

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2017] NZERA Auckland 237
3016151**

BETWEEN ABOUT FACE LIMITED
Applicant

AND HAYLEY MILLER
Respondent

Member of Authority: Eleanor Robinson
Representatives: Tim Oldfield, Counsel for Applicant
Jennifer Mills, Counsel for Respondent
Investigation Meeting: 10 August 2017
Submissions received: 8 August 2017 from Applicant and from Respondent
Determination: 14 August 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a Statement of Problem filed in the Authority on 28 July 2017 the Applicant, About Face Limited (About Face) sought an interim injunction against the Respondent, Ms Hayley Miller, a former employee.

[2] The application for an interim injunction was accompanied by an undertaking as to damages, and an affidavit in support of the application by Mr Paul Glucina, Director, and Ms Haley Asbridge, Business Performance Manager, of About Face.

[3] This determination addresses the application for interim injunction, and the substantive matters will be investigated by the Authority at a later date as yet to be scheduled.

[4] At this interim application stage I have relied on the submissions of Counsel, the as yet untested evidence in the affidavits which have been lodged by Mr Glucina, Ms Asbridge and also Ms Miller, and supporting documents. Consequently the conclusions which have been drawn are tentative

and not necessarily what will be decided at the substantive investigation after a full examination of all the evidence which will then be available has been undertaken.

The Issues

[5] The issues to be determined are whether or not interim injunctions should be granted:

- Restraining Ms Miller from working in FaceTime Limited in Mairangi Bay until 29 October 2017; and/or
- Requiring Ms Miller to comply with the restraint of trade in her employment agreement with About Face.

Background Facts

[6] About Face is a business providing beauty treatments, operating in the personal services and appearance market, specialising in facial treatments. It has seven clinics in and around Auckland, including one at Mairangi Bay.

[7] Ms Miller was employed by About Face as a Senior Skin (Beauty) Therapist at the Mairangi Bay skin clinic (the Clinic). She was provided with a written individual employment agreement (the Employment Agreement) on 10 May 2017.

[8] The Employment Agreement contained the following clauses:

8. Termination

...

- **Garden Leave**

Outside the Trial Period if notice is given by either party, the employer reserves the right to suspend the employee from the performance of some or all of their duties, for some or all of the notice period. ...

18 Confidentiality and Privacy

Any personal, trade, professional or other like information of a confidential nature gained by the employee during the course of employment shall not, without the specific authority of the employer, be passed on to any person who would be in a

position to use such information to the detriment of the employer. Nor may it be used for the personal benefit of the employee. The employer shall not at any time during the contract period, or after its termination, discuss or disclose information, processes, materials, costs or secrets relating to any aspect of the business or affairs of the employer or clients to any person without the employer's express written agreement.

Before and after the employee leaves the Company it is agreed that no soliciting, canvassing, contact or offer of inducements of About Face clients (and staff) to change their custom (or their employment) will occur.

20. *Employment Relationship Problems, Personal Grievances and Disputes and Obligations*

...

- *The Employee agrees that for a period of three months following the termination of their employment (for whatever reason) they shall not either personally, or as an employee, consultant or agent in any other entity or employer, carry on business in competition with the Employer within a radius of 5 kilometres from the Employer's premises. In exchange the employer agrees to provide considerable investment in training of the employee,*

[9] Ms Miller signed the Employment Agreement on 14 May 2017 beneath a declaration which stated:

- (1) *Read and understood the above Conditions of Employment, and agree to accept employment on these terms; and*
- (2) *Have been provided with a reasonable opportunity to seek independent advice on the nature of this agreement prior to signing.*

[10] Ms Miller was provided with a position description which included among her job duties:

- Rebooking clients to About Face standards (at least 80%)
- Following up treatments by phoning and writing to customers to monitor effectiveness and to facilitate improvements.
- Maintaining up-to-date client histories (for the receptionist to enter into the computer)

- Developing a good knowledge of client databases and “working” the databases through phone calls and letters (to fill in gaps in bookings, identify target clients for promotional treatments)

[11] Ms Miller commenced employment with About Face on 6 June 2017 and was provided with four days of paid training. During the following two weeks she worked at the Clinic and was provided with a two hour induction on 19 June 2017.

[12] In the period from 23 June to 14 July 2017 Ms Miller was on a pre-arranged holiday without pay.

[13] Following her return from leave, Ms Miller worked two further days at the Clinic, on the 14 and 15 July 2017.

[14] Ms Miller emailed About Face on 14 July 2017 stating:

I am writing to announce my resignation as of the 14th July 2017. I will continue to work out the two week notice period as outlined in the 90 day trial part of my contract.

I am so thankful for the opportunity to be part of the About Face company, however after much thought I don't see it as a fit for me currently. I wish you all the best and will kiss the lovely team in Mairangi Bay.

