to occur.¹

[5] Mr Keogan claims HP NZ is seeking to obtain an inappropriate commercial advantage by suppressing competition with it. Mr Keogan says that the confidential information clause in his employment agreement is sufficient to protect HP NZ's proprietary interests because he has not retained and cannot remember any confidential information.

[6] Mr Keogan says that by agreement with HP NZ he has been away from the workplace for seven weeks already. Mr Keogan resigned on four weeks' contractual notice on 20 March 2017 so his employment with HP NZ ends on 17 April 2017. Mr Keogan intends to start work for his new employer Fuji Xerox on 18 April 2017.

[7] Mr Keogan has been involved in the printer industry for approximately 17 years. Over that period he has worked for a number of different companies and has therefore been involved in building up significant relationships with his various employers' customers.

[8] Mr Keogan started work for Hewlett-Packard New Zealand (Hewlett Packard) on 21 March 2014 as the PPS Commercial Account Manager responsible for leading a number of Hewlett Packard's large accounts. Mr Keogan's employment agreement with Hewlett Packard contained a restraint of trade clause which contained a three month non-competition restraint.

[9] On 15 June 2015, following a proposed global separation of Hewlett Packard companies, Mr Keogan received an offer to transfer his Hewlett Packard employment to HP NZ. This offer stated that it has to be accepted by 24 June 2015, after which time it would be withdrawn.

¹ Mr Keogan's undertaking says he will not commence employment with Fuji Xerox until the expiry of any modified restraint period determined by the Authority. Fuji Xerox's undertaking says it will engage Mr Keogan on reduced duties from 19 April until the end of any modified restraint

[10] HP NZ's offer of employment contained more restrictive post termination restraints than the Hewlett Packard employment agreement did. Mr Keogan sent a query to HP NZ's Human Resources (HR) on 19 June 2015 noting that the restraint provision had been extended from 6 months to 12 months.

[11] On 22 June 2015 HP NZ replied to Mr Keogan's query about the proposed restraint. HP NZ advised him that it required its employees to sign an agreement regarding confidential information and proprietary developments New Zealand (ARCIPDNZ) which was a contractual term of the employment agreement to ensure that its confidential information, intellectual property and business was protected.

[12] Mr Keogan was told by HR that acceptance of the ARCIPDNZ was a term and condition of the offer which he would need to accept in its current form if he wanted to accept the offer of a transfer of his employment agreement from Hewlett Packard to HP NZ.

[13] HP NZ informed Mr Keogan that if he elected not to accept the ARCIPDNZ in its current form that would be taken as a rejection of its overall offer of the transfer of his employment. Mr Keogan accepted the offer by signing the offer of transfer, which included the ARCIPDNZ on 22 June 2015.

[14] Clause 10 of Mr Keogan's employment agreement with HP NZ stated that:

In consideration of the offer of employment made by Company, and Company entering into its obligations under this agreement, you agree that you are subject to the post employment obligations set out in the separate ARCIPDNZ and that those obligations form part of your terms and conditions of employment.

[15] Clause 7 of the ARCIPDNZ contains the protective covenants that applied during Mr Keogan's employment and for a period of 12 months following the termination of his employment. These restrictions include non-competition and non-solicitation of customers, company employees and suppliers restraints.

[16] The dispute in respect of this substantive matter relates solely to clause 7(a) of the ARCIPDNZ which relates to a restriction on Mr Keogan engaging in conflicting business activities ("the non compete restraint").

period determined by the Authority. HP NZ says these undertakings are insufficient to address its concerns so it maintains the orders sought should be made.

[17] Clause 7(a) states:

I will not provide services to a competitor in any role or position (as an employee, consultant, or otherwise) that would involve conflicting business activities, however, in the event my employment with the company is involuntarily terminated by the company as a direct result of a workforce restructuring or similar reduction in force, the restriction in this clause (paragraph 7(a)) will not apply;

[18] Clause 8 of the ARCIPDNZ states that Mr Keogan makes the agreements made in that agreement to *“avoid any future dispute between myself and the company regarding specific restrictions on my post-employment conduct that will be reasonable, necessary and enforceable to protect company’s confidential information and proprietary developments and other legitimate business interests.”*

[19] *“Confidential information”* is defined in Clause 2 of the ARCIPDNZ and *“proprietary developments”* is defined in Clause 3 of the ARCIPDNZ.

