

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 154  
5555215

BETWEEN YAMAHA MOTOR NEW  
ZEALAND LIMITED  
Applicant

AND STEPHEN BEECHEY  
Respondent

Member of Authority: Vicki Campbell

Representatives: Josh McBride and Chris Hogg for Applicant  
Michael Quigg for Respondent

Investigation Meeting: 29 May 2015

Determination: 2 June 2015

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**A. The application for an interim order is declined.**

**B. Costs are reserved.**

**Employment relationship problem**

[1] Yamaha Motor New Zealand Limited (Yamaha) seeks an interim order preventing Mr Stephen Beechey from working in competition to it pursuant to a restraint of trade provision entered into by the parties. Yamaha seeks the following interim and substantive orders:

- a) An interim injunction requiring Mr Beechey to cease providing services to his current employer until 9 July 2015;
- b) A determination that Mr Beechey has breached the express terms of his employment agreement;

- c) A compliance order requiring Mr Beechey to comply with the terms of his employment agreement; and
- d) The imposition of a penalty in respect of Mr Beechey's alleged breach of the terms of his employment agreement.

[2] Mr Beechey says the restraint of trade clause is unreasonable, contrary to the interests of public policy and accordingly unenforceable. Mr Beechey denies breaching the terms of his employment agreement.

[3] The application for interim relief was accompanied by an undertaking as to damages (although not in the required form) and an affidavit in support of the application by Mr Darryl Lovegrove, General Manager for Yamaha in New Zealand.

[4] With the agreement of the parties this determination deals only with the interim application as a preliminary matter and has been dealt with on an urgent basis on the affidavit evidence lodged in the Authority. I acknowledge the submissions presented by Counsel for the parties that I have considered, but will, for the most part, not refer to.

[5] The conclusions which have been drawn in this determination are tentative and not necessarily what will be decided at the substantive investigation after full examination of all the evidence has been undertaken.

### **Background**

[6] Yamaha imports and distributes motorcycles, all terrain vehicles and Recreational Off-Highway Vehicles/Side-by-side Vehicles. Yamaha sells its products through independent dealerships.

[7] Mr Beechey commenced employment on 17 April 2012 as a Dealer Support – MC, ATC, SSV and entered into a written employment agreement with Yamaha on 20 April 2012. This was a middle tier position.

[8] The employment agreement at clause 24.2 states:

**24.2 Restraint after employment**

- (1) The Employee must not, during the Restraint Period starting immediately after the Termination Date and within the Restraint Area, do any of the following without the prior written consent of **Yamaha**:
- a) directly or indirectly carry on (whether alone, in partnership or in joint venture with anyone else) or otherwise be concerned with or interested in (whether as trustee, principal, agent, employee Manager, partner, shareholder, unit holder or in any other capacity) any business competitive with the Business;
  - b) directly or indirectly carry on (whether alone, in partnership or in joint venture with anyone else) or otherwise be concerned with or interested in (whether as trustee, principal, agent, Employee, partner, shareholder, unit holder or in any other capacity) any business competitive with the Business by working in a role or performing work, services or duties that are the same as or similar to the role, work, services or duties the Employee performed for **Yamaha** in the 12 months immediately preceding the Termination Date.
- (2) The employee must not, during the Restraint Period starting immediately after the Termination Date, do any of the following without the prior written consent of the Managing Director:
- a) solicit or persuade any person who has dealt with **Yamaha** during the Employee's employment or is in the process of negotiating with **Yamaha** at the Termination Date in relation to the Business, to cease doing business with **Yamaha** or reduce the amount of business which the person would normally do with **Yamaha**;
  - b) induce or attempt to induce any director, consultant, Employee or employee of **Yamaha** to terminate his or her employment or engagement with **Yamaha**, whether or not that person would commit a breach of that person's contract of employment.

- [9] The employment agreement defines the following relevant terms as meaning:
- a) Business is the business of Yamaha and its subsidiaries;
  - b) Restraint Period is defined as 12 weeks;
  - c) Restraint Area is New Zealand; and
  - d) Termination Date is the date the employment relationship terminated being 17 April 2015 (albeit a letter from Yamaha confirms a termination date of 15 April 2015).

