IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2023] NZERA 753
3263819

	BETWEEN	ANNA LOUISE MCCORMICK-WILSON Applicant
	AND	ALESHIA MAE DOWLER Respondent
Member of Authority:	Peter van Keulen	
Representatives:	Ashleigh Fechney, advocate for the Applicant Tim Mackenzie and Kirsten Maclean counsel for the Respondent	
Investigation Meeting:	15 December 2023	
Submissions Received:	11 December and 15 December 2023 from the Applicant 13 December and 15 December 2023 from the Respondent	
Date of Determination:	18 December 2023	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Anna McCormick-Wilson operates a hairdressing business, Tanglez Hair Studio, in Ashburton.

[2] Aleshia Dowler was employed in the Tanglez business as Senior Stylist. After just over two years of working at Tanglez, Ms Dowler resigned and shortly after this began operating her own hair dressing business from her home, also in Ashburton.

[3] Ms McCormick-Wilson says that by operating this business Ms Dowler is breaching the restraint of trade provision in her employment agreement. She also says Ms Dowler has

solicited business from Tanglez clients and has interfered with the relationships Tanglez has with its clients and other businesses, which are also breaches of the restraint provisions.

[4] Ms McCormick-Wilson has lodged a claim against Ms Dowler in the Authority based on these alleged breaches and she seeks damages and an injunction to prevent further and ongoing breaches.

[5] In particular an injunction is sought on an urgent interim basis preventing Ms Dowler from continuing to operate her business until the substantive claim is resolved and permanent injunctions can be ordered.

[6] Ms Dowler has denied any liability in terms of the substantive claims and in response to the application for an interim injunction she says the restraint of trade is not enforceable and the injunction should not be granted.

The Authority's investigation

[7] I investigated Ms McCormick-Wilson's application for an interim injunction on 15 December 2023. As usual for an interim application, I did not hear any oral evidence as part of my investigation. The evidence I considered was presented through sworn affidavits from Ms McCormick-Wilson and Ms Dowler.

[8] 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.

What happened?

[9] Ms McCormick-Wilson employed Ms Dowler as a Senior Stylist in the Tanglez business on 13 July 2021. Ms Dowler signed an employment agreement on 18 July 2021 (the IEA).

[10] In a meeting on 19 September 2023, Ms Dowler handed Ms McCormick-Wilson a letter which set out her written resignation. In this letter Ms Dowler recorded that her last day of

employment would be 2 October 2023. And Ms Dowler also recorded that she was incredibly grateful for the opportunities she had been given in her position with Tanglez, and that she was grateful for Ms McCormick-Wilson being supportive of her professional growth.

[11] Ms McCormick-Wilson and Ms Dowler have conflicting evidence about what was discussed in the 19 September meeting:

(a) Ms McCormick-Wilson says she understood Ms Dowler was going to work at the local meat works for a period of time to save some money and then some time later, probably 12 months in line with the restraint period in her IEA, Ms Dowler would open up her own business.

(b) Ms Dowler says she advise Ms McCormick-Wilson that she was not going to work at the meat works but rather she would open her own business soon. Ms Dowler says Ms McCormick-Wilson was supportive of her setting up her own business and she was left with the impression that Ms McCormick-Wilson was not going to enforce the restraint of trade provisions in the IEA.

[12] On 23 September 2023 Ms McCormick-Wilson called Ms Dowler. Ms McCormick-Wilson says she had learnt that Ms Dowler had been telling staff about setting up her own hairdressing business from her house. From this, Ms McCormick-Wilson had the impression that Ms Dowler had already been setting up a hairdressing salon at her home behind her back, so she called Ms Dowler to find out what was going on.

[13] Both Ms McCormick-Wilson and Ms Dowler say this conversation did not go well. The end result was, regardless of what had been discussed previously:

(a) Ms McCormick-Wilson was now aware that Ms Dowler was intending to commence her own hairdressing salon from her house shortly after the end of her employment and Ms McCormick-Wilson was not happy about this.

(b) Ms Dowler now knew that Ms McCormick-Wilson was not supportive of her starting her own business because Ms McCormick-Wilson believed she was bound by the restraint provisions in her IEA and could not do that.

