

ATTENTION IS DRAWN TO
THE ORDER PROHIBITING
PUBLICATION OF CERTAIN
INFORMATION REFERRED
TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 149
3166746

BETWEEN

**BRS CHRISTCHURCH
LIMITED**
Applicant

AND

TROY MEIKLE
Respondent

Member of Authority: Peter van Keulen

Representatives: Alastair Espie and Miranda Braddock, counsel for
the Applicant
Hilary Palmer, counsel for the Respondent

Investigation Meeting: 13 April 2022

Submissions Received: 11 April 2022 and 13 April 2022 from the Applicant
11 April 2022 and 13 April 2022 from the
Respondent

Date of Determination: 20 April 2022

DETERMINATION OF THE AUTHORITY

Non-publication orders

[1] The statement of problem, statement of reply and affidavit evidence in this claim include references to commercial and financial information relating to BRS Christchurch Limited's business and includes some conclusions drawn by Troy Meikle about BRS's financial position and business operations.

[2] BRS seeks non-publication orders in relation to this financial and commercial information on the basis that it is confidential and may be prejudicial if released publicly, particularly the conclusions drawn by Mr Meikle which it says are not accurate.

[3] At this interim stage I am persuaded by BRS's arguments of potential impact on it if the information is disclosed publicly and I am satisfied that this displaces the presumption of open justice.

[4] So pursuant to Clause 10 of schedule 2 of the Employment Relations Act 2000, I grant non-publication orders prohibiting the publication of the following parts of this claim:

(a) Paragraphs 32(b), 34, 37(b) of the Statement in Reply.

(b) Paragraphs 2, 3, 5, 9, 12, 16, 17, 18, 19, 25, 27, 35, 59, 60, 62, 65, 66, and 68 of Mr Meikle's affidavit dated 4 April 2022.

(c) Paragraphs 7, 8, 10 – 14, 16 – 20, 31, 35 and 36 of Mr Jeffrey's affidavit dated 4 April 2022.

(d) Annexures H and J of Mr McArthur's affidavit dated 8 April 2022.

[5] This non-publication order is to remain in place until any further order by the Authority or the Employment Court. For the avoidance of doubt the order does not prevent BRS from using the information in conducting its business and it does not prevent either party from using the information in relation to this claim.

Employment relationship problem

[6] BRS runs a business specialising in asbestos removal. BRS has offices in Tauranga, Auckland and Christchurch.

[7] Troy Meikle worked for BRS, based out of the Christchurch office, as a labourer and asbestos remover, then he was promoted to Site Supervisor and then Operations Manager for the South Island region.

[8] On 29 November 2021, Mr Meikle resigned from BRS with his last day of work being 21 January 2022. After this Mr Meikle commenced employment with TechClean Limited as a Project Supervisor.

[9] BRS says TechClean is a competitor and by working for it Mr Meikle is breaching a restraint of trade provision in the employment agreement between it and Mr Meikle. BRS also claims Mr Meikle has contacted some of its clients seeking to defer work from those clients to TechClean and in some cases he has achieved this. BRS says this is also a breach of a restraint provision in the employment agreement.

[10] BRS has lodged a claim against Mr Meikle in the Authority based on these two alleged breaches and additional alleged breaches by Mr Meikle of the employment agreement, the duty of good faith and the duty of fidelity. BRS seeks various orders and remedies for those alleged breaches.

[11] In relation to the alleged breaches of the restraint of trade provisions in the employment agreement, BRS seeks interim injunctions preventing Mr Meikle from working for TechClean and from carrying out work for any of its clients or seeking to canvass work from any of its clients, pending the determination of its substantive claim.

[12] Mr Meikle opposes the interim injunctions sought on the basis that the restraint of trade provisions are not enforceable.

The Authority's investigation

[13] I investigated BRS's application for interim injunctions on 13 April 2022. As is usual for interim injunctions, I did not hear any oral evidence as part of my investigation. The evidence I considered was presented through sworn affidavits from Sean McArthur – Chief

Financial Officer for BRS, Robert Gartshore – Managing Director for BRS, Troy Meikle and Thomas Jeffrey – Director of TechClean.

[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 orders sought should be granted or declined.