[10] The employment agreement at clause 17 requires Mr Beechey not to disclose confidential information belonging to Yamaha. Confidential information is defined as meaning all information relating to the current or future business interests, methodology, know-how or affairs of Yamaha or any person or entity with whom it deals or is concerned, including:

- a) financial and business (including technical, marketing and sales and human resources) information, strategies and plans of **Yamaha**;

- b) the Remuneration and other benefits provided to the Employee (including any future increases) under this Agreement;
- c) names, lists and directories of **Yamaha's** employees, contributors and advertisers;
- d) budgets, publishing schedules, production schedules, critical schedules;
- e) trade secrets, inventions, patents and novel designs of **Yamaha**;
- f) know-how and technology developed or used by **Yamaha**; and
- g) documents including artwork, film, transparencies, logos, masthead design, software, disks, manuals, diagrams, graphs, charts, projections, specifications, estimates, records, concepts, discoveries, ideas, designs, formulae, processes, documents, accounts, plans, drawings, methods, techniques, price lists, enquiry lists, market research information, correspondence, letters and papers of every description including all copies of or extracts from such information relating to its affairs or business, reasonably regarded by **Yamaha** as confidential, being information not in the public domain or known to competitors of **Yamaha** other than information in the public domain or known to competitors not as a result of a breach of confidentiality by the Employee or any other person.

[11] The employment agreement also provides for the protection of intellectual property rights.

[12] On 16 April 2015 Mr Beechey formally resigned from his employment. At the time he resigned Mr Beechey notified Mr Lovegrove that he was considering two new employment opportunities. Mr Beechey disclosed that one of these was with a competitor and the other was not. Mr Lovegrove says he advised Mr Beechey that if he accepted employment with a competitor he would be bound by the restraint provisions in the employment agreement and that he should familiarise himself with them.

[13] On 17 April 2015 Mr Beechey advised Mr Lovegrove that he had decided to accept employment with the competitor. Mr Lovegrove gave Mr Beechey a letter dated 16 April 2015 accepting Mr Beechey's resignation effective from 15 April 2015. Mr Beechey offered to work out his notice period of one month.

[14] The employment agreement at clause 19.2 allows Yamaha the discretion to require Mr Beechey to cease attending the office and to cease performing any work during all or part of the notice period. The 16 April 2015 letter from Yamaha did not specifically address 19.2 of the employment agreement. Mr Beechey was not required to serve out his notice period and his employment terminated with immediate effect.

[15] The 16 April 2015 letter includes extracts from the employment agreement of the clauses dealing with confidentiality, intellectual property and the restraint after employment.

[16] On 23 April 2015 Mr Beechey emailed Mr Lovegrove requesting information about when he could expect to receive his final pay. The email came from Mr Beechey's new employment email address which included an electronic signature showing Mr Beechey's new title was that of Dealer Relationship Manager.

[17] Mr Beechey's new employer markets and sells ATV's and ROV/SSV's and is a key competitor of Yamaha both globally and in New Zealand.

[18] Mr Lovegrove's evidence is that on receipt of the email he became aware which company Mr Beechey was working for and he became very concerned. Mr Lovegrove says that working within the 12 weeks of the restraint period was a breach of the employment agreement and Yamaha was currently entering the key agricultural consumer buying cycle.

[19] There does not seem to be any dispute that Mr Beechey was clear with Mr Lovegrove from the outset on 16 April 2015 that he was considering working for a competitor and on 17 April 2015 confirmed that he would be working for a competitor. The evidence indicates that Mr Lovegrove raised the existence of the restraint of trade but took no immediate steps to prevent Mr Beechey from leaving and working for the competitor. Nor was there any evidence that Mr Lovegrove made any enquiries into the name of Mr Beechey's new employer or the nature of his new role at the time he resigned.

### **Issues**

[20] The issue for determination is whether an interim injunction should be ordered to prevent Mr Beechey from continuing with his employment with a competitor until 9 July 2015.

### **The applicable tests**

[21] In determining this application for interim orders, the Authority must have regard to<sup>1</sup>:

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<sup>1</sup>*Pottinger, Nine Dot Consulting limited & Carew v Kelly Services (New Zealand) Limited* [2012] NZEmpC 101.

- a) Whether there is an arguable case;
- b) Where the balance of convenience lies between the parties in the period until the substantive application has been determined; and
- c) The overall justice of the case.

[22] The remedy is discretionary. The purpose of interim relief is to protect an applicant against injury for which it cannot be adequately compensated in damages in the event that it succeeds at the substantive hearing.

[23] Protection for the applicant needs to be balanced against the damage that might be done to a respondent, through being prevented from exercising their rights if the applicant fails in its substantive hearing.

### **Arguable case**

[24] The question of whether Yamaha has an arguable, but not necessarily certain, prospect of success at the Authority's investigation of the substantive issue will focus on the enforceability of the restraint provision in the employment agreement.

### ***Restraint of trade***

[25] Contractual provisions restricting the activities of employees after termination of their employment are, as a matter of public policy, regarded as unenforceable unless they can be justified as reasonably necessary to protect proprietary interests of the employer in the public interest.<sup>2</sup>

[26] The onus of establishing that a restrictive covenant is reasonable is on the employer.<sup>3</sup> Such a provision should be no wider than is required to protect the party in whose favour it is given.<sup>4</sup>

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<sup>2</sup>*Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 (CA) at [20] citing *Mason v Provident Clothing & Supply Company Ltd* [1913] AC 724 (HL) at 733.

<sup>3</sup>*Ibid* at [28].

<sup>4</sup>*Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 NZLR 731, [2001] ERNZ 46 (CA) at [28].

[27] Restraints are enforced only to the extent required to protect a proprietary interest of the employer. The nature of the employee's role and the employer's business, the geographical scope of the restraint, and its nature and duration are relevant factors in assessing whether a restraint is reasonably necessary.

[28] The issue for the Authority in the context of this application is whether an arguable question arises as to the likely enforceability of the covenants at issue in relation to Mr Beechey.

[29] Yamaha submits that it has a strongly arguable case because:

- a) The employment agreement contains two restraining provisions at clauses 24.2(1)(a) and (b). These provisions restrain Mr Beechey from being involved with any business competitive with Yamaha and providing similar services to another business competitive with Yamaha.
- b) The restraints are valid and enforceable because:
  - (i) Mr Beechey had the opportunity to seek legal advice prior to entering into the agreement and confirmed his understanding and acceptance of all terms;
  - (ii) The restraints were included in the employment agreement from the outset and therefore no additional consideration was required for the restraint;
  - (iii) At the time of entering into the agreement Yamaha had legitimate proprietary interests to be protected;
  - (iv) The period of 12 weeks is reasonable;
  - (v) The geographical area of New Zealand is justified by the territory covered by Mr Beechey's role which required him to cover all of New Zealand;
  - (vi) The restraining provisions do not prevent Mr Beechey from working in the automotive/vehicle industry.

- c) Mr Beechey is employed in the same or similar role as he had been for Yamaha and is therefore likely to be providing the same or similar services as he had been for Yamaha.
- d) Mr Beechey was employed within 12 weeks of leaving Yamaha.
- e) During his three years of employment with Yamaha Mr Beechey had access to confidential and sensitive information.
- f) Mr Beechey built and maintained strong relationships with Yamaha's dealers although it is the nature of the products sold by the two businesses that is the key issue.

[30] Mr Beechey submits that Yamaha's case is barely arguable because:

- a) The restraining provisions in the employment agreement are poorly drafted and on their face do not prevent Mr Beechey from working in his new role. By way of example:
  - (i) Clause 24.2(1)(a) does not restrain an Employee (defined in the employment agreement as being Mr Beechey) but restrains an "employee Manager". An employee Manager is not defined in the employment agreement; and
  - (ii) Clause 24.2(1)(b) only seeks to prohibit Mr Beechey from working in a specified role or performing specified work, services or duties. Mr Beechey's says his role at Yamaha was in practice different to the role described in the employment agreement. He says his role for Yamaha was largely confined to administrative tasks whereas his new role will require him to address the needs of 15 dealers.
- b) The provisions are unreasonable and unenforceable as they prevent competition rather than protecting any genuine proprietary interest.