[14] What followed from this telephone call on 23 September 2023 was an exchange of correspondence about the restraint provisions in the IEA and the enforceability of the provisions. Ms McCormick-Wilson firmly believing Ms Dowler could not set up and operate a hairdressing business from her home for a period of 12 months. And, Ms Dowler believing the restraints were not enforceable and in any event Ms McCormick-Wilson had waived her right to enforce them in the 19 September 2023 meeting, so she could operate her own hairdressing business from her home.

[15] Ms McCormick-Wilson says in the week following 23 September 2023 she and other staff at Tanglez contacted clients who had upcoming appointments with Ms Dowler seeking to rebook them with a different stylist at Tanglez. Ms McCormick-Wilson says many were not interested in rebooking, some advising that they were going to Ms Dowler's salon.

[16] On 2 October 2023 Ms Dowler set up a Facebook page for her new business and then on 4 October 2023 she officially opened her hairdressing business, which operates from her home.

[17] Further exchanges of correspondence followed but the parties have been unable to agree on the enforceability of the restraint of trade provisions in the IEA and what this means for the continued operation of Ms Dowler's hairdressing business. Ms Dowler continues to operate her business and it is for this reason that Ms McCormick-Wilson seeks the interim injunction.

What are the issues I need to consider for the application for an interim injunction

[18] The law applying to applications for interim injunctions has been outlined and applied by the Court of Appeal and the Employment Court.[1] The issues to be determined at this interim stage are:

(a) Is there a serious question to be tried, that Ms Dowler has breached the relevant restraint of trade provision in the IEA and an order restraining her from operating a competing business should be made; and

[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.

(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 further determination?

[19] I will turn to consider each of these issues in order to determine Ms McCormick-Wilsons interim application.

A serious question to be tried

What is the relevant restraint of trade provision?

[20] The IEA includes three restraint of trade provisions. For the purposes of the application for an interim injunction Ms McCormick-Wilson relies on only one. This is clause 24.4 which states:

> 24.4 From the date your employment ends, you agree not to engage or prepare to engage in a business that competes with the business of the Employer for the duration of twelve (12) months within five kilometres from the location described in item 1 of the Schedule.

[21] The location set out in item 1 of the Schedule to the IEA is 35A Archibald Street, Tinwald, Ashburton, where the Tanglez hairdressing business was originally located. In 2021 the business was moved to new premises in the centre of Ashburton, 52 Cass Street.

What is the serious question to be tried?

[22] Whether there is a serious question to be tired, that there has been a breach of clause 24.4 of the IEA by Ms Dowler, involves assessing:

(a) Whether clause 24.4 of the IEA is a valid and enforceable restraint; and

(b) If clause 24.4 of the IEA is valid and enforceable, whether Ms Dowler has breached it and might continue to breach it.

[23] 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]

Is this restraint of trade provision enforceable?

[24] The prima facie position in respect of a restraint of trade clause is that it is unenforceable. As a result, the onus lies with Ms McCormick-Wilson to show that clause 24.4 of the IEA is enforceable. This involves two steps. First Ms McCormick-Wilson must show that she has legitimate proprietary interests that she wishes to protect. And, second, she must show that the restraint is no wider than is reasonably necessary to protect that proprietary interest.[3]

[25] In this case there is also an additional aspect that Ms Dowler raises. Ms Dowler says clause 24.4 is unenforceable because in the meeting on 19 September 2023 Ms McCormick-Wilson waived her right to enforce clause 24.4 because she consented to Ms Dowler starting her own business and was, in fact, fully supportive of this.

Has Ms McCormick-Wilson waived the right to enforce clause 24.4 of the IEA?

[26] Whilst Ms Dowler advances waiver as a basis for arguing that clause 24.4, if it is enforceable, cannot be enforced, her counsel rightly concedes that this issue cannot be resolved on the basis of the affidavit evidence and at this interim stage. Counsel says however, that it is a factor that goes to the serious question as it adds significantly to the question of how strong Ms McCormick-Wilson's case is.

[27] Ms McCormick-Wilson's advocate agrees regarding the resolution of the waiver point but adds, that actually the affidavit evidence shows that the requirements for waiver are unlikely to be met, so to the extent that waiver may impact on the serious question it largely has no effect. The advocate says that even based on Ms Dowler's affidavit evidence, if it was accepted in its entirety, there was no clear statement by Ms McCormick-Wilson that she was waiving her

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[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.

right to rely on and enforce clause 24.4 so that Ms Dowler could start her business on 4 October 2023. And, in fact the affidavit evidence simply shows there was, at best, a misunderstanding about when any business would be started by Ms Dowler. For these reasons there can be no waiver.