[15] The parties agreed that Ms Miller would be on garden leave during the two week notice period.

[16] Ms Asbridge telephoned Ms Miller on 17 July 2017 to discuss the reason for leaving her employment at About Face and Ms Miller confirmed that she had accepted a position at FaceTime, a Skin Clinic located 100m from the Clinic. The employment was due to commence on 29 July 2017.

Mr Glucina's untested affidavit evidence

[17] In his untested affidavit evidence Mr Glucina stated that most of About Face's clients are female and require three areas of service, appearance improvement, massages and spa treatments, and grooming treatments. About Face offers these three services and endeavours to build long-term relationships with clients with a key strength being its training systems.

[18] About Face operates in a highly competitive market. There are three beauty therapy salons within Mairangi Bay, and six (including About Face) operating within a radius of 2-3km from the Clinic.

[19] A key asset of the business is its client database which includes client names, telephone numbers, email and physical addresses, their history of visits and treatments they had or homecare products they purchased.

[20] Other confidential information includes About Face's extensive training materials, manuals and methods.

[21] Mr Glucina stated that close personal relationships are a common part of the industry. Clients are booked with particular therapists who form a close personal bond with "*their' particular skin therapist*". When a therapist leaves their current employer and works for either themselves, or another business within a relatively close proximity, many clients often 'follow' that therapist to their new location. As clients can remain loyal to the business for up to 10 or more years, this would represent a substantial loss in revenue.

Ms Miller's untested affidavit evidence

[22] Ms Miller stated that in the seven weeks in which she was employed by About Face she worked for only twelve days. Of the twelve days, four days were basic introductory training and a one hour 'Omnilux' training session.

[23] During the 12 days she saw a total of 64 clients, approximately 9 of whom had been clients she had treated previously and who had made bookings once she commenced employment at About Face. She did not see a client more than once during that period.

[24] During her brief period of employment at About Face Ms Miller stated that she had not developed a knowledge of the About Face Database, and as she did not treat any client of About Face more than once she did not have an opportunity to build rapport with those clients such that she could expect them to follow her.

[25] Ms Miller has filed undertakings that she will not solicit, offer to induce or deal with any of the customers or clients whom she had served whilst employed at About Face, which include the 9 clients whom she had served at About Face with whom she had a pre-existing connection (the 9 Pre-

Existing Clients). She will not deal with any employees or contractors of About Face who were employed during the period she was employed, nor will she solicit, canvass, contact, offer to induce and/or deal with any of About Face's suppliers who were suppliers of About Face during the period she was employed at Face Time. The undertakings will apply for a period of three months from 31 July 2017.

[26] Ms Miller also undertakes to comply with the confidentiality and privacy provisions of the Employment Agreement.

[27] FaceTime Limited, Ms Miller's current employer, has also filed an undertaking that support Ms Miller's undertaking and to not do anything to induce her to breach the undertakings she has given.

Interim injunction application: investigation

[28] I granted About Face's application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim injunction.

[29] At the Investigation Meeting on 10 August 2017 I heard submissions from counsel in relation to the interim injunction application and tested these by questioning how the available evidence related to the relevant principles for determining an interim injunction application. Those principles fall to be addressed by the answers to the following questions:

- (a) Is there an arguable case?
- (b) Where does the balance of convenience lie between the parties?
- (c) Where does the overall justice of the case lie requiring that a declaration be made?

[30] As previously stated, I have relied on the submission of counsel and on the, as yet untested, evidence in the affidavits which have been lodged by the parties in answering these questions. Consequently the conclusions which have been drawn are tentative and not necessarily what will be decided at the substantive investigation after full examination of all the evidence which will then be available has been undertaken.

Determination

Is there an arguable case?

[31] It is accepted that contractual provisions restricting the activities of employees following the termination of their employment are regarded, on the grounds of public policy, as unenforceable¹: “*unless they can be justified as reasonably necessary to protect proprietary interests of the employer*”.² The law does not extend to prohibiting competition alone.³

Proprietary Interests

[32] Mr Oldfield, on behalf of About Face, submits that clause 18 *Confidentiality and Privacy* of the Employment Agreement does not adequately protect its proprietary interests because there is a risk of inadvertent disclosure on Ms Miller’s part. Further that there are also real difficulties in an employer enforcing such clauses post-termination because it is virtually impossible for an employer to know whether its confidential information has been disclosed.

[33] About Face also submits that the geographic area of the restraint is very limited and the duration is also reasonable and no wider than necessary to protect its proprietary interests.

[34] Mr Glucina in his untested affidavit evidence stated that during her employment Ms Miller treated 64 clients and was privy to, and exposed to, confidential information about About Face’s customers and business matters. She also had access to its confidential database containing client information and contact details.