Issues

[15] The law applying to applications for interim injunctions has been comprehensively canvassed by the Court of Appeal and the Employment Court.¹ Based on the relevant case law the issues to be determined at this interim stage are:

- (a) Is there a serious question to be tried, that Mr Meikle has breached the restraint of trade provisions in the IEA and an order restraining him in line with his contractual obligations should be made; and
- (b) Where does the balance of convenience lie pending a substantive investigation and a final determination on the alleged breaches of the restraint of trade provisions in the IEA; 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?

What happened?

[16] BRS first employed Mr Meikle in 2014 as a labourer and asbestos remover. He was promoted to Site Supervisor in January 2018 and then promoted to Operations Manager for the South Island in October 2019.

¹ See for example, *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90; and *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36.

[17] It appears that BRS sent Mr Meikle a draft employment agreement in October 2019 which inadvertently referred to Mr Meikle's new role as General Manager. BRS has not produced a signed copy of the 2019 employment agreement.

[18] Then in October 2020, BRS changed Mr Meikle's bonus structure and it sent him an updated employment agreement with the new bonus terms set out; this was set out in an email from Mr McArthur to Mr Meikle on 6 October 2020.

[19] Mr Meikle then responded by email on 7 October 2020, stating "Here ya go mate, all signed" and BRS says a copy of the updated employment agreement, which was initialled and signed by Mr Meikle, was attached to that email.

[20] Mr Meikle says he has no recollection of receiving the draft employment agreement in October 2020 nor does he have any recollection of signing and returning it. He says the signed employment agreement produced by BRS has an electronic signature on it and he has never signed any documents using an electronic signature. He also notes that the employment agreement is for a General Manager, which he was never employed as. Mr Meikle concludes therefore that there is no signed written employment agreement applying to his role as Operations Manager.

[21] BRS says the reference to Mr Meikle's role as being a General Manager was a mistake that was carried over from the draft agreement provided to Mr Meikle in October 2019. It also says it is clear from the email exchange that Mr Meikle accepted the terms and initialled and signed the agreement accordingly. It says the initials on each page appear slightly differently, as would be expected if done by hand, refuting the implication that there has been some electronic form of initialling and signing that Mr Meikle says he did not do. BRS also says, in any event, the terms and conditions set out in the signed employment agreement governed Mr Meikle's employment as Operations Manager as they were performed by the parties – for example, Mr Meikle was paid the bonus according to the new structure set out and when Mr Meikle resigned, he said he was giving 8 weeks' notice "as per my contract".

[22] I am satisfied that the employment agreement of October 2020, has been initialled and signed by Mr Meikle and that this agreement sets out the terms and conditions of Mr Meikle's employment as Operations Manager (the IEA).

[23] The IEA includes the following provisions:

- 28.1 The Employee shall not at any time during the term of the employment or for a period of 18 months after the termination of this Agreement for any reason, carry on or be connected, engaged or interested either directly or indirectly or alone with any other person or persons and whether as principal, partner, agent, director, shareholder, employee, or otherwise in any business which in any way competes with the Employer which is carried on within a radius of 75 kilometres of the business premises of the Employer's situated head office Tauranga and all branch offices, without the express written consent of the Employer provided that such consent shall not be unreasonably withheld.
- 28.2 ...
- 28.3 The Employee shall not either during or within 12 months after leaving the Employer for any reason whatsoever:
- (a) Conduct for any client or agent of any client, of the Employer or canvass any business from any client or
 - (b) Assist any related persons to directly or indirectly do any of the matters referred to in this clause.
- 28.4 The word "client" where used in this clause means any person or entity who was a client of the Employer at any time during the three years prior to the termination of this Agreement.
- 28.5 The words "related persons" includes any partner, employee, employer, contractor, consultant or family member of the Employee.

[24] On 29 November 2021, Mr Meikle gave notice of resignation, advising that his last day of work would be 21 January 2022. Mr Meikle advised BRS that he was resigning to try "my hand at something new". When BRS discussed this with Mr Meikle he told it he was going into a grass seeding business with his brother-in-law.

[25] As Mr Meikle was leaving the asbestos removal industry, BRS thought there was no risk in having Mr Meikle work his notice period. Given his role, the difficulties it knew it would have in replacing him and the need to manage its South Island workload in the interim, BRS required Mr Meikle to work his notice period.

