**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI**
**ŌTAUTAHI ROHE**

[2019] NZERA 635
3076972

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| | BETWEEN | ACCOUNTSDEPT. LIMITED<br>Applicant |
| | A N D | DANIELLE DRIVER<br>Respondent |

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| Member of Authority: | Peter van Keulen |
| Representatives: | Marty Logan, counsel for the Applicant<br>Maree Kirk, counsel for the Respondent |
| Investigation Meeting: | 31 October 2019 |
| Submissions Received: | 31 October 2019 from the Applicant<br>31 October 2019 from the Respondent |
| Date of Determination: | 5 November 2019 |

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## DETERMINATION OF THE AUTHORITY

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**Employment relationship problem**

[1] Accountsdept. Limited seeks an interim order preventing its former employee, Danielle Driver, from working for Thompson Property Group Limited (TPG) pending the determination of its substantive claim.

[2] Accountsdept claims that Ms Driver is breaching a restraint of trade provision in her employment agreement, by working for TPG, which was a former client of its.

[3] Accountsdept is a Nelson based company that provides bookkeeping and marketing services to clients, which are locally based businesses.

[4] Accountsdept employed Ms Driver from 15 October 2018 in a client services support role. Ms Driver's role was split between new product development in two areas – add on services and social media management. This work included "on-boarding" new clients, that is working with new clients to set them up so Accountsdept could provide the requested or agreed services to it.

[5] Ms Driver was employed pursuant to the terms and conditions set in an employment agreement dated 15 October 2018, which Ms Driver signed on 14 October 2018 (the IEA).

[6] The IEA included the following restraint of trade provision:

> 19. **Restraint**
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> 19.1 The employee agrees that for a period of six months following the termination of her employment for any reason the employee will not:
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> (a) The Employee agrees that for a period of 6 months following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, seek to solicit or carry out any work of the same nature for any client or customer of the Employer with which the Employee had any contact or dealings whilst employed by the Employer.
>
> ….

[7] On 22 August 2019, Ms Driver handed in her notice, with her last day of work being 20 September 2019. Ms Driver advised Accountsdept that she had accepted a role with TPG, and it was clear that she intended to start working with TPG immediately after 20 September 2019.

[8] TPG was a new client of Accountsdept at the time and Ms Driver had worked with TPG, over five days, on-boarding them by reviewing and tidying the Xero accounting files, aligning inter-company accounts, reviewing payroll and employee set-up, and reviewing and adjusting coding where required.

[9] So, Accountsdept says Ms Driver is in breach of clause 19 of her employment agreement and seeks an order preventing her from continuing to work for TPG in the interim.

[10] Ms Driver opposes the interim order sought on the basis that the restraint of trade is otherwise unreasonable and unenforceable.

**The law**

[11] The law relating to interim applications is settled. This was summarised by Judge Inglis (as she was then) dealing with an application for interim reinstatement in *Western Bay of Plenty District Council v Jarron McInnes*[1]. Her Honour referred to the Court of Appeal decision in *NZ Tax Refunds v Brooks Homes Ltd* [2] and summarised the law as:

> [7] ... An applicant must establish that there is a serious question to be tried. Consideration must be given to the balance of convenience, and the impact on the parties of the granting of, and the refusal to grant, an order. The impact on third parties will also be relevant to the weighting exercise. Finally, the overall interests of justice are considered, standing back from the detail required by the earlier steps. While the power to make an order for interim reinstatement is a discretionary one, the assessment of whether there is a serious question to be tried is not. It requires judicial evaluation.
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> [8] ...
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> [9] Counsel for the plaintiff submitted that it was necessary for a party seeking interim relief to adduce sufficiently precise factual evidence to satisfy the Court that he/she had a real prospect of succeeding in their claim.[3] However, as *Brooks Homes Ltd* makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous.[4] The merits of the case (insofar as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and overall interests of justice[5]. ….

[12] So, the issues to be determined at this interim stage are:

(a) Is there a serious question to be tried, that Ms Driver has breached the restraint of trade in her employment agreement and an order restraining her from working for TPG should be made; and

(b) Where does the balance of convenience lie pending a substantive investigation and a final determination on the alleged breach of the restraint of trade; and

(c) Where does the overall justice of this case lie from now until the completion of the substantive investigation and issuing of a final determination?

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[1] *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36.
[2] *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.
[3] Citing *Re Lord Cable (deceased) v Waters* [1976] 3 All ER 417 (Ch) at 431 in support.
[4] At [12].
[5] *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

[13] In order to determine these issues I have not heard any oral evidence as part of my investigation other than some evidence in reply from Accountsdept led at the investigation meeting. The majority of the evidence I have considered was presented through sworn affidavits from Samantha Bell of Accountsdept, Ms Driver and Nanette Thompson of TPG.

[14] As permitted by s174E of the Employment Relations Act 2000, my determination has not recorded all of the evidence and submissions given but has stated relevant findings of fact and law that I am able to make at this interim stage so that I can express a conclusion on whether the interim order sought should be granted or declined.