[20] Mr Keogan accepts that his new employment with Fuji Xerox would amount to a conflicting activity in respect of clause 7(a) of the ARCIPDNZ if that clause is held to be enforceable. *“Competitor”* is defined in clause 7 as is *“Conflicting business activities”* and *“Company employee”* and *“Company supplier”*.

[21] Clause 11 of the ARCIPDNZ states that if any of the provisions in it are deemed void, illegal or unenforceable the agreement remains in full force and the parties authorise revisions, deletions, or additions to the extent necessary to enforce the intent of the parties and to protect HP NZ’s goodwill, confidential information, proprietary developments and other business interests.

[22] Clause 13 of the ARCIPDNZ contains an acknowledgement that Mr Keogan has read and understood the terms of the agreement and has had an opportunity to seek legal advice before accepting it.

[23] The confidential information clause in clause 2 states:

This agreement concerns trade secrets, confidential business and technical information, and know how not generally known to the public (hereinafter *“confidential information”*) which is acquired or produced by me in connection with my employment by company. Confidential information may include without limitation, information on company organisation, staff, finance, structure, information of employee performance, compensation of others, research and

development, manufacturing and marketing, files, keys, certificates, passwords, and other computer information, as well as information that company receives from others under an obligation of confidentiality. I agree to abide by the company confidential information policy and specifically agree that with regard to the company confidential information:

- (a) To use such information only in the performance of company duty;
- (b) To hold such information in confidence and trust; and
- (c) To use all reasonable precautions to assure that such information is not disclosed to unauthorised persons or used in an unauthorised manner, both during and after my employment with company.

I further agree that any organisational information or staffing information learned by me in connection with my employment by company is the confidential information of company, and I agree that I will not share such information with any recruiters or any other employers, either during or subsequent to my employment with company; further, I agree that I will not use or permit use of such as a means to recruit or solicit other company employees away from company (either for myself or for others).

[24] When Mr Keogan resigned he was responsible for less than ten of HP NZ's key enterprise accounts which are mainly based in the Auckland region. However prior to November 2016 he was responsible for up to 400 accounts.

[25] Mr Keogan's current responsibility for key enterprise accounts involves approximately half of his workload so he is required to develop new business with the remainder of his time. This means that Mr Keogan is personally responsible for selling to a small number of important key enterprise accounts as well as acquiring new customers.

[26] Mr Keogan's seniority is reflected in his remuneration and his total gross earnings for the previous year which were apparently one of, if not the highest in his team.

[27] HP NZ had a reorganisation of roles leading up to November 2016 and as part of that Mr Keogan's employment was refocused to involve a smaller group of customers. He was also presented with new terms in relation to his remuneration which is a mix of base salary and commission, calculated monthly against specific financial targets.

[28] Prior to November 2016 Mr Keogan had been paid commission based on calculations relating to team financial targets, because he had a specialist role across a

number of team accounts; however, from November 2016 because he was personally responsible for his own accounts the commission was to be based on an individual financial target.

[29] Mr Keogan's position is that the new remuneration structure was less favourable to him and he believes that it resulted in the employment relationship becoming "*increasingly strained*". HP NZ refutes that evidence. It says as far as it was aware Mr Keogan agreed to the changes which were readjusted in his favour after representations from him.

[30] Mr Keogan attributes the changes in November 2016 as being the catalyst for him seeking out potential new work opportunities late last year. Mr Keogan's actions in that regard resulted in him receiving a verbal offer of employment from Fuji Xerox on 20 January 2017.

[31] Mr Keogan says that he approached HP NZ's Managing Director Mr Grant Hopkins on 16 February 2017 to advise that he (Mr Keogan) was considering taking up employment with a competitor so he wanted to know what HP NZ's position would be on the restraint of trade obligations. Mr Keogan did not reveal that he had already received a job offer from one of HP NZ's competitors.

[32] Mr Hill joined Mr Hopkins and Mr Keogan for their conversation. Mr Keogan claims that he told Mr Hopkins and Mr Hill that he was considering a potential role at Fuji Xerox that would involve managing ten of its largest accounts for Fuji Xerox existing customers. Mr Keogan told HP NZ that he did not believe that the new role would involve competing with HP NZ in relation to any of its print contracts.

[33] HP NZ disputes that. After reviewing Mr Keogan's employment agreement with Fuji Xerox I find that Mr Keogan's new job would fall within the 7(a) non-compete restraint if that clause is held to be enforceable.