[28] I am not persuaded that the waiver issue has merit and is relevant to the question of the arguable case. On the affidavit evidence I conclude there is little merit in the argument. This is for the following reasons:

(a) I accept that the affidavit evidence of what occurred on 19 September 2023 shows there was a misunderstanding between the parties as to when Ms Dowler would start operating her business.

(b) There is no evidence of a clear statement of waiver by Ms McCormick-Wilson. Ms Dowler says she believed Ms McCormick-Wilson knew she was going to operate her business from her home after her notice period ended, but she does not say in her affidavit evidence that she told Ms McCormick-Wilson she was going to start on 4 October 2023 and that Ms McCormick-Wilson gave her approval on this basis.

(c) There is no evidence that Ms Dowler relied on the waiver (if it was in fact made). Rather the evidence shows she had already undertaken significant preparation to start her business before she resigned and she had no other job lined up – so she always intended to start her business irrespective of what Ms McCormick-Wilson said to her.

(d) If Ms McCormick-Wilson had waived her right to enforce clause 24.4 this was subsequently withdrawn in circumstances which suggest the withdrawal would be valid.

What is Ms McCormick-Wilson's proprietary interest?

[29] Turning to the question of a proprietary interest, Ms McCormick says the proprietary interests she wants to protect is Tanglez's client base, i.e. customer relationships built up through services offered by Tanglez, which is primarily hairdressing but also has other aspects.

[30] Customer relationships are a proprietary interest that can be protected.[4]

[31] Counsel for Ms Dowler says that whilst customer relationships are proprietary interests capable of protection, in this case the customer relationships are not interests belonging to Ms McCormick-Wilson. He says customer relationships in the hairdressing industry are personal and attach to a stylist not the business. He also says, in addition, there is no trading entity for the client base to attach to, so Ms McCormick-Wilson would need to satisfy me that all of Ms Dowler's customers that she cut hair for during her employment at Tanglez were in fact Ms McCormick-Wilsons. And, given that Ms McCormick-Wilson no longer cuts hair but specialises in makeup for clients, she has no proprietary interest in the customers that Ms Dowler cut hair for.

[32] I acknowledge that this is a credible argument. However, I am not persuaded that it is right. The fact that Tanglez is operated by Ms McCormick-Wilson in her own capacity rather than through a company is, in my view of no consequence. Tanglez is a business and irrespective of how it is owned and operated, the owner has a right to protect the business, which is fundamentally reliant on goodwill and its client base.

[33] In this case Ms Dowler was employed to work in the Tanglez business and she obtained the benefit of that.[5] Ms Dowler's evidence is she brought client with her to Tanglez but it is also the case that she cut and styled hair for other customers which must have been clients of Tanglez or put another way customers who sought to have their hair cut and styled in Ms McCormick-Wilson's business.

[34] Based on the affidavit evidence I am satisfied that Ms McCormick-Wilson through her business, Tanglez, has a client base and she therefore has a proprietary interest in the customer relationships which is capable of being protected by restraint of trade provisions.

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[4] *Stephen Green v Transpacific Industries Group (NZ) Limited* [2011] NZEmpC 6.
[5] An acknowledgement Ms Dowler made in her letter of resignation.

Is clause 24.4 of the IEA no wider than necessary to protect Ms McCormick-Wilsons client base?

[35] I must now consider if clause 24.4 of the IEA is no wider than is necessary to protect the Tanglez client base. This requires consideration of the duration of the restraint, its scope and geographical limits.[6]

[36] Clause 24.4 of the IEA provides that Ms Dowler cannot:

(a) engage or prepare to engage in a business that competes with Tanglez,

(b) within 5 kilometres from 35A Archibald Street, Tinwald, Ashburton,

(c) from 4 October 2023 until 4 October 2024.

[37] At the outset I note that a restriction period of 12 months from the end of employment is too long. This is compounded by the fact that the 12-month period relates to undertaking any preparation to engage in a competing business. The affidavit evidence shows that the preparation for establishing a home-based hairdressing business would probably be at least three months. So, the cumulative effect is a 15-month restriction on engaging in a competing business.