**A serious question to be tried**

[15] Based on *Western Bay of Plenty District Council* and *Brooks Homes*, the threshold for a serious question is that the claim is not frivolous or vexatious. A decision on this aspect is not an exercise of discretion rather it must be based on a judicial assessment of the evidence, albeit untested, and the submissions advanced.

[16] Whether there is a serious question to be tried, that there has been a breach of the restraint of trade provision in the IEA, involves assessing:

(a) Whether the restraint of trade is a valid restraint, the prima facie position being that restraints of trade are contrary to public law and not enforceable; and if the restraint of trade is valid

(b) Whether, by working for TPG, Ms Driver is in fact in breach of that restraint of trade.

*Is the restraint of trade enforceable?*

[17] In order to override the prima facie positon rendering a restraint of trade unenforceable, an applicant, seeking to enforce a restraint, needs to show that it has a legitimate proprietary interest and that the restraint is no wider than is reasonably necessary to protect that interest.[6]

[6] *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153 at paragraph 23.

[18] The proprietary interest Accountsdept seeks to protect is its goodwill in its client and customer relationships. This is a recognised proprietary interest, capable of being protected by a restraint.[7]

[19] In order to ascertain if the restraint of trade is no wider than is reasonably necessary to protect Accountsdept's goodwill I must first interpret the clause. On my analysis clause 19 of the IEA has three parts:

(a) It applies for six months following the termination of Ms Driver's employment.

(b) It prevents Ms Driver from carrying out "work of the same nature" for that period of time for a client or customer of Accountsdept.

(c) The restriction on carrying out work for clients or customers is limited to clients or customers that Ms Driver had any contact or dealings with whilst employed by Accountsdept.

[20] Parts (a) and (c) set out above are straight forward. Part (b) however, requires some analysis and interpretation. The issue with "work of the same nature" is the phrase does not articulate what work of the same nature relates to. I suggested to both counsel in the investigation meeting that there were four possibilities - work of the same nature as:

(a) Any work undertaken by Accountsdept;

(b) Only work undertaken by Accountsdept for TPG;

(c) Any work undertaken by Ms Driver when employed by Accountsdept;

(d) Only work undertaken by Ms Driver for TPG, when employed by Accountsdept.

[21] In reaching a conclusion on the extent of the phrase "work of the same nature" I have applied the principles of contractual interpretation from case law.[8]

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[7] *Stephen Green v Transpacific Industries Group (NZ) Limited* [2011] NZEmpC 6.
[8] *Vector Gas v Bay of Plenty Energy* [2010] NZSC 5; and *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* [2011] NZEmpC 149

[22] I must establish, objectively, the meaning the parties intended their words to bear. I do this by assessing what a reasonable and properly informed third party would consider the words to mean. Being properly informed means the third party will have knowledge of the context in which the parties agreed the terms, so knowledge of the facts and circumstances that would be operating in the parties' minds. However, evidence of this contractual context is not relevant if it simply establishes what the parties subjectively intended their words to mean; an objective assessment does not involve analysing what the parties say they intended the words to mean.

[23] I should take the natural and ordinary meaning of the words and accept this as being what the third party would take them to mean if they are not ambiguous in light of the contractual context and ensuring the interpretation accords with business common sense.

[24] The contractual context is that Accountsdept wants to protect its client and customer relationships. Accountsdept describes this, in the IEA, as being about protecting the goodwill of its business. That business goodwill, arising out of the client and customer relationships, is work undertaken by Accountsdept for any clients and customers both currently and in the future; it is Accountsdept's value in terms of current and future earnings.

[25] As I understand the evidence, Accountsdept's future earnings includes not just ongoing work of the kind undertaken for a current client but other additional work that might be generated through ongoing contact with a client.

[26] On this basis it seems logical that work of the same nature must relate to work of the same nature as that offered by Accountsdept to its clients and customers. If this was not the case then the restraint of trade clause would not protect all of Accountsdept's goodwill.

[27] So, applying this conclusion, clause 19 of the IEA means that for six months from 20 September 2019, Ms Driver cannot carry out work of the same nature as that undertaken by Accountsdept, for any client or customer with whom she had contact during her employment.

[28] So, is this restraint no wider than is necessary to protect Accountsdept's goodwill?

[29] The question of whether a restraint of trade is no wider than is reasonably necessary to protect a proprietary interest has been considered on numerous occasions. The Employment Court, in *Air New Zealand v Kerr*[9] confirmed that this assessment requires consideration of the duration of the restraint, its scope and geographical limits.

[30] Given that the restraint is limited to customers and clients that Ms Driver had dealings with, the scope and geographical limits are reasonable. As counsel for Accountsdept submitted, Ms Driver can work anywhere doing anything just so long as she is not working for an Accountsdept client she had contact with, doing work Accountsdept could do for that client.

[31] The key issue is whether the period of six months is no more than is necessary to protect the customer and client relationships. Given that the protection relates to current and future work generated from the client and customer relationships, I believe six months is necessary to protect the goodwill. In particular I believe six months reflects a reasonable period of time to build a working relationship with a client if a new variable is introduced, such as a new Accountsdept employee undertaking the work, new work being done by Accountsdept or a new clients starting with Accountsdept (as was the case with TPG).

[32] There is one other issue to address on the enforceability of the restraint of trade – counsel for Ms Driver submits that there was no adequate consideration for the restraint.

[33] In this case, as the restraint is part of the terms of employment offered, the consideration is the terms and conditions of employment. And that is adequate consideration.

[34] So, there is a serious question to be tried as to the enforceability of the restraint of trade provision in the IEA.

*Breach of restraint*

[35] Ms Driver is now working for TPG. TPG was a client of Accountsdept and Ms Driver had contact with TPG whilst employed by Accountsdept. Ms Driver is undertaking work for TPG that Accountsdept could do. And this is being done within six months of the termination of Ms Driver's employment with TPG.

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[9] *Air New Zealand Ltd v Kerr* above n6

[36] So there is a serious question to be tried in respect of Ms Driver's alleged breach of the restraint of trade in the IEA.

*Conclusion*

[37] In conclusion then I find there is a serious question to be tried and it appears that Accountsdept has a reasonably strong case.

**The balance of convenience**

[38] Assessing the balance of convenience requires consideration of the impact on each party if the interim order is granted or not. The same consideration also applies in respect of third parties.

[39] This assessment requires some comparative analysis, hence the balancing. At its simplest, the comparison is assessing the impact of granting the interim order on Ms Driver and any third parties and the impact of not granting the interim order on Accountsdept and any third parties. I must weigh those respective impacts and determine if either outweighs the other. Part of this assessment is to consider what happens if the interim position is reversed in any substantive determination. In the case of Ms Driver, this means assessing the consequences of reversing an interim order preventing her from working for TPG. And in the case of Accountsdept, this means assessing the consequences of imposing an order preventing Ms Driver from working for TPG after refusing to grant that order on an interim basis.

[40] Relevant to this assessment is the question of whether the impact on a party is harm that can be adequately compensated by damages. And the strengths of the relative cases are also relevant.

[41] So I am required to assess the impact on the parties and third parties, of granting or not granting the interim order, having regard to, amongst other things, the relative merits of the case and whether damages would be an adequate remedy if the interim position is reversed.

[42] If the order is granted there will be some hardship to Ms Driver, as she will probably not work for TPG at all for the balance of the restraint period. There is the possibility she might do work for TPG that Accountsdept does not do, so I cannot be certain Ms Driver will be without work completely if the interim order is made.

[43] There is also no evidence of any hardship or loss for Ms Driver, if she cannot work for TPG in the interim period, which cannot be compensated by damages if the order is reversed. There may be some lost remuneration but there is no evidence that Ms Driver might not meet her outgoings if she is not working for TPG. Also, there is no evidence that the restraint would cause her to lose her job with TPG. In fact, Ms Driver's evidence on the impact of any restraint being imposed on her is that she will return to work for TPG when she can and that she might be eligible for an unemployment benefit in the interim.

[44] Conversely, if I do not grant the interim order there does not appear to be any immediate hardship to Accountsdept. TPG is lost as a client, and any order I make will not change that. Accountsdept can be compensated for the alleged breach by Ms Driver and an interim order is of no consequence to that.

[45] There is however, some potential loss or impact of not making an interim order for Accountsdept. If the restraint of trade is reasonable and enforceable but an interim order is not made this may undermine the protection; it is possible other employees will view the restraint as being of no consequence and they may decide to act as Ms Driver has, causing more potential loss of business and potential damage to Accountsdept goodwill.

[46] In terms of the balance of convenience, this is marginally weighted in favour of Accountsdept as there is the possibility for it to lose the protection afforded by its restraints of trade with other employees and it cannot be compensated for this if it occurs.

**The overall justice**

[47] The overall justice assessment is essentially a check on the position that has been reached after my analysis of the serious question to be tried and the balance of convenience[10].

[48] My starting point is that there is a serious question to be tried and the balance of convenience favours granting Accountsdept the order it seeks.

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[10] *NZ Tax Refunds v Brooks Homes Limited* above n1

[49] When I stand back and look at this case, the overall justice supports granting the interim order sought by Accountsdept. In coming to this conclusion I am persuaded by the Court of Appeal in *Fuel Espresso Ltd v Hsieh*[11] where it concluded at [21]:

> … The restraint is plainly reasonable. Agreements are made to be kept. Mr Hsieh was employed and trained but left in the face of a clear contractual provision preventing him from doing what he has done. In the absence of an interim injunction, any relief to Fuel will, in the time-honoured phrase, be nugatory. This is a clear case for an interlocutory injunction.

**Conclusion**

[50] I am satisfied that Accountsdept has a serious question to be tried in respect of the enforcement of clause 19 of the IEA. The balance of convenience and overall justice of this case supports an interim order being made in the terms sought by Accountsdept.

**Determination**

[51] Danielle Driver is not to work for TPG undertaking any of the work Accountsdept is capable of doing until 20 March 2020.

[52] This order is to remain in place until the earlier of 20 March 2020, the date on which a substantive determination is issued by the Authority in this claim or the parties agree some variation.

**Costs**

[53] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority

[11] *Fuel Espresso Ltd v Hsieh* [2007] ERNZ 60.