[34] Mr Hill and Mr Hopkins say they believed that Mr Keogan had resigned verbally during this discussion because he told them he would hand in his resignation the following day after he had delivered planned sales training. Their view about that was supported by the fact that Mr Keogan did not return to the workplace subsequent to their discussion on 16 February.

[35] Mr Keogan did not go into the office on 17 February or Monday, 20 February 2017. On 20 February 2017 Mr Hill emailed Mr Keogan asking where he was and stating that he had expected to see him in the office that day. By agreement Mr Keogan then went on gardening leave so he has not been in the workplace since 16 March 2017.

[36] The parties have attended three mediations. They attended voluntary mediation on 16 February 2016. The Authority directed the parties to mediation on 16 March 2016. The Authority also directed the parties to attend mediation this morning.

[37] All three mediations have been unsuccessful. The parties filed a joint memorandum this morning advising the Authority that they had been unable to reach agreement and asking the Authority to determine the claims before it as soon as possible given Mr Keogan's desire to start his new job on 18 April 2017 (immediately after the Easter public holiday that starts tomorrow).

[38] Mr Keogan says that in addition to undertaking the management of ten of Fuji Xerox's new accounts, he will be required to bring in one or two accounts per year but that does not include attempting to obtain any of HP NZ's existing print accounts. Mr Keogan says his new role at Fuji Xerox does not include any product planning work or attendances at sessions in relation to product or strategic planning.

[39] Mr Keogan did not know who his new Fuji Xerox clients would be but he acknowledged that he would be receiving a higher rate of commission for new business than for serving Fuji Xerox's existing client base.

[40] Mr Hill and Mr Hopkins say that gives Mr Keogan a strong incentive to go after its customers and to undermine or disrupt its contractual relationships which Mr Keogan is privy to because of the nature of his senior key role with HP NZ.

[41] I note that Fuji Xerox declined to attend the investigation meeting voluntarily to give evidence about Mr Keogan's new role or its expectations of him.

The issues

[42] The following issues are to be determined:

- (a) Does HP NZ have a legitimate proprietary interest capable of protection by a non-compete restraint?

- (b) If so, is the non-compete restraint reasonable, other than duration?
- (c) If so, should the Authority exercise its discretion to modify the non-compete restraint from 12 months to 6 months, or some other period?
- (d) Have the requirements of s.164 of the Employment Relations Act 2000 (the Act) been met?
- (e) If so, how should the restraint be modified?
- (f) Should the Authority exercise its discretion to issue injunctive relief?
- (g) What if any costs should be awarded?

Is there a legitimate proprietary interest capable of protection by a non-compete clause to protect?

[43] The starting point for a restraint is that it is unenforceable unless the employer proves that it is reasonably necessary to protect a legitimate proprietary interest.

[44] It is well known that an employer is not permitted to merely prevent an employee from competing with it. This means an employer must first identify and prove the existence of a legitimate proprietary interest that is capable of being protected by a post-employment restraint before the reasonableness of a restraint can be examined.

[45] HP NZ says that the non-compete restraint is necessary to protect it from its competitors having access via Mr Keogan to the HP NZ's highly confidential information which is so commercially sensitive and confidential that it is in the nature of trade secrets.

[46] The leading case on definition of confidential information is a *Faccenda Chicken Ltd v Fowler & Ors*² which categorised confidential information as falling into three categories.

[47] Although the English High Court in *Faccenda Chicken* held that confidential information which remained in an employee's head as part of their own skill and knowledge that they have gained during the course of employment could be used for

² [1985] 1 ALL ER 724.

their own benefit after termination and therefore could be protected by a post termination restraint, the English Court of Appeal disagreed with that.

[48] In interpreting the English Court of Appeal's judgment in *Faccenda Chicken* the New Zealand Courts appear to have given the concept of "*trade secrets*" a liberal interpretation in terms of the type of confidential information which is capable of amounting to a legitimate proprietary interest capable of being protected by a post termination of employment restraint.

[49] Mr Towner submits that in accordance with the English Court of Appeal decision in *Lansing Linde Ltd v Kerr*³ that it is the quality of the confidential information and the fact that its disclosure to a competitor could result in real hardship to an employer which is relevant in assessing whether the information is truly confidential in terms of being capable of protection by post-employment restraint.