[26] It transpired that Mr Meikle decided not to go into business with his brother-in-law and in December 2021 TechClean offered Mr Meikle a role as a Project Manager. Neither Mr Meikle, nor Mr Jeffrey of TechClean, provided any detail of the role, such as how and when the offer was made, when it was accepted or the terms and conditions of employment, other than stating that Mr Meikle currently works on a project for KiwiRail in Dunedin, working remotely from Christchurch.

[27] Mr Meikle did not tell BRS that he had changed his mind and had accepted a role with TechClean. Mr McArthur says, in his affidavit evidence, that on 17 January 2022 he spoke to Mr Meikle about new machinery Mr Meikle had purchased for his brother-in-law's business and he was going to start by working on his own property.

[28] Mr Meikle commenced work with TechClean in January 2022 - neither Mr Meikle nor Mr Jeffrey provided any details of the start date.

[29] BRS says that in February 2022 an employee, who was working on an interim basis covering the work Mr Meikle had done, discovered that Mr Meikle had been contacting BRS clients and soliciting work from them. After speaking to various clients that Mr Meikle had provided quotes to for work on behalf of BRS prior to 21 January 2022, the employee said he was told that at least five clients had or were going to transfer their work to TechClean because Mr Meikle was now working there.

[30] I note here that this evidence was provided in Mr McArthur's affidavit evidence. Mr McArthur did not give direct evidence of this, i.e., he did not speak to any of the clients who are alleged to have moved their business from BRS to TechClean. The evidence is what an employee has told Mr McArthur that he discussed with BRS clients.

[31] Mr Gartshore says, in his affidavit evidence, that when BRS became aware that Mr Meikle might be working for TechClean he spoke to Mr Meikle – he did not state the date but it must be after 21 January 2022 – to ask him about working at TechClean as they had just been told that by a customer. Mr Gartshore says that in that telephone call Mr Meikle denied he was working at TechClean and when he asked about Mr Meikle’s car being seen at TechClean’s premises, Mr Meikle explained that by saying he was renting desk space from TechClean for the grass seeding business.

[32] What followed from this point was an exchange of correspondence between the parties’ respective lawyers and the parties were unable to come to any compromise based on undertakings or some restrictions around Mr Meikle’s continued employment by TechClean or not.

[33] As of 13 April 2022, Mr Meikle continued to be employed by TechClean working from its Christchurch base on the KiwiRail project in Dunedin.

A serious question to be tried

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

- (a) Whether the restraint of trade provisions in the IEA are valid and enforceable restraints, the prima facie position being that restraints of trade are contrary to public law and not enforceable; and
- (b) If the restraint of trade provisions in the IEA are valid and enforceable, whether Mr Meikle has breached and may breach the restraint of trade provisions.

[35] The threshold for a serious question is that the claim is not frivolous or vexatious and my decision on the serious question issue is based on a judicial assessment of the evidence, albeit untested, and the submissions advanced.²

[36] In summary I must assess the untested affidavit evidence and decide if that evidence shows that the claims advanced by BRS, that clauses 28.1 and 28.3 of the IEA are enforceable and that Mr Meikle has breached and may continue to breach either clause, are not frivolous or vexatious.

Are the restraint of trade provisions in the IEA enforceable?

[37] In order to override the prima facie position that a restraint of trade clause is unenforceable BRS needs to show that it has legitimate proprietary interests that it seeks to protect and that the restraints are no wider than is reasonably necessary to protect those interests.³

[38] BRS says the proprietary interests it seeks to protect through the restraint of trade provisions are its client relationships, confidential and commercially sensitive information, and employee relationships.

[39] The Courts have recognised that confidential information is a proprietary interest and have stated that a restraint of trade, such as a restrictive covenant, may be necessary, in addition to any confidentiality obligations, in order to protect the inadvertent disclosure of confidential information during further employment.⁴

[40] Client relationships are also a proprietary interest that can be protected.⁵

² *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90; and *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36.

³ *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153 at paragraph 23.

⁴ *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252; and *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97.

⁵ *Stephen Green v Transpacific Industries Group (NZ) Limited* [2011] NZEmpC 6.

[41] Based on the affidavit evidence I am satisfied that BRS has confidential information and client relationships, both of which are proprietary interests capable of being protected by restraint of trade provisions.

[42] So, I must now consider if each restraint of trade provision is no wider than is necessary to protect BRS's proprietary interests. The Employment Court has confirmed that this requires consideration of the duration of the restraint, its scope and geographical limits.⁶

[43] In order to do this, I must start by interpreting each clause so I can assess the scope, duration and geography provided by each.