[35] In her untested affidavit evidence Ms Miller stated that she was only briefly employed by About Face, and therefore had limited opportunity to access and utilise the client database.

[36] Ms Mills on behalf of Ms Miller submits that About Face’s proprietary interests which are capable of protection, namely any truly confidential information and its trade connections (or client relationships), are adequately protected by Ms Miller’s employment agreement and the undertakings she has provided.

[37] It is submitted that there is no evidence of any real risk that Ms Miller could disclose confidential information, whether innocently or inadvertently.

[38] In Mr Glucina’s untested affidavit evidence he stated that clients are booked in with particular therapists who form a close bond with them and they trust the therapist for their advice.

¹ Cf: *Pottinger v Kelly Services (NZ) Ltd* [2012] NZEmpC 101

² *Ibid* at [16]

³ *Green v Transpacific industries Group Limited* [2011] NZEmpC 6 at [27]

[39] Clients require time to require time to form a relationship with a new therapist. The three month restraint period was to allow About Face to contact clients, introduce them to a new therapist and allow time to maintain the customer relationship, ideally through a repeat booking if possible. This provides the potential for rebooking which is very important, and minimises the risk of the client following the departing therapist to another clinic.

[40] In her untested affidavit evidence Ms Miller agrees with Mr Glucina's affidavit evidence that it takes time for clients to see results, feel confident with the treatment and build a relationship with the therapist.

[41] She stated that her opportunity to rebook and upgrade clients was restricted due to About Face's policies and procedures on re-training. She saw clients once only during her brief period of employment and has not retained contact details relating to About Face's customers, clients, employees or contractors. Moreover that she cannot recall the names and contact details of the About Face clients she had treated, other than the 9 Pre-Existing Clients, during her employment.

[42] I find, in light of Mr Glucina's untested affidavit evidence, that during her brief period of employment Ms Miller had no real opportunity to form or develop a close relationship with the clients she treated (other than the 9 Pre-Existing Clients) such that there would be a real risk that they would follow her to another clinic.

Consideration

[43] Clause 20 in the Employment Agreement, the restraint clause, states that in exchange for Ms Miller's agreement to the restraint, About Face: "*agrees to provide considerable investment in training of the employee*".

[44] A principle relating to restrictive covenants referred to in *Gallagher Group Ltd v Walley*⁴ is that consideration is necessary, but may be satisfied by the mutual promises intrinsic in the offer and acceptance of employment.

[45] The Court of Appeal considered the issue of adequacy of consideration for a restraint in *Fuel Espresso Ltd v Hsieh (Hsieh)*⁵. The Court observed⁶:

⁴ [1999] 1 ERNZ 490 (CA)

⁵ *Hsesh* [2007] NZCA 58 at [18]

What we are dealing with here is the initial (and only) agreement of the parties. 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 promisee or some other benefit to the promisor. But the law does not inquire 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. As Treitel G.H, Law of Contracts (9th Ed), London, Sweet & Maxwell, 21995, at p 66 puts it:

“A person who makes a commercial promise expects to have to perform it ... correspondingly, one who receives such a promise expects it to be kept. These expectations can properly be called a detriment and a benefit and they satisfy the requirement of consideration in the case of mutual promises.”

[46] Consideration is necessary, but may be satisfied by the mutual promises intrinsic in the offer and acceptance of employment as expressly stated in an employment agreement, which is clearly the case in this instance.

[47] I find that Ms Miller entered into an employment relationship with About Face knowing that the Employment Agreement contained the restraint of trade clauses for which training would be provided.

[48] During the period of her employment About Face fulfilled the training requirement by providing Ms Miller with two periods of training, the first of which constituting four days.

[49] While Ms Miller submits that the training provided by Face Time did not constitute training which was of value to her in terms of her experience, Mr Glucina states that the training provided to her constituted: “*seriously fast tracking for any new therapist*”.

[50] That is a matter better explored at the substantive stage. As stated by the Court of Appeal in *Hsieh* “*We accept that the issue of adequacy of consideration may be relevant to question of whether a restraint of trade is reasonable. However that is not an issue in the present case*”.⁷ At this interim stage I find that there was consideration for the restraint clause.

Summary of arguable case

We accept that the issue of adequacy of consideration may be relevant to the question whether a restraint of trade is reasonable. However, that is not an issue in

⁶ Ibid at para 18

⁷ *Hsesh* [2007] NZCA 58 at [20]

the present case.

[51] The threshold for an arguable case is low. There are of necessity limitations inevitable upon determining interim injunction applications: the evidence is untested by questioning from me, or by cross-examination. However the threshold for an arguable case is low and I find that About Face has an arguable case.