- c) He was a mid-level employee in a largely administrative role and had limited access to any significant information during his employment with Yamaha and had little discretion or autonomy.
- d) There was no real consideration given in exchange for the restraint.

*Proprietary interest*

[31] The Employment Court in *Green v Transpacific*<sup>5</sup> states:

Whilst a restraint of trade may be lawful to the extent that it protects reasonably a proprietary interest that the employer has, including business with its customers, the law does not extend to prohibiting competition alone as [this clause] purports to do. The title to [the clause] of the employment agreement (“COVENANT NOT TO COMPETE”) illustrates the misunderstanding of what the law allows and prohibits: competition per se is not able to be prohibited ...

[32] Mr Lovegrove says Yamaha’s strategic plans and initiatives related to the year’s activities are well known to Mr Beechey including plans relating to:

- a) Marketing and sales information including knowledge of the marketing strategies, marketing support to dealers, market share targets per product segment and wholesale and retail sales targets during the period by dealer;
- b) Product and pricing including the timing of new Yamaha product releases and introductions;
- c) Stock/Supply Chain/Logistics including stock levels of Yamaha and its dealers;
- d) Dealer Data including the current financial status of all dealers and their ability to trade effectively; and
- e) General (Strategic) including a concern that Mr Beechey may attempt to convert his current employer’s dealers or encourage current dealers to focus less on Yamaha products and more on the competitors’ products.

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<sup>5</sup> [2011] NZEmpC 6 at [27].

[33] Mr Beechey's evidence is that his current employment, for the remaining period of the restraint does not involve access to, or interactions with, dealers with whom he worked during his employment with Yamaha. Further there are no trade secrets, items of genuinely confidential information, or business or trade connections which are relevant to both Yamaha's business and Mr Beechey's new role.

[34] Mr Beechey says all Marketing Strategies were handled by Management employees and that he was only given incomplete and infrequent information about marketing programs, and then only at the time that such programs became public knowledge. Mr Beechey says that other information is publicly available and is not confidential, that he had no knowledge of Yamaha's pricing strategies.

[35] Mr Beechey did have access to dealer stock levels, sales targets and incentive structures when he was instructed to send the information to dealers and contact them when they fell below the levels set.

[36] Mr Beechey's evidence is that there are only four dealers that he will be dealing with in his new role which also stock Yamaha products. He has provided the Authority with a copy of his work program for the period commencing on his start date until the end of July 2015 which shows that Mr Beechey will not be having any contact with dealers which currently stock Yamaha products. In addition to that Mr Beechey's evidence is that he has been given a specific instruction by his new employer that he is not to make contact with dealers stocking Yamaha products.

[37] The evidence as to whether there is a proprietary interest to be protected is conflicting and needs to be fully tested. I am unable to draw any conclusions on this point.

### ***Consideration***

[38] The Court of Appeal in *Fuel Espresso v Hiesh*<sup>6</sup> held the underlying principle that consideration must be given for a subsequent contract, remained and the existence of consideration may be inferred from the contractual terms.

[39] The employment agreement signed by the parties does not seek to tie the value of the remuneration package to the need for Mr Beechey to agree to enter into the

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<sup>6</sup>[2007] ERNZ 60 (CA).

restraint. Mr Beechey was paid \$55,000 per annum at the commencement of his employment and this moved to \$60,000 after a period of 90 days.

[40] There is no evidence that any consideration was given in exchange for the restraint. I agree with submissions on Mr Beechey's behalf that the restraint provision appears to be a standard clause. There is no evidence about when the employment agreement was given to Mr Beechey, that is, whether it was provided to him in writing after or before the commencement of the employment relationship. The employment agreement was signed on 20 April 2012 which is after the commencement date of the relationship. There is no evidence about what, if any, discussions were held with Mr Beechey prior to commencing employment about the need for a restraining provision.

### ***Conclusion as to arguable case***

[41] I accept there is an arguable case as to whether there is any proprietary interest to be protected by the restraint, whether the restraint itself is reasonable given Mr Beechey's mid-level position and whether his role at Yamaha in reality, reflected the role set out in the employment agreement or whether it was, as contended by Mr Beechey, an administrative role where his interaction with dealers was at a very low level.