[44] Clause 28.1 of the IEA provides that Mr Meikle cannot:

- (a) directly or indirectly, alone or with others, as a principal, partner, agent, director, shareholder, employee or otherwise,
- (b) carry on, be connected with or interested in, any business that competes with BRS within a 75 km radius of any BRS office,
- (c) for a period of 18 months after 21 January 2022.

[45] Clause 28.3 of the IEA provides that Mr Meikle cannot:

- (a) conduct any business for a client of BRS until 21 January 2023; or
- (b) canvass for any business from any client of BRS until 21 January 2023,

with BRS clients being confined to any client of BRS in the period 21 January 2019 until 21 January 2022.

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

[46] Clause 28.1 of the IEA is a non-compete, preventing Mr Meikle from working for a competitor of BRS. Clause 28.3 of the IEA is a non-dealing clause preventing Mr Meikle from dealing with any BRS clients.

[47] The effect of each clause is to provide relatively wide restraints in terms of non-competing and non-dealing. However, neither clause prevents Mr Meikle from working in the asbestos removal industry. This is because the general scope of each clause is restricted to some extent:

- (a) Clause 28.1 being limited to working for a business that competes within the 75-kilometre radius of the Tauranga, Auckland or Christchurch branches of BRS.
- (b) Clause 28.3 being limited to clients of BRS in the period 21 January 2019 to 21 January 2022.

[48] So, Mr Meikle can work in asbestos removal so long as he is not working for a business that competes with BRS in Tauranga, Auckland or Christchurch and so long as he is not doing work for a client of BRS.

[49] Turning to the length of both clauses, each has a relatively long period attached to it – an 18-month period of not working for a competitor of BRS and a 12-month period of not dealing with BRS clients. On the face of it, the concern I have is they are inconsistent, why can Mr Meikle not compete with BRS for 18 months yet he can do work for a client of BRS in 12 months. And, whilst there is some evidence from BRS to show why such long periods of restraint are required, such as the time it will take to find a replacement and build the client relationships with that replacement, or the length of time the confidential information may

remain relevant, I am not sure that evidence supports periods of time greater than have been recognised as being reasonable in most industries.⁷

[50] When asked about this counsel, for BRS stated that 18 months for a non-compete restraint and 12 months for a non-dealing restraint are at least arguable i.e., they do not make the claims for the enforceability of clause 28.1 and clause 28.3 of the IEA frivolous or vexatious claims. And, on any substantive assessment of the claims it will be open to me to modify the length of time of both clauses, if that is appropriate, making them enforceable on the basis that the time is no more than what is considered reasonable – counsel submitting that to preserve and protect BRS’s business in the interim the injunctions should be granted until the full assessment and any modification is made (if at all).

[51] The other aspect of reasonableness to consider is the geographical scope. The effect of clause 28.3 of the IEA is to prevent Mr Meikle from working for a competitor of BRS – with the competitor being established by the 75-kilometre radius test - even if the work Mr Meikle is doing for the competitor of BRS in an area where BRS does not operate or is in an area where Mr Meikle did not work. Likewise, clause 28.3 of the IEA prevents Mr Meikle from doing work for a client of BRS even if that work is undertaken in an area where BRS does not operate or is in an area where Mr Meikle did not work.

[52] I am less concerned about this aspect. It is arguable that both clauses need a national scope to cover the national basis of BRS’s work and client base. Just because Mr Meikle might be employed by a competitor of BRS to work in a location in the North Island where BRS does not operate, does not mean BRS’s proprietary interest are not at risk. Mr Meikle may still provide confidential information to the competitor or leverage off his previous relationships with BRS’s clients. And he may still be able to have some influence over BRS client connections if he is doing work for a BRS client.

⁷ See for example *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252 and *Janet Pottinger & Ors v Kelly Services (New Zealand) Limited* [2012] NZEmpC 101.

[53] Despite my concerns about the extent of the restraints imposed by clauses 28.1 and 28.3 of the IEA, I am satisfied there is a serious question to be tried as to the enforceability of both clauses 28.1 and 28.3. This is particularly so with modification of the time period for each clause, which on my assessment of the affidavit evidence would seem highly likely. With modification of the time period to a period of six months the restraints of trade in the IEA would be reasonable and likely enforceable by BRS against Mr Meikle; I find the claims for enforceability to be strongly arguable if I was to amend the duration of each to six months from the termination of Mr Meikle's employment.