Where does the balance of Convenience lie?

[52] The balance of convenience considers the relative hardship resulting to each party in this situation. It concerns the effect upon Ms Miller in the event that the application for an interim injunction is upheld and she is not allowed to work for FaceTime Limited when she might later be found not to be subject to a valid restraint of trade after all. It is also concerned with the effect on About Face, which might have a potential loss of business as a result of Ms Miller if she is permitted to work for FaceTime Limited.

[53] About Face submits that the balance of convenience favours it. Ms Miller would have no difficulty obtaining alternative employment in a buoyant job market, either within the North Shore area or in the wider Auckland area in which she was previously working

[54] In the case of Ms Miller, it is submitted that the balance of convenience rests firmly in her favour. Working outside the North Shore area would be difficult for her as she does not currently have use of a vehicle. Enforcing the restraint on an interim basis would diminish her reputation and the likelihood that clients she had treated previously to her employment at About Face, than the 9 Pre-Existing Clients, would continue to provide her with their repeat custom.

[55] It would prevent her from earning a living in her chosen field at a time when she is trying to save money in order to embark upon a nursing course.

[56] The balance of convenience also includes considering which party is better placed to bear the burden as well as protecting the ability of each party to meet any obligations which may later apply to them, principally having to pay damages.

[57] In the case of About Face I find that any damages to Ms Miller would be easily quantifiable, the interim injunction would be for a brief period and there is no doubt that About Face could meet any damages award.

[58] Whilst Ms Miller is of modest financial means, the undertaking on her behalf by FaceTime Limited confirms that it will support her with any award of damages should one be made following the substantive hearing.

[59] I accept that the adequacy of a damages award is subject to the well-known difficulty associated with quantifying losses from misuse of confidential information.⁸ It may be difficult to obtain comprehensive information from clients who may have transferred to FaceTime Limited. That element of the balance of convenience favours About Face.

[60] However there is no certainty of such losses, and I take into consideration the undertakings provided by Ms Miller and those given on her behalf by FaceTime Limited to the effect that she will not use confidential information obtained at About Face during the restraint period.

[61] Weighing all the factors, I conclude that the relative inconvenience and risk is greater for Ms Miller than for About Face and find that the balance of convenience favours her.

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Overall Justice of the case

[62] The overall justice consideration requires me to stand back from the detail and consider the case from a more global view.

[63] I have concluded that whilst About Face had established an arguable case, the balance of inconvenience was greater on Ms Miller if an interim injunction was granted. Accordingly the application needs to be resolved on an assessment of the overall justice between the parties until a substantive investigation is held and a determination issued.

[64] However I acknowledge that the assessment needs to be relatively robust, being made in a short time frame on the basis of submissions, untested affidavit evidence and supporting documents. Moreover I recognise that the interim result may well be the substantive result given the short period occupied by the restraint period of 3 months, and that these matters do not always proceed to a substantive investigation.

[65] For the reasons set out as follows I have concluded, exercising the discretion to do so, that the overall justice of the case favours declining About Face's application for an interim injunction.

⁸ *Credit Consultants Debt Services NZ Limited v Wilson (No 3)*[2007] 1 ERNZ 252

[66] Whilst I have found that About Face had an arguable case, it was not a strongly arguable case, particularly in light of the short period of employment and Ms Miller's correspondingly short period of exposure to About Face's clients, and the undertakings provided by Ms Miller and FaceTime Limited.

[67] I have found on the untested affidavit evidence available at this interim stage that by becoming employed at FaceTime Limited, and potentially utilising the confidential data base and client contacts for the benefit of her new employer, Miss Miller would be in breach of the confidentiality and restraint provisions to which she agreed in the Employment Agreement.

[68] There is no evidence that Ms Miller has taken or disclosed any confidential information in breach of clauses 18 and 20 of the Employment Agreement.

[69] Ms Miller has given undertakings that she will not solicit, offer to induce or deal with any of the customers or clients whom she had served whilst employed at About Face, which include the 9 Pre-Existing Clients whom she had served at About Face with whom she had a pre-existing connection. She will not deal with any employees or contractors of About Face who were employed during the period she was employed, nor will she solicit, canvass, contact, offer to induce and/or deal with any of About Face's suppliers who were suppliers to About Face during the period she was employed at About Face. She also undertakes to comply with the confidentiality and privacy provisions of the Employment Agreement. The undertakings will apply for a period of three months from 31 July 2017, and are supported by the undertaking from FaceTime Limited.

[70] These undertakings are for a period commensurate with the confidentiality and restraint periods.

[71] I conclude that the overall justice weighs against granting the application for an interim injunction. The application for an interim injunction is dismissed.

Next Steps

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

Costs

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

Eleanor Robinson
Member of the Employment Relations Authority