### **Balance of convenience**

[42] The Employment Court has described the balance of convenience as the balance of the risk of doing an injustice.<sup>7</sup> The Authority is required to balance the potential injustice that will be caused to Yamaha if the injunction is not granted, against the potential injustice to Mr Beechey if the injunction is granted.

[43] Factors that are relevant to an assessment of where the balance of convenience lies includes the adequacy of damages for all parties, the relative strength of each party's case, and the conduct of the litigants. Also relevant is the position of the parties pending substantive determination of the claim and whether an award for damages would be an adequate remedy as this is relevant in assessing where the balance of convenience lies.<sup>8</sup>

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<sup>7</sup>Supra n 1 at [76].

<sup>8</sup>*American Cyanamid Co Ltd v Ethicon Ltd*[1975] AC 396.

[44] Mr Beechey's employment with Yamaha came to an end on 17 April 2015 after he had formally resigned from his employment. Mr Beechey's employment ended immediately and he received payment in lieu of notice.

[45] Mr Beechey commenced employment in his new role on 20 April 2015. Mr Beechey advised Mr Lovegrove that he had decided to accept employment with a competitor. There is no evidence of any further information being provided by Mr Beechey, nor any further enquiries made by Yamaha.

[46] It has been six weeks since Mr Beechey left his employment at Yamaha. The restraint of trade is for a period of 12 weeks. Mr Beechey is the sole source of income for his family and is supporting his son to attend university.

[47] I have considered whether damages would be an adequate remedy if Mr Beechey continues in his current employment and is subsequently found to be in breach of the employment agreement.

[48] I accept that establishing liability for a breach of the employment agreement, including establishing financial loss and quantification of the loss would not be an easy exercise. In any event, the only financial remedy sought by Yamaha in respect of any found breach is the imposition of a penalty against Mr Beechey.

[49] The Authority does not have any substantial evidence of Mr Beechey's financial position. Mr Beechey, in his affidavit evidence, does not state that he will necessarily be without paid employment in the event that this application is granted. I am therefore not in a position to conclude whether he could pay a penalty to Yamaha in the event that he is unsuccessful in a substantive hearing. It goes without saying that if he is to remain in his current employment and earning a salary Mr Beechey will be in a better position to be able to pay any penalty than if he is not.

[50] Mr Beechey has confirmed his work program does not require him to have any contact with dealers currently stocking Yamaha products and I have no reason to believe he will breach the instruction given to him by his new employer not to have contact with these dealers.

[51] These factors weigh in Mr Beechey's favour in terms of an assessment of where the balance of convenience lies.

**Overall justice**

[52] The Authority is required to stand back and determine where the overall justice of the case lies until the substantive investigation and determination.

[53] Mr Lovegrove's evidence was to the effect that Mr Beechey's knowledge of confidential information would allow his new employer to reassess their campaigns, market approach and gain strategic advantages by reacting to, or nullifying Yamaha's strategic approach through realignment of their activities.

[54] The period of the restraint incorporates the dates during which the National Fielddays event is to be held at Mystery Creek in Hamilton. This is a major event on the farming calendar. The event for 2015 will run from 8-14 June. Mr Beechey's work program shows that Mr Beechey is to be working at this event for his new employer. Mr Lovegrove says that it is inappropriate for Mr Beechey to work for his new employer on its show stand given the confidential information he had access to in the lead up to the event.

[55] I am not persuaded that Mr Beechey could have the influence on his new employer's marketing strategy for the period from early May to the end of July or at Fielddays contended by Yamaha. Marketing strategies are generally put in place months in advance to allow marketing materials to be organised and produced. With a major selling period of early May to end July it is highly likely that Mr Beechey's new employer would have solidified its marketing strategy and business development plans for that period well before Mr Beechey commenced working for it, which was only two weeks before the major selling period commenced.

[56] The overall justice requires that this application be declined.

**Next Steps**

[57] The Authority will shortly convene a case management conference to set timetable directions for the investigation of Yamaha's substantive claims.

**Costs**

[58] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

Vicki Campbell  
Member of the Employment Relations Authority