[50] Mr Towner submits that this body of case law he cited in his submission illustrates that in New Zealand the type of confidential information which may give rise to a legitimate proprietary interest capable of protection through a post-employment restraint has included a wider category of information than that would strictly fall within the third category (trade secrets) identified in *Faccenda Chicken*.

[51] I accept that submission. The cases cited by Mr Towner appear to show a trend of jurisprudence that has developed in the New Zealand Courts which has allowed marketing and other commercially sensitive business strategies including the launching of new products by employers to be protected by a post termination restraint.

[52] Mr Towner sets out at paragraph [26] of his submissions the information which HP NZ claims is among its most confidential information which it must protect via the non-compete restraint.

[53] HP NZ submits that all of the information which it has identified in paragraph [26] of Mr Towner's submissions (relating to its products, launch, strategies, sales pipelines, contractual arrangements, product analysis, business relationships and sales strategies and pricing and margins) are factors which, if disclosed by Mr Keogan, would cause it real harm.

³ [1991] 1 ALL ER 418.

[54] HP NZ says this commercially sensitive internal confidential information is only shared with its employees who all have confidential information clause in their employment agreements, customers who sign a contract which contains a confidentiality clause, business partners who are only provided with information after signing contracts that include confidentiality clauses and prospect business parties/customers who are required to sign a non-disclosure agreement before such confidential information is shared with them.

[55] I do not accept Mr Keogan's evidence that this information, which HP NZ says is subject to contractual confidentiality clauses, is already in the public domain. Mr Keogan did not produce documentary evidence or evidence from other individuals to support his claim that such information is already in the public domain.

[56] Mr Hopkins' evidence was that if the information which HP NZ is seeking to protect via the non-compete restraint fell into a competitor's hands then that could be used to upset the relationship between HP NZ and its customer/clients and business partners which in turn could then derail HP NZ's current marketing, sales and launch strategies.

[57] By virtue of his position Mr Keogan has knowledge of the specific contractual arrangements of HP NZ's existing clients that account for approximately \$4.5 million of HP NZ business which are coming up for renewal before the end of October 2017. HP NZ says that the information Mr Keogan has about its upcoming launch is exponentially larger than that.

[58] I do not accept Mr Keogan's evidence that he knows nothing about HP NZ's upcoming launch other than what has been announced to the public. I consider that evidence was undermined by the fact that Mr Keogan was responsible for contractual negotiations which involved this new product which were conducted under the terms of a non-disclosure agreement. HP NZ also produced evidence that he has attended many internal meetings about the new product.

[59] I found Mr Keogan's evidence that the new product was not discussed at any of the meetings he attended unconvincing. I also refer to Mr Keogan's evidence that he accepts that he was effectively the internal 'go to' person (because he had the most experience) on the previous product that the new product launch was going to overtake.

[60] I therefore consider it more likely than not that Mr Keogan has considerably more knowledge and information about the upcoming new product launch than he has acknowledged.

[61] I accept that HP NZ has established on the balance of probabilities that it has highly confidential information including but not limited to confidential customer contractual arrangements and pricing, new product pipelines, potential new client pipelines, confidential business relationship information and product launch knowledge which I consider together form a legitimate proprietary interest which HP NZ is legally capable of protecting by way of a post-employment restraint.

[62] In reaching this conclusion I am guided by the comments made by the Full Employment Court in *Transpacific Industries Group (NZ) Ltd v Harris*⁴ which expressly recognised that strategy information, particularly in the developmental stages, can be especially confidential.

[63] Although the Full Employment Court had reservations about whether such information fell within the trade secrets category of *Faccenda Chicken* it nevertheless accepted that the information in issue in *Harris* was confidential to the employees concerned, had limited circulation and was equivalent to trade secrets so was sufficiently confidential to amount to a proprietary interest capable of being protected by a post-employment restraint.

[64] The Full Employment Court in *Harris* doubted whether the pricing information in that case was the equivalent of a trade secret on the basis it could be obtained directly from the customers concerned.

[65] However I find that there is a distinction with the pricing information in this case because HP NZ's customers must sign a contract which requires them to keep their contractual terms with HP NZ confidential. Any disclosure of by a HP NZ client to one of HP NZ's competitors of the customer's pricing or contract expiry or other terms would therefore be a breach of contract.

