Determination Number: AA 113/05
File Number: AEA 261/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Ingersoll-Rand Architectural Hardware Limited (Applicant)
AND	David Nicholson (Respondent)
REPRESENTATIVES	Brian Spong, for Applicant Simon Mitchell, for Respondent
AUTHORITY MEMBER	Y S Oldfield
INVESTIGATION MEETING	30 March 2005
DATE OF DETERMINATION	31 March 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] From late 2002 until recently Mr Nicolson worked for Ingersoll-Rand Architectural Hardware Limited as a sales consultant. During February 2005 the principal competitor of Ingersoll Rand approached him with a job offer. After some negotiation, he accepted and on 1 March he gave one month's notice of his resignation. Ingersoll Rand asked him to take pay in lieu of notice and he agreed, leaving that day. Mr Nicolson arranged to take up his new position on 29 March. Ingersoll Rand says that he cannot do this as he is bound by a three month restraint of trade clause in his employment agreement which reads as follows:

"*Restraint of Trade*

The employee agrees that he/she will not at any time within a period of three months from the date of termination of employment with the Company for any reason:

(i) Be interested in or engage in any way, directly or indirectly and whether as a principal, agent, director or shareholder or otherwise howsoever in any enterprises carrying on business similar to or in competition with any business carried on by the Company, or

(ii) Solicit any business from or in any way approach any person, persons or company who shall have been a customer of the Company with the 12 months immediately preceding such termination."

[2] On an urgent basis Ingersoll Rand now seeks:

- an order that Mr Nicolson comply with the terms of the employment agreement, and
- an interim injunction restraining him from taking up his new job.

[3] Mr Nicolson says that as he reads it, sub-clause (i) of the restraint provision does not prevent him from taking a job with a competitor, but only from setting up his own business in competition with Ingersoll Rand.

[4] Mr Nicolson also says that if he is wrong about that, the restraint is not reasonable anyway primarily because its meaning was not clear. He says that he would not have agreed to it if he had thought it prevented him from taking another job and that for a restraint to be upheld it should be expressed in plain language comprehensible to a lay person.

[5] Finally he says that it does not protect a proprietary interest that is not already protected by sub clause (ii). Mr Nicolson does not dispute that he is bound by sub clause (ii) and has given undertakings that he will comply with it in general terms as well as undertaking specifically that he will not approach or solicit clients in relation to jobs for which he has already completed work schedules on behalf of Ingersoll Rand.

[6] Because only two months are left to run of the period of the restraint I suggested to the parties that rather than dealing separately with the application for interim relief it might be more efficient for me to determine the substantive matters between them at once. They agreed to this proposal and so this determination disposes of the all the matters that are before the Authority.

[7] The issues for me to determine in this matter are:

- whether the clause is to be interpreted as restraining employment with a competitor;
- whether the clause protects a proprietary interest, and
- whether it is reasonable.

Does the clause relate to employment with a competitor?

[8] Ingersoll Rand says that the plain meaning of sub clause (i) is to exclude an employee from working for an enterprise that is in competition with the employer. Mr Spong has argued that "engage in any way" must include employment. He argues that the words "directly or indirectly" cover all possibilities of engagement or interest in a business including working for or on behalf of such a business. Mr Spong also argued that "otherwise howsoever" is an omnibus expression designed to catch any categories of relationship not listed there. Finally he says that to interpret the sub clause as excluding an employment relationship is a strained interpretation.

[9] Mr Mitchell argues that a significant obligation such as refraining from working for a competitor would need to be specifically and explicitly stated. Here, he says, it is not; the term "employee" is not mentioned in sub-clause (ii) as it so easily could have been. He submits that "or otherwise howsoever" cannot be interpreted as including employment because the established principle of interpretation is that a general phrase should not expand the categories specifically stated. He further submits that if there is any doubt as to the meaning and scope of the excluding or limiting term the ambiguity must be resolved against the party who had inserted it and is now relying on it.