Breach of the restraint of trade provisions in the IEA

[54] TechClean is a competitor of BRS in that it is a business that carries on asbestos removal work within a 75-kilometre radius of BRS's offices. As an employee of TechClean, Mr Meikle is directly connected with and interested in TechClean. There is therefore clear evidence of a breach of clause 28.1 of the IEA based on the evidence before me, and based on how I interpret clause 28.1 and assuming it is enforceable. It follows that by continuing to work for TechClean Mr Meikle continues to be in breach of clause 28.1.

[55] The affidavit evidence from Mr McArthur shows there is a basis for BRS's allegations that Mr Meikle has breached clause 28.3 of the IEA. That evidence, albeit of what Mr McArthur has discussed with another employee and untested, has some merit and a ring of credibility to it. In addition, there is direct evidence from Mr McArthur about the downturn in work from some of its clients, including those it believes Mr Meikle has contacted, since Mr Meikle left.

[56] In contrast Mr Meikle has attempted to explain what may have occurred, suggesting the BRS employee is mistaken. Mr Meikle says he spoke to two of BRS's clients after he left but one was in relation to work TechClean already had with one of those clients and the other was a request for a roofing contractor and was not about work for TechClean. Mr Meikle denies having any contact with other clients and he says that two of the companies referred to

by Mr McArthur are not clients but a subcontractor in one case and a referrer of work in the other.

[57] TechClean says it is not interested in taking work from BRS through Mr Meikle. It says Mr Meikle is not involved in quoting for work for it and is focused on the KiwiRail project in Dunedin. Further, TechClean says it does not really compete with BRS as they largely operate in different sectors of the asbestos removal industry, with TechClean receiving most of its work from other clients. TechClean also says any loss of clients or business that BRS claims to have suffered since Mr Meikle left is its own doing and does not arise from Mr Meikle leaving and soliciting work from these clients.

[58] I accept there is conflicting evidence before me in respect of this claim. However:

- (a) Mr Meikle's evidence and TechClean's evidence does not persuade me that BRS is wrong in its assessment of what occurred or mistaken in what it has been told or that it has simply made up the allegations – on the basis of untested affidavit evidence I cannot draw these conclusions.
- (b) There has been a lack of openness from Mr Meikle about his employment with TechClean. On the face of it Mr Meikle failed to advise BRS that he had accepted a role with TechClean in December 2021 when he was still an employee of BRS and owed duties to it to disclose this. Mr Meikle was then evasive or obtuse, or perhaps he simply lied, about working for TechClean. And he has failed to disclose the terms of his employment including his start date and his role – so for example whilst he says he is working on TechClean's KiwiRail project there is no detail about what his precise duties are and whether he will be doing that solely and for how long.
- (c) And, whilst TechClean's evidence about not directly competing with BRS for work and not needing or wanting to take BRS's work is persuasive, that too must be weighed against the lack of detail it has provided about Mr Meikle's

employment, including the how, why and when of offering work to Mr Meikle, the details of his role including start date and whether he is solely working on TechClean's KiwiRail project and for how long.

[59] Whilst BRS's claim that Mr Meikle has breached clause 28.3 of the IEA is not as strong as the claim relating to the alleged breach of clause 28.1, it is still arguable. So, there is a serious question to be tried in respect of Mr Meikle's alleged breaches of clause 28.3 of the IEA, both actual and prospective and I assess this to be a reasonably arguable case.

Conclusion

[60] In conclusion I find there is a serious question to be tried for the claims by BRS that Mr Meikle has breached clause 28.1 and clause 28.3 of the IEA.

The balance of convenience

[61] Assessing the balance of convenience requires consideration of the impact on each party if the interim injunctions are granted or not. I must also consider what happens if the interim position is reversed in any substantive determination. The question of whether the impact on a party is harm that can be adequately compensated by damages is relevant to these assessments. The strengths of the relative cases are also relevant.

