IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 45/10
5127926

	BETWEEN	PROVIDA FOODS LIMITED Applicant
	AND	KEVIN DAVIDSON First Respondent
		BIDVEST (NZ) LIMITED t/as CREAN FOOD SERVICE Second Respondent

Member of Authority:	R A Monaghan
Representatives:	A S Menzies, counsel for applicant A Hope, counsel for respondents
Investigation Meeting:	24 November 2008 and 18 May 2009
Further information provided:	24 December 2009 and 26 January 2010
Determination:	3 February 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Provida Foods Limited (PFL) employed Kevin Davidson until May 2008. Mr Davidson resigned his employment and entered into a new employment relationship with Bidvest (NZ) Limited (Creans). PFL says he did so in breach of a restraint of trade provision in the parties' written employment agreement. It seeks penalties against Mr Davidson for the breach, and against Creans for inciting, instigating, aiding or abetting the breach. It has withdrawn its claims for damages.

[2] Mr Davidson and Creans deny breaching the restraint of trade provision.

[3] Further, Mr Davidson seeks the repayment of deductions made from his final pay, and a payment in respect of 30 days' long service leave.

[4] Mr Davidson also seeks penalties against PFL pursuant to s 133 and 134 of the Employment Relations Act 2000, for breaches of the Wages Protection Act 1983.

Background

[5] PFL supplies and distributes food products to the retail, route retail and food service markets. Its main storage and distribution centre is located in Hamilton, with a smaller centre located in Mt Maunganui.

[6] Mr Davidson's employment with a company which is now part of PFL began in or about 1983. Mr Davidson had the position of storeman. At the time his employment terminated in 2008, he held the position of shift supervisor. His job involved working in the freezer, stacking boxes, replenishing shelves and checking inwards goods against the associated paperwork, and checking daily stock reports. PFL's view of him was that, as a result of his long association with the company and its predecessors, he held a great deal of information about its operations in his head, and had very good recall of it.

[7] There was no written employment agreement until PFL sought to introduce such agreements for all staff in 2002. Three staff members, of whom Mr Davidson was one, were reluctant to sign. Eventually Mr Davidson did sign the agreement, which included the restraint of trade provision.

[8] The issues arising out of the restraint under the present application concern whether the restraint was:

a. supported by consideration at the time it was entered into;
b. reasonable in its terms;
c. waived when Mr Davidson gave notice of his resignation.

The presence of consideration

[9] Gerald Hudson, PFL's managing director, had discussions with the staff members who were reluctant to sign the employment agreements. He told Mr Davidson that Mr Davidson's employment would not be compromised by a refusal to

sign, but the written agreement contained benefits that would not otherwise be available to him. These included new provisions for: top-up payments for absences to carry out jury service; long service leave; and 15 years' unbroken service leave. Mr Davidson's service since 1983 would be treated as being continuous for the purposes of the long service leave provision.

[10] Mr Hudson's evidence was also that he discussed the contents of the restraint with Mr Davidson. Four companies in particular were identified expressly as competitors, and Creans was one. In his oral evidence Mr Davidson recalled Mr Hudson saying that the provision was there to protect PFL if he went to work for a competitor, and that Creans was a competitor.

[11] Mr Hudson also told Mr Davidson that a refusal to sign would limit his opportunities to progress in PFL because of concerns about the protection of confidential information.

[12] Mr Davidson signed the agreement. He said he felt pressured to do so, but has not sought to raise an argument of duress in the legal sense. Moreover he had been in possession of the document for some weeks before the discussion with Mr Hudson, had read and considered it, and accepted that he could have discussed or obtained advice on it if he wished. Further, he was confident enough at the time to raise an issue of his own about the agreement.

[13] The consideration relied on amounted to the three new entitlements in the agreement, and the access to opportunities for promotion.

[14] The Court of Appeal has said of the principles relevant to consideration:

> "[18] … 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 promise or some benefit to the promisor. But the law does not enquire 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 …"[1]

[1] **Fuel Espresso Ltd v Hsieh** [2007] ERNZ 60, 64.

[15] Had Mr Davidson been presented with and signed a written agreement which effectively codified his existing terms and conditions, while adding a restraint of trade provision without any further corresponding benefit or promise in his favour, there would have been a failure of consideration. However there were additional benefits associated with acceptance of the agreement inclusive of the restraint. In Mr Davidson's circumstances these were real benefits, and it is not for the Authority to enquire into their adequacy.

[16] For these reasons I conclude the restraint was supported by consideration.

Was the restraint reasonable

[17] The restraint read as follows:

> 49. Restraint of Trade
>
> 49.1 Employees shall not at any time during the term of this agreement and for a period of six months after the termination of employment with the employer establish, purchase, or obtain an interest in, either directly or indirectly any business in relation in any way in competition with the employer within a radius of 160 kilometres, without the express consent of the Employer, provided that such consent shall not be unreasonably withheld.
>
> 49.1(a) Extension to subsection 49.1 dated 4 April 2002.
>
> Employees shall not at any time during the term of this agreement and for a period of six months after the termination of employment with the Employer accept employment with, either directly or indirectly, any business in any way in competition with the Employer within a radius of 160 kilometres, without the express written consent of the Employer, provided such consent shall not be unreasonably withheld."

[18] I bear in mind fundamental principles regarding restraints of trade, including that: they are unenforceable unless they are reasonably necessary to protect the proprietary interests of the former employer; and the reasonableness of a restraint clause is determined at the time the agreement was entered into.

[19] The principal issue arising in respect of the reasonableness of the restraint on Mr Davidson was whether there was a proprietary interest to be protected. A second issue concerned the effect of the apparent unevenness in PFL's enforcement of the restraint against a number of employees who left its employ, several of whom also moved to Creans.

[20] Otherwise while there was some discussion during the investigation meeting about the differences between Creans' business and that of PFL, I accept that Creans operates a business in competition with PFL and in that respect the scope of the restraint is reasonable. Secondly, Creans operates its business within a radius of 160 kilometres of Hamilton, and Mr Davidson sought to commence employment with it in Hamilton. Thirdly Mr Davidson commenced his employment with Creans on 3 June 2008 - immediately on the termination of his employment with PFL. Accordingly no issues have arisen directly in respect of the reasonableness of the geographical and temporal restraints.

1. Proprietary interest

[21] The proprietary interest PFL relied on concerned: confidential information about suppliers and customers which it believed Mr Davidson could both access from its computer system and recall independently of the system; the customised electronic information management system itself; and stores management procedures the efficiency of which it believed provided a competitive edge.

[22] Overall, I accept PFL had a proprietary interest in this information.

2. Unevenness in enforcement of restraint

[23] Of the two other employees who were reluctant to sign the employment agreement in 2002, one elected not to sign and was later employed by Creans. The second signed on the basis that, if he wished to take up employment with Creans, Mr Hudson would not stand in his way. That employee was also subsequently employed by Creans. As promised, Mr Hudson did not attempt to enforce the restraint provision against that employee.

[24] The restraint was raised with two further employees who left to work at Creans, and settlements resulted. A third commenced employment at Creans after the expiry of the restraint period.

[25] When another employee went to work for an Auckland-based firm, Mr Hudson assessed the risk to PFL as small, reinforced to the employee her obligations of confidentiality, and being satisfied with her response did not enforce the restraint.

[26] Nothing in any of this affects the reasonableness of the restraint against Mr Davidson, judged at the time of entry into it.

[27] I do not find anything in these circumstances indicates a lack of good faith towards Mr Davidson on PFL's part. On the contrary, it attempted a flexible and practical approach to protecting its proprietary interests while not unreasonably limiting its former employees' rights to work elsewhere. Either there was no breach of a restraint provision, or accommodations in respect of their new employment were reached with the other employees mentioned.

Was enforcement of the restraint waived

[28] This issue has been framed as a waiver and argued with reference to whether Mr Davidson was told the restraint would not be enforced against him.

[29] In or about April 2008 Creans offered Mr Davidson a position as freezer storeman. On 28 April 2008 Mr Davidson informed Peter Li Calsi, PFL's operations manager, of the offer. He said in his written evidence that Mr Li Calsi informed him the restraint of trade would not be enforced against him. In reliance on that assurance, he accepted the offer from Creans. He gave four weeks' notice of his resignation in writing on or about 29 April.

[30] Mr Li Calsi denied telling Mr Davidson that the restraint would not be enforced. It was common ground that there was a conversation about whether the restraint would 'hold up'. Mr Li Calsi said he tried to say only that he would not want things to end negatively with Mr Davidson. It was common ground that Mr Li Calsi said he would raise the matter with Mr Hudson.

[31] It was also common ground that the conversation included a discussion about how the salary Mr Davidson was being offered compared with the remuneration at PFL, and that Mr Li Calsi conferred with Mr Hudson about that matter. He responded

to Mr Davidson afterwards by saying the PFL package was at least as favourable and would not be increased. There was no suggestion the response included any comment about the restraint of trade.

[32] Although Mr Davidson was adamant that Mr Li Calsi told him the restraint would not be enforced, he accepted Mr Li Calsi's account in most other respects. Overall I consider it likely that Mr Davidson drew inferences or made assumptions about whether the restraint would be enforced rather than receiving an express statement to that effect from Mr Li Calsi.

[33] Finally Mr Hudson was known to be the decision-maker and I accept that he did not waive the restraint. By letter dated 1 May 2008 he advised Mr Davidson that the resignation was accepted, but added:

> "There is and will be no formal approval that waives the rights of Provida Foods Ltd under this agreement."

[34] By further letter dated 12 May 2008 Mr Hudson notified Mr Davidson of his view that Mr Davidson's employment with Creans was being embarked upon in breach of the restraint of trade provision. Mr Hudson sent a corresponding letter to Creans dated 13 May 2008.

[35] For these reasons I find there was no waiver of the restraint.

The claim for a penalty against Mr Davidson

[36] The above findings - together with the facts that Mr Davidson sought to commence employment with a competitor of PFL in the same city and promptly upon the termination of his employment with PFL - mean I find the employment with Creans commenced in breach of the restraint of trade.

[37] Mr Davidson replied to the 12 May letter, disputing the reasonableness and enforceability of the restraint. Notably he did not allege that Mr Hudson had indicated the restraint would not be enforced, which would be an immediate and

obvious reaction to Mr Hudson's letters if there had previously been such an indication.

[38] Mr Davidson's reply prompted a further detailed letter dated 16 May 2008 from PFL's solicitors to Mr Davidson, disagreeing with Mr Davidson's view and warning that the restraint would be enforced, and penalties sought, if Mr Davidson proceeded. This resulted in another letter from Mr Davidson dated 27 May 2008, confirming that he had legal advice to the effect the restraint was not enforceable and that he would take up Creans' offer of employment.

[39] For the purposes of the claim for a penalty it is relevant that Mr Davidson was on notice that his actions would be treated as a breach of the restraint, and elected to proceed. Although he was acting on advice rather than embarking on a flagrant breach, he must take the consequences of his election.

[40] A penalty is therefore warranted.

[41] In **Credit Consultants Debt Services NZ Limited v Wilson (No 3)**[2] the Employment Court found a number of wilful breaches by a former employee of restraint and associated provisions in an employment agreement, and found three causes of action proved. Penalties of $2,000 were ordered against the employee in respect of each cause of action.

[42] Mr Davidson's conduct was not as serious as Mr Wilson's. He is therefore ordered to pay a penalty of $1,000 in respect of the breach of the restraint provision.

[43] PFL sought an order under s 136(2) of the Employment Relations Act for an order that the penalty be paid directly to PFL.

[44] An order of that kind was made in the **Credit Consultants** case, on the ground that there was no breach of a statutory obligation and the problem was essentially a problem inter partes.

[45] I take a similar approach and order accordingly.

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[2] [2007] ERNZ 252

The claim for a penalty against Creans

[46] The penalty against Creans was sought under s 134(2) of the Employment Relations Act 2000. The provision reads:

> "(2) Every person who incites, instigates, aids, or abets any breach of an employment agreement is liable to a penalty imposed by the Authority."

[47] As the Employment Court has said:

> "[75] To warrant the imposition of a penalty under s 134(2) of the Employment Relations Act 2000, the plaintiff must establish that there was an act of incitement, instigation, aiding or abetting and that this act was wilful.
>
> [76] … It is sufficient if the defendant knew of the general contractual situation or practice in a particular field. I accept that as an appropriate standard of wilfulness for the purpose of evaluating whether a person is a party to a breach of an employment agreement."[3]

[48] The letter to Creans dated 13 May placed Creans on notice of PFL's view of the existence and enforceability of the restraint in respect of Mr Davidson, as well as its intention to enforce the restraint and to seek penalties if Mr Davidson's employment proceeded. Creans' general manager, Gavin McGregor, replied by letter dated 26 May 2008 saying the company had taken legal advice and been informed that the restraint was unreasonable. Accordingly Creans had no hesitation in employing Mr Davidson.

[49] In that Mr Davidson saw a Creans' advertisement of a vacancy, and answered it, I accept that Creans did not incite or instigate the breach of the restraint. I accept Mr McGregor's denial that he was aware of the restraint on Mr Davidson at the time of the offer of employment, although the two settlements mentioned earlier in this determination had already been reached and he was aware there were negotiations in respect of at least one of those. Further he was aware there was a restraint against another employee which had not been invoked. In those circumstances it would be disingenuous to suggest that likelihood of a restraint on Mr Davidson did not at least occur to him.

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[3] **Credit Consultants** at p 266

[50] In deciding to proceed with the employment relationship once the detail of the restraint had been made known to him, Mr McGregor took a risk. Again I acknowledge that he did so on advice, and was not seeking simply to ignore the restraint. However the result was that he aided and abetted Mr Davidson's breach.

[51] A penalty is therefore warranted.

[52] The penalty ordered against the new employer in the **Credit Consultants** case was $2,500 each in respect of two causes of action. Again I do not consider Mr McGregor's conduct to be as serious, and nor, because of the nature of the respective positions of the employees, do I consider Creans had as much to gain as the new employer in the **Credit Consultants** case. Creans is therefore ordered to pay a penalty of $1,000.

[53] PFL again sought an order under s 136(2) of the Employment Relations Act for an order that the penalty be paid directly to PFL.

[54] Again an order of that kind was made in the **Credit Consultants** case, for the same reasons as the order made against the former employer.

[55] I adopt the same approach and order accordingly.

Mr Davidson's claims for payment

[56] Mr Davidson accepted PFL's calculations regarding monies owed to him, except that he sought interest on the unpaid sum. The calculations PFL provided were:

. long service leave of 30 days @ $180.77	$5,423.10
. bonus payment	$2,000.00
. sub total	$7,423.10
less tax	$ 816.54
balance	$6,606.56

. 25 years' service payment	$2,500.00
TOTAL	$9,106.56

[57] Liability was acknowledged for a further payment of $80.77 (gross) in respect of a statutory holiday not paid.

[58] I was advised that, although liability was otherwise disputed, payment has been made. In that respect, unless there is any outstanding issue regarding interest, there will be no further order.

[59] For the avoidance of doubt interest is payable on the amount owed to Mr Davidson. If the matter has not been resolved I order accordingly.

[60] Clause 11 of Schedule 2 of the Employment Relations Act requires that the rate of interest be identified as at the date of the order so I set the rate at 4.8%, to be calculated from the date of termination of Mr Davidson's employment to the date on which payment was made.

Mr Davidson's claims for penalties against PFL

[61] A deduction of $2,500 was made from Mr Davidson's final pay. That sum had been paid to Mr Davidson on 20 February 2008. A deduction of $2,000 was also made from Mr Davidson's final pay. The associated bonus had been paid to Mr Davidson on 30 June 2007. Finally, annual leave not taken was recorded in Mr Davidson's final payslip as 42 days. A record dated 3 May 2008 showed a balance of 76.5 days. Mr Davidson did not take any leave during the notice period.

[62] The deductions corresponded with the value of the additional provisions agreed when the restraint of trade was entered into. Mr Hudson made them on the basis that, if Mr Davidson was electing to disregard the restraint that was part of the associated agreement, then he should not be entitled to the additional benefits under the agreement. Mr Hudson was not entitled to act in that way and his conduct would in principle have attracted a penalty.

[63] Although broadly-stated claims for penalties in respect of these matters were included in the counterclaim, and confirmed at the commencement of the investigation meeting, there was an adjournment during the meeting while the parties attempted to resolve issues relating to Mr Davidson's wage claim. At the time the extent to which the discussions had resolved the matter was unclear. Among other things, counsel were to file by the end of the week a joint memorandum identifying what, if any, outstanding issues remained in respect of the wage claim.

[64] The matter should have been straightforward, but proved not to be. In February 2009 I issued a minute saying I was unaware of what issues may be outstanding and in particular the extent to which matters set out in Mr Davidson's statement dated 12 November 2008 (which addressed the wage claim) remained unresolved. The response on behalf of Mr Davidson was only that PFL's calculations were accepted, but interest was sought.

[65] That and subsequent failures to mention the claim for penalties, including a failure to mention it in submissions, has caused confusion. When I subsequently sought clarification Mr Hope said the claim was still being pursued, while Mr Menzies said he had inferred from the above circumstances that penalties were no longer being sought.

[66] This is unsatisfactory. Ultimately the failures to mention the claim at the proper times have caused me to determine the matter on the basis of the material before me at the close of the investigation meeting. That material did not include a claim for penalties on behalf of Mr Davidson.

[67] There will therefore be no further order for the payment of penalties.

Summary of orders

[68] Mr Davidson is ordered to pay directly to PFL $1,000 as a penalty for his breach of the restraint of trade provision.

[69] Creans is ordered to pay directly to PFL $1,000 as a penalty for aiding and abetting Mr Davidson's breach of the restraint of trade provision.

[70] If it has not done so PFL is ordered to pay interest to Mr Davidson on the monies owed to him and not paid at the date of termination of employment, calculated at 4.8% from the date of termination of Mr Davidson's employment to the date on which payment was made.

Costs

[71] Costs are reserved.

[72] The parties are invited to reach agreement on the matter. If any party seeks an order for costs from the Authority there shall be 28 days from the date of this determination in which to file and serve a memorandum on the matter. Any responding party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan
Member of the Employment Relations Authority