Determination

[10] I accept Mr Mitchell's submissions on this issue. In order for it to be caught within the general phrase "or otherwise howsoever" the term "employee" would need to be in the same class or category as the terms principal, agent, director and shareholder. I cannot accept that

it is. The term "agent" shares some common ground with the term employee (since employees may be called upon to act as the agents of their employers) but none of the others do. They are terms denoting a role within an enterprise distinctly different from that of an employee. Principals, agents, directors and shareholders may or may not work in the enterprise; that is not the common element amongst them. Rather it is a degree of control over the enterprise. Even the term agent connotes a third party relationship with a degree of independence and autonomy that employees do not have.

[11] In contrast, control is not an inherent feature of the contract of service. Employees are in a completely different type of relationship with an enterprise to those who own or direct the enterprise. I am not therefore satisfied that sub clause (i) restrains Mr Nicolson from taking up employment with a competitor of Ingersoll Rand.

Is there a proprietary interest to be protected?

[12] Because of my conclusions in relation to the first issue the company's case fails. However, in case I am wrong on that point, I now go on to deal with the other issues also.

[13] Three witnesses attended the investigation meeting from Ingersoll Rand. I asked them to explain to me the nature of the proprietary interest they sought to protect. This required an explanation of Mr Nicolson's role and responsibilities, as follows.

[14] Mr Nicolson was a sales consultant with the company which is a manufacturer and importer of door fittings and the like. Its direct customers are four merchants who purchase stock from Ingersoll Rand and sell it on to the architects and others who manage large commercial building projects. The merchants who stock Ingersoll Rand's products also carry product from its competitors. In order to maintain its position in the market, Ingersoll Rand (along with its competitors) has adopted a system of direct approach to the end users of its product. It subscribes to a publication which advises of significant projects coming on stream. Sales consultants use this information to identify architects or others who manage these projects and approach them seeking the opportunity to prepare detailed schedules of the hardware needed. If they succeed the sales consultants will liaise with the architect to prepare a schedule which meets the building code, the project's budget, and the design requirements, using Ingersoll Rand's product. The schedule is then sent out for tender along with the rest of the specifications for the project.

[15] The company told me that it had a proprietary interest in the relationships Mr Nicolson had built up with architects and others who trust him and rely on technical skill and product knowledge he has developed while with Ingersoll Rand. The company says it needs the balance of the period of the restraint to get in touch with these people in order to ensure their on going loyalty to Ingersoll Rand. It describes the industry as highly competitive and very fickle although there is of course an abundance of work available at present.

[16] Mr Nicolson has given an undertaking that he will not in any way become involved in any jobs for which he has already worked on a schedule while with Ingersoll Rand. Mr Mitchell says that this undertaking addresses any possible proprietary interest that the company may have arising out of Mr Nicolson's relationships with his contacts.

[17] Mr Nicolson does wish to remain free to approach new and existing contacts in relation to new projects which are independent of any work he has done for the company up until now. On this issue, Mr Mitchell argues that the company may rightfully object to the

solicitation of existing customers, but it would be anticompetitive for it to prevent Mr Nicolson from winning new business in the future.

[18] The Sales consultant's role does not cease once the schedule is sent out for tender. From the point of view of the manufacturer the ideal is of course for a project to use its product exclusively but in practice some of the scheduled items may be substituted for an alternative product from a different manufacturer. (Sometimes a complete second schedule will have been obtained from another manufacturer but this tends to be unusual.) One or more sales consultants from Ingersoll Rand will therefore continue to be involved throughout the tender process. They will liaise as required with building companies and with merchants on supply and pricing issues.

[19] The company says that there is also a proprietary interest in relation to this part of the process involving Mr Nicolson's knowledge of pricing as applied in the work with merchants and others. Standard prices and discount levels are widely known. For obvious reasons, however, the company attempts to keep confidential special pricing arrangements and rebate arrangements for individual merchants. Both these matters are outside Mr Nicolson's discretion as a sales consultant, although once special pricing has been agreed in a particular case he is advised of this. As for rebate arrangements the company suspected that Mr Nicolson might have some knowledge of these but had no evidence to back it up.

[20] Mr Nicolson says his knowledge of past special pricing arrangements is not extensive in any event. However, he agrees that any knowledge he does have must be kept confidential pursuant to sub clause (ii) above and undertakes to do so.

[21] Mr Mitchell says that Mr Nicolson's undertakings address any legitimate concerns the company might have in relation to Mr Nicolson's knowledge of pricing. He also relies on the principle enunciated in DB Breweries v Marshall (1994) 1 ERNZ 98, where Judge Colgan said at po.101:

"A restraint clause should not be enforced merely to ensure that there is no breach of the restriction on confidentiality."

[22] In response to this submission, and in relation to the effectiveness of the undertakings the company witnesses told me that they now mistrusted Mr Nicolson as a result of certain conduct of his in the month prior to his resignation. He had made several calls to his prospective new employer on the respondent's mobile phone. Although some personal use of the phone was permitted the company witnesses felt that this was improper conduct. He had also made five expense claims in relation to one customer in that one month. Sales consultants had a budget for entertaining clients and it is not asserted that Mr Nicolson had exceeded this however the company witnesses said they felt that it was unusual for him to have made five claims in relation to one merchant. Mr Nicolson explained this by saying that all the claims were to celebrate the winning of a tender and that there was nothing unusual in that.

Determination

[23] Once again, I accept Mr Mitchell's submissions on this issue. I do not agree that the company has a proprietary interest in the general level of skill Mr Nicolson has built up over the course of his career (of which only two and a half years have been with the respondent) or in the good general relationships he currently has within the industry. Any future benefit

he or his new employer may obtain from those skills and relationships is legitimately theirs to obtain.

[24] Where the company does have a proprietary interest (in current scheduled work and in confidential information on special pricing systems) it is adequately protected by sub clause (ii) of the restraint provision and by Mr Nicolson's undertakings as recorded above. I reject the assertion that Mr Nicolson cannot be relied on to keep his word. The evidence on this was insignificant. Company witnesses agreed that he did not breach any company policy in relation to either his expense account or his mobile phone and in such circumstances I do not consider that they have established that he is not to be trusted.

[25] I conclude that there is no proprietary interest to be protected by sub clause (i).

Is the restraint reasonable?

[26] I have already covered two matters relating to this issue (the clarity of the provision and whether it deals with legitimate proprietary interests of the company.) A third factor, the length of the restraint, was conceded by Mr Mitchell as being reasonable in itself, so I do not need to say anything more about that.

[27] However there are other factors to be discussed under this heading.

[28] One is the effect of the restraint on Mr Nicolson. At the time he resigned Mr Nicolson was a sales consultant on a salary of $64,000.00, plus a car and bonuses. He was not a senior executive or even a middle manager within the company. He had very limited discretion and did not have extensive access to information of any sort. In his personal life he is the sole breadwinner of a family of five, with three young children. He told me that he and his wife do not have sufficient savings to cover normal expenses even for a short time let alone two months. I accept that it will cause considerable hardship and worry to them all if he is prevented from starting his new job.

[29] The other is whether the company is at any real risk of loss over the next two months specifically. Company witnesses told me the annual revenue generated on average by its experienced consultants and asserted that it stood to lose 1/6 of this over the two month remaining of the restraint period. However, because of the undertakings Mr Nicolson has given, work which he has already put in train for the company stands to generate its anticipated income despite his departure and so can be excluded from the equation. It accounts for the greater part of the loss the respondent feared. As to the balance, there is no evidence before me to show how or why Mr Nicolson's departure will necessarily result in future new business going with him. All witnesses agreed that the timeframe for the sort of projects he worked on is 12-18 months and in such circumstances. I am not satisfied that a further two month restraint will provide the company with any protection against any specific loss of business as opposed simply to curbing legitimate competition for another two months.

Determination

[30] In these circumstances, even if the first two issues had been concluded in the company's favour, I do not consider that the restraint would have been reasonable.

[31] The restraint of trade clause in this case is unenforceable. The remedies sought by the applicant company are declined.

Costs

[32] I leave it to the parties to discuss this issue. If it cannot be resolved they have a period of 28 days in which to request that I determine the issue.

Y S Oldfield
Member of Employment Relations Authority