[62] So, firstly the impact on the parties of granting the interim injunctions:

- (a) At its simplest if the injunctions are granted BRS will have the protection it seeks for its confidential information and client relationships – there is no hardship to it as a result and it will have the benefit of the contractual terms it agreed with Mr Meikle.
- (b) In contrast, Mr Meikle will be prevented from working for TechClean. Mr Meikle says this means he will be without work and unable to provide for his family and unable to meet his mortgage. However, that is the extent of the

evidence about harm Mr Meikle says he will suffer if the injunctions are granted. This means, despite what Mr Meikle says, I do not know if Mr Meikle will lose his job with TechClean, they may keep it open for the period of any injunction; I do not know if Mr Meikle will not be able to find other work in the interim, short term labouring work as counsel for BRS has suggested may be available; I do not know what outgoings Mr Meikle has on a regular basis and whether these can be met or not if he cannot work for TechClean (there may be other income available to his family or there may be some savings he can use); overall, I do not really know what the consequences will be for Mr Meikle and his family if he cannot work for TechClean.

[63] Secondly the impact of not granting the interim injunctions:

- (a) BRS will not have the protection for its confidential information and client relationships and may lose business.
- (b) Mr Meikle will be able to work as he currently does and there will be no impact on him.

[64] Thirdly, if the interim position is reversed in any subsequent investigation and determination by me:

- (a) If the injunctions are granted but then not upheld Mr Meikle can be compensated by damages for the financial loss he will have arising out of not being able to work for TechClean in the interim period. I am not aware of what, if any, other loss there may be so it is clear that damages would be an adequate remedy for Mr Meikle.
- (b) If the injunctions are not granted and then subsequently put in place then the possible loss to BRS is any loss of business it can satisfy me is attributable to Mr Meikle working for TechClean or approaching BRS's clients for work or

doing work for them, during the period of the restraints of trade. These damages may be difficult to quantify and may continue on beyond any determination I issue – a client lost during the restraint period may be a client lost indefinitely and therefore may represent an ongoing loss. The Court has recognised these factors concluding it might be impossible to put a party back in a position it would have been in but for the breach.⁸ Damages are not likely to be an adequate remedy for BRS in the circumstances.

[65] Added to this analysis is the fact that my conclusion is that BRS has, at this interim stage, relatively strong cases for breach of the restraint of trade provisions in the IEA.

[66] Overall, the balance of convenience weighs heavily in favour of BRS.

The overall justice

[67] 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.⁹

[68] To start, there are serious questions to be tried and the balance of convenience favours granting BRS the orders it seeks. Then, when I stand back and look at this case, the overall justice favours granting the orders sought.

[69] My assessment of the overall justice is heavily informed by the approach taken by the courts and, in particular as expressed by the Employment Court in *Stephen Green v Transpacific Industries Group (NZ) Limited*:¹⁰

⁸ *Janet Pottinger & Ors v Kelly Services (New Zealand) Limited* [2012] NZEmpC 101.

⁹ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

¹⁰ *Stephen Green v Transpacific Industries Group (NZ) Limited* [2011] NZEmpC 6.

[37] Ultimately, this Court must take appropriate cognisance of the clear signal given by the Court of Appeal in *Fuel Espresso v Hsieh*¹¹ that not only are such provisions to be taken seriously by the parties that have entered into them expressly but that they are amenable to enforcement by injunction to the extent that they are reasonable and otherwise lawful. Gone are the days, if they ever existed, when an employee could confidently sign up to a restraint and then breach it in the bold expectation that “those things are not worth the paper they are written on”.

Summary

[70] I am satisfied that BRS has a serious question to be tried in respect of the enforcement of clauses 28.1 and 28.3 of the IEA. And I am satisfied that the balance of convenience and overall justice of this case supports interim orders being made.

[71] The only significant factor is however, that the period of time for the injunctions should be shorter than the contractual provisions given the likelihood of reduction by me in any substantive investigation and determination. On this basis after assessing the evidence and weighing the relevant issues I grant the interim injunctions sought on the following terms.

[72] Troy Meikle shall not work for:

- (a) TechClean Limited before 21 July 2022; and/or
- (b) any business that competes with BRS within 75 kilometres of any of BRS’s offices before 21 July 2022.

[73] Troy Meikle shall not:

- (a) conduct any business for a client of BRS until 21 July 2022; and/or
- (b) canvass for any business from any client of BRS until 21 July 2022.

[74] A client of BRS for the purposes of the order in paragraph [73] is any person or entity who was a client of BRS in the period 21 January 2019 until 21 January 2022.

¹¹ *Fuel Espresso Ltd v Hsieh* [2007] NZCA 58.

Costs

[75] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority