



Subject to obtaining the extension of the necessary work permit and legal requirements from the NZ Immigration Service (NZIS) and as per the terms and conditions of the attached employment agreement this offer becomes effective from July 10 2009. On extension of your work permit by NZIS you are required to continue working in this capacity. Contrary to this, it will be unfortunate that your services cannot be continued with this organization, hence your appointment will be terminated on July 09 2009.

The letter was accompanied by a new employment agreement that was signed by the parties on 4<sup>th</sup> June 2009. The agreement contains two clauses that are the subject matter of the application before the Authority.

[3] The first of these clauses is:

**The Position**

The Employee is employed in the position of Store Manager at the Employer's business at 33-35 Arapuni Street, Putaruru 3411, New Zealand. This Agreement supersedes any previous agreements signed between the employer and employee. This is a legally binding agreement valid from the date of signing till [sic] 20<sup>th</sup> December 2010. In the event that the employee terminates this agreement before this date he is obliged and willing to pay back the equivalent of the salary remaining till 20<sup>th</sup> December 2010.

[4] The second clause is:

**Restraint of Trade**

In the event of the employee terminating this agreement it is agreed that the employee will not engage, work or be part of a business similar to that of the employer for a period of three years and not within 25 kilometres of the radius of the workplace from the date of the termination.

[5] It transpired that Mr Pillay did not make an application for a new work permit immediately. Rather, it appears, he remained in New Zealand on a visitor permit for a short period and then subsequently obtained a new work permit. Relevant to the matter before the Authority is that due to the expiry of the work permit, Mr Pillay could no longer legally continue to work for Mr Singh and hence, by common acceptance, Mr Pillay ceased his employment at Civic Food Store on or about 9<sup>th</sup> July 2009.

[6] In early September 2009, or possibly a little sooner, Mr Pillay obtained employment at another store in Putaruru; K-Beez Model Foodmarket, and currently is employed there in a management role.

[7] Mr Singh now claims that Mr Pillay is in breach of the two clauses (above) and seeks to have them enforced against Mr Pillay along with monetary remedies.

## Determination

[8] Unfortunately for Mr Singh, the claims before the Authority have no chance of success for several reasons. The most obvious reason is that the proposed employment agreement was conditional on Mr Pillay obtaining a new work permit, which would be effective from 10<sup>th</sup> July 2009. That simply did not happen and the parties, by mutual agreement, went their own ways with no further obligations owed to each other, following the termination of Mr Pillay's employment on or about 9<sup>th</sup> July 2009. Therefore, the glaring reality is that this is where matters effectively should have ended.

[9] However, Mr Singh should also be aware, for future reference, in case he is of a mind to include the above clauses in another employment agreement, that neither of the clauses is legally enforceable. In regard to the first clause, apart from the fact that it is in conflict with the termination clause, that (reasonably) requires either party to give two weeks' notice of termination of employment, it appears to represent a form of bondage in regard to the employee remaining in the employment for a set period. It goes without saying that such a provision is legally unenforceable.

[10] In regard to the restraint of trade clause, given that the parties are not legally represented, it is not really appropriate for the Authority to go into too much detail in regard to the legal principles that apply to restraint of trade provisions. It is enough to say that such provisions are essentially contrary to the public interest in that they have the effect of preventing an employee from engaging in alternative employment and hence they are *prima facie* void, unless such a provision is found to be reasonable between the parties, with reference to the public interest.<sup>1</sup>

[11] Any examination in respect of the reasonableness of a restraint of trade covenant essentially begins by asking whether an employer has a proprietary interest that is entitled to protection, or whether the employer is simply attempting to limit or reduce competition. A business may have a proprietary interest in trade secrets, confidential information and its business and trade connections. Mr Singh was unable to point to any particular factor within his business that would meet the usual criteria applying to a proprietary interest. With respect, that is not surprising given that his

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<sup>1</sup> *Airgas Compressor Specialists v Bryant* [1998] 2 ERNZ 42.

store is simply one of very many such enterprises that exist in small communities throughout New Zealand.

[12] And of course there is another major problem with the clause in question in this case. This is that the term of the restraint is for three years and hence even if Mr Singh had a proprietary interest that he is entitled to protect, a term of three years is unreasonable and most restraints are usually only reasonably enforceable for a period of 6 to 12 months unless certain special circumstances exist.

[13] In summary, upon the evidence available to the Authority, given the current overall nature of his business, it is difficult to see how Mr Singh could ever enforce a restraint of trade provision against an employee and hence one has to question why such a provision would be included in the employment agreements for the business. I would respectfully suggest to Mr Singh that he obtains specialist legal advice in regard to the content of future employment agreements for his business.

**Costs:** Given that both parties were unrepresented, a consideration of costs is not required.

**K J Anderson**  
**Member of the Employment Relations Authority**