[66] I consider that the margins on a particular sale and the lowest available pricing that can be offered by HP NZ on a particular item or service (its bottom possible price for any given customer) is a legitimate proprietary interest which is capable of

⁴ [2013] ERNZ 267.

protection because its information is imparted to employees on a confidential basis, it is not shared with the customer, and is not available for HP NZ's competitor's to obtain.

[67] I further accept Mr Towner's submissions that the non-compete restraint is also reasonably necessary to protect its customer connections for a period of time after the ending of Mr Keogan's role with HP NZ.

[68] HP NZ's evidence is that the sales cycle is approximately 12-18 months and that it will take approximately 4-6 months to replace Mr Keogan, leaving it with 2 out of 3 of the key staff required in his role for many months.

[69] Clause 7 of the ARCIPDNZ specifically refers to "*customer relationships*" that are developed during the employment as one of the legitimate business interests which the non-compete restraint is seeking to protect.

[70] In Mr Keogan's case because of the way in which the business and his team operated I find that he had detailed knowledge not only of his own client accounts but also of the client accounts of everyone else in the print sales team that he worked so closely with.

[71] I find that HP NZ has a legitimate proprietary interest that is capable of protection by a non-compete restraint.

Is the non-compete clause reasonable?

[72] The fact that the HP NZ has a legitimate proprietary interest which is capable of post-employment protection does not mean that the restraint is enforceable. It still must meet the reasonableness test, which involves an assessment of reasonableness from the point of view of the employer, the employee and the general public⁵.

[73] The existence of the ARCIPDNZ clause 2 confidentiality protection does not in itself render the non-compete restraint unnecessary or unlawful.⁶

[74] HP NZ accepts that the duration of 12 months is too long which makes the non-compete restraint inherently unreasonable. I find that there are material differences between the HP NZ non-compete restraint and the non-compete clause in

⁵ *Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 NZLR 731 CA.

⁶ *Warmington v AFFCO New Zealand Ltd* [2012] ERNZ 1.

Harris which the Full Employment Court expressed reservations about on the basis it appeared to be intended to not just protect confidential information but rather to prevent competitors gaining the use of its valuable employees.

[75] The words and references used in the *Harris* clause which gave rise to the Employment Courts' concern do not appear in the HP NZ clause. I consider it significant that, notwithstanding the Employment Court's concerns about the content of the restraint in that matter, it nevertheless indicated that had a timely application for modification been filed such application would have likely been successful.

[76] It is a well-recognised and important principle that an employee has a right to earn a living so there will only be limited cases in which an employer has a legitimate proprietary interest that would warrant an employer imposing a non-compete period on a former employee after the employment relationship has ended.

[77] Mr Keogan says that the confidentiality protection provided by clause 2 of the ARCIPDNZ provides HP NZ with sufficient protection. He further says that he has undertaken to be bound by the other restrictive covenants⁷ he entered into and that his new employer Fuji Xerox is not interested in receiving any confidential information about HP NZ. Mr Keogan says this is sufficient to protect any legitimate proprietary interests HP NZ may have.

[78] HP NZ says that that misses the point because it does not believe that Mr Keogan can do his new role with Fuji Xerox without a serious and significant risk of him disclosing HP NZ's confidential and commercially sensitive information, which involves confidential information that would not normally be available to a competitor, even inadvertently.

[79] Mr Towner referred to the Employment Court's finding in *Warmington*⁸ that even though the employees may not have a precise recollection of the details of each report that they had seen the information that they did have was "*likely to be of use*" to the new employer.

[80] In *Warmington* the Employment Court noted the inherent difficulties associated with an inadvertent disclosure of confidential information because it recognised that in practice it can be difficult to draw a line between what is

⁷ Excluding the non-compete restraint.

confidential and what is not and it is extremely difficult to prove a breach of confidential information which is carried in a former employee's head.

[81] I consider that is the case here. The parties were so far apart in terms of what constituted confidential information that I consider there is a real risk of Mr Keogan using what can properly be categorised as confidential information in the course of his new employment, even if it is used innocently or inadvertently. I did not get the sense from Mr Keogan's evidence that he was clear about what information he cannot disclose to his new employer.

[82] I accept Mr Towner's submission that the Authority should apply the approach taken by the Employment Court in *Warmington* of upholding the non-compete restraint, notwithstanding the existence of the confidentiality obligations which Mr Keogan has agreed to observe.

[83] I accept HP NZ's submission that the confidential information (which may be protected) which it is seeking to protect by way of non-compete restraint is information which Mr Keogan may carry in his head and which is so intermingled with what would be his own knowledge and skills (which cannot be restrained) that it would be difficult to prevent inadvertent disclosure.

[84] I rely on the evidence of Mr Hill at paragraphs 44-46 and of Mr Hopkins at paragraphs 35-37 of their statements in support of that conclusion. I do not set it out as to do so would nullify the non publication orders in place.

[85] I want to make it clear that my conclusion about this relates to confidential and commercially sensitive information which is outside of the employee's normal skill, experience and knowledge that Mr Keogan would have gained by virtue of his job.

[86] I am satisfied that the non-compete restraint is not seeking to restrain that level of information but is targeted at the confidential and commercially sensitive information which I have found is capable of giving rise to a legitimate proprietary interest which may protected.

[87] I find on the balance of probability that Mr Keogan has both types of information in his head because of the senior nature of his role and the key role he played in relation to the team to the extent that I do not consider it practicable to

⁸ Ibid 6.

expect him to separate out or ring fence the confidential information which the non-compete restraint is seeking to protect.

[88] I agree with HP NZ's assessment that there is an unreasonable risk of innocent or inadvertent disclosure of HP NZ's confidential information by Mr Keogan if he were not restrained for a period of time following the ending of his employment in circumstances where he is about to start work with one of HP NZ's competitors.

[89] I therefore find that it is reasonable for there to be a non-compete restraint to protect the confidential information consisting of HP NZ's confidential contractual arrangements, its pricing and margins, its sales pipeline and launch marketing, sales and business strategies.

[90] I further consider that, apart from the duration problem, the non-compete restraint is otherwise reasonable as at the time it was entered into.

Should the Authority exercise its discretion to modify the duration?

[91] Just because HP NZ has a legitimate proprietary interest capable of being protected by a non-compete clause it does not automatically follow that the duration of the clause should be modified by the Authority. The decision to modify is discretionary and it is subject to a number of statutory restrictions on the exercise of that power.

[92] The jurisdiction of the Authority to modify the restraint is contained in s8 of the ICA, which allows for both deletion and modification of a restraint of trade clause. Section 8(1)(b) of ICA allows the Authority to exercise its discretion to modify the duration of the restraint so that it would have been reasonable at the time the contract was entered into.

[93] There is no presumption in favour of modification because it is discretionary in nature so it depends on a judicial exercise of the Authority's discretion in relation to all of the material circumstances at the time this matter is determined.

[94] HP NZ seeks modification of the 12 months duration to 6 months but I consider that period too long. Mr Keogan had a 3 month non-compete restraint in his employment agreement with Hewlett Packard and that is also the length of the non-compete restraint in his new Fuji Xerox employment agreement as well.

[95] Mr Keogan told me he considered the Hewlett Packard and Fuji Xerox non-compete restraints of three months were reasonable.

[96] In assessing duration I consider it appropriate to impose a duration that is the least amount of time possible to ensure that HP NZ is not effectively 'rewarded' for imposing an unreasonably long restraint in the first instance. I find that three month's duration is no more than is reasonably necessary to protect HP NZ's legitimate proprietary interests.

[97] In concluding that 3 month post-employment duration is sufficient I am mindful of the fact that Mr Keogan has been away from the workplace since 16 February 2017 by agreement, so he has not had access to any confidential or commercially sensitive information from that date. A three month restraint period will also protect the confidential information related to the upcoming new product launch.

[98] I therefore consider it appropriate to exercise the Authority's discretion to modify the duration of the non-compete restraint.

Have the requirements of s.164 of the Act been met?

[99] Section 164 of the Act sets out the mandatory statutory process which the Authority must have complied with before it is permitted to make an order under s.162 of the Act varying an employment agreement or term of an employment agreement.

[100] The Authority's modification of Mr Keogan's non-compete restraint may only occur if all of the requirements of s.164 of the Act have been fully complied with.

[101] This process requires the Authority to only make an order varying an employment agreement if it has first identified the problem in relation to the agreement and has directed the parties to attempt mediation to resolve that problem⁹.

[102] The parties must have attempted in good faith to have resolved the problem relating to the agreement by way of mediation¹⁰ and despite doing so the problem has still not been resolved¹¹.

⁹ Section 164(a)(i) and (ii) of the Act.

¹⁰ Section 164(b) of the Act.

¹¹ Section 164(c) of the Act.

[103] If each of the conditions in s.164(a)–(c) of the Act are met, the Authority must then still also be satisfied that any remedy other than varying the employment agreement would be inappropriate or inadequate¹².

[104] I find that each of these requirements have been met. The Authority has twice directed the parties to mediation to resolve the problem that the duration of the non-compete restraint makes it unenforceable.

[105] The second Authority directed mediation occurred after the Authority had given a preliminary indication of what its findings would be in relation to each of the claims before it. I also identified additional specific matters the parties might have wished to consider within the context of confidential mediation.

[106] Although the parties considered that the requirements of s.164 of the Act had already been met before the Authority held its investigation meeting yesterday, given the Act's emphasis on mediation to resolve employment relationship problems, I still directed the parties to again attend urgent mediation that was arranged for this morning.

[107] The parties have subsequently advised the Authority that after mediating the matter in good faith they have still been unsuccessful in resolving the problem I had identified with Mr Keogan's employment agreement.

[108] I consider that the parties have not put forward any other satisfactory alternatives to ensure that HP NZ's legitimate proprietary interest is protected for a period following the end of Mr Keogan's employment.

[109] I am therefore satisfied in terms of the requirements in s.164(d) of the Act that failing to modify the duration of the non-compete restraint would be inappropriate because it would leave HP NZ without adequate protection for its legitimate proprietary interests.

[110] I am mindful of the fact that Mr Keogan has not offered any undertakings which in my view would have adequately addressed the protection of HP NZ's legitimate proprietary interests. On that basis I consider there is no other remedy available that would render modification inappropriate.

¹² Section 164(d) of the Act.

[111] I am therefore satisfied that any remedy other than modification of the duration of the non-compete restraint would be inappropriate or inadequate.¹³

What modification should occur?

[112] In these circumstances I am satisfied that the requirements of s.164(a)–(d) of the Act have been met and that this is an appropriate case within which to exercise the Authority’s jurisdiction under s.8(1)(b) of the ICA to modify the existing non-compete restraint by reducing its duration from 12 months to three months.

[113] That modification would prevent Mr Keogan from starting work with Fuji Xerox (or another competitor for that matter) in breach of clause 7(a) of the ARCIPDNZ before 17 July 2017.

[114] I order that clause 7(a) of the ARCIPDNZ be modified by inserting after the existing words “*a period of 12 months*” the new words “*(but 3 months in relation to paragraph (a) below)*” pursuant to s.8(1)(b) of the ICA.

Should the Authority exercise its discretion to award issue injunctive relief?

[115] HP NZ sought an injunction preventing Mr Keogan from breaching the non-compete restraint in his employment agreement.

[116] Mr Keogan has informed the Authority at the investigation meeting that he intends to comply with its determination (subject to his right to challenge) so he does not intend to start work in violation of a modified non-compete restraint.

[117] Mr Keogan was invited to provide an undertaking to that effect but has not done so. The undertaking Mr Keogan filed this morning was limited to starting work with Fuji Xerox when the injunction sought by HP NZ is wider because it relates to adherence to the non-complete restraint in its entirety, not just in relation to Fuji Xerox.

[118] This appears on the face of it to be a back tracking of what he told me at the investigation meeting yesterday. No reason has been given for that apparent change.

¹³ S.164(d) of the Act.

[119] However it has lead me to believe that it is necessary to exercise the Authority's jurisdiction to grant HP NZ's application for an injunction to restrain Mr Keogan from breaching the (modified) three month non-compete clause in his employment agreement.

[120] Accordingly, I order that Mr Keogan is restrained from commencing new employment before 17 July 2017 which would breach clause 7(a) of the ARCIPDNZ in his employment agreement.

What, if any, costs should be awarded?

[121] HP NZ as the successful party is entitled to a contribution towards its actual costs. The parties are encouraged to resolve costs by agreement.

[122] However, if that is not possible then HP NZ has 14 days in which to file its cost submissions, Mr Keogan has seven days within which to respond with HP NZ having a further three working days within which to file any cost submissions in reply.

[123] The Authority is likely to adopt its notional daily tariff-based approach costs so the parties are invited to identify any factors they say should result in the notional daily tariff being adjusted.

Rachel Larmer
Member of the Employment Relations Authority