[38] An appropriate length of time for a restriction of the type set out in clause 24.4 for a hairdressing business is likely to be three to four months. This period would provide Ms McCormick-Wilson the opportunity to rebook appointments with those clients already scheduled to have their hair cut and styled by Ms Dowler or those that might make appointments. I am persuaded by the suggestion that more than one appointment might be necessary to establish a new stylist with a customer and consider that four months would cover this – however this is subject to a full assessment of appropriate evidence in the investigation of the substantive claims.

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

[39] Overall, then in relation to the time of the restriction, given that I have the power to modify the restraint period and, in this case would likely do so, the time frame expressed is not problematic for an interim assessment.[7]

[40] In terms of the geographical scope counsel for Ms Dowler points out that the five kilometre radius effectively rules out Ms Dowler from establishing a competing business anywhere in Ashburton. And given that Ashburton is where she lives and has always worked this is unreasonable.

[41] In my view it is unfortunate that the five kilometre radius rules out all of Ashburton but I do believe and accept that the area is reasonable.

[42] Finally on the question of validity of clause 24.4 of the IEA the advocate for Ms McCormick-Wilson says the overall scope of the restriction is reasonable because it is limited to engaging in a business; the advocate says Ms McCormick-Wilson is not prevented from working as a stylist at another hairdressing salon. She also says the scope relates to protecting a client base and non-competition is important because restrictions based on non-solicitation of clients are largely ineffective, particularly given the reach of passive marketing through social media platforms.

[43] Counsel for Ms Dowler says the overall scope is unreasonable as it effectively prevents Ms Dowler from working in her own business for more than 12 months anywhere in Ashburton.

[44] I consider the scope to be acceptable as clause 24.4 of the IEA applies to a competing business and does not prevent Ms Dowler from continuing to work as a stylist in Ashburton. And the scope as it applies to not competing is important and justifiable on the basis that other restrictions are less effective.[8]

[45] Overall, I conclude there is a serious question to be tried that clause 24.4 of the IEA is enforceable, particularly with modification of the time frame.

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[7] Section 83 of the Contract and Commercial Law Act 2017.

[8] This is the same point made in relation to confidential information in *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153.

Breach of the restraint of trade provisions in the IEA

[46] If clause 24.4 of the IEA is enforceable then Ms Dowler is in breach of it by undertaking her own hairdressing business from her home and will continue to breach the clause.

Conclusion

[47] In conclusion I find there is a serious question to be tried that clause 24.4 of the IEA is enforceable and that by setting up and commencing her own hairdressing business Ms Dowler is in breach of clause 24.4. Overall, I consider this to be a reasonably strong case given the likelihood of modification to shorter time period of three to four months.

The balance of convenience

[48] 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 subsequent determination on the substantive claims.

[49] In my view there are three things that are relevant to the balance of convenience, in this case:

(a) The harm that will follow if I grant the injunction or not and whether that resulting harm can be adequately compensated by damages.

(b) The strength of Ms McCormick-Wilson's case.

(c) The effect of granting an injunction now when it is over two months since the end of Ms Dowler's employment and will likely be a further three months until the substantive claims are investigated and resolved.

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

(a) Ms McCormick-Wilson will have the opportunity to protect her client base, albeit that some damage has already been done to it.

(b) Ms Dowler's counsel says an interim injunction is likely to be of little benefit to Ms McCormick-Wilson as customers will follow Ms Dowler irrespective of

whether she starts her business now or later. And, in any event, those that want to follow her have already done so in the two months Ms Dowler has been operating her business.

(c) In contrast counsel says the impact on Ms Dowler of granting the injunction will have a significant financial effect; he describes it as "financially ruinous". The injunction will mean she is unable to work in her business and given the time of the year will be unable to find other work.

(d) If the injunction is granted and then reversed this financial hardship for Ms Dowler can be compensated by damages – it would be an assessment of what she would likely have earned if the injunction had not been imposed. There may however be an additional element that is more difficult to assess, being compensation her for the period of time her business cannot operate and develop. Overall though it appears that damages would be an adequate remedy for Ms Dowler if the injunction was granted and then reversed subsequently.

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

(a) Ms McCormick-Wilson will not have an opportunity to try and keep those customers who might follow Ms Dowler.

(b) Ms Dowler can continue to operate and will not have the financial hardship or impact on her business.

(c) Counsel for Ms Dowler says not granting the injunction allows the reality of the market to play out – customers inevitably follow a stylist, particularly one with whom they have had a customer relationship with for a period of time - and that has happened. If this is wrong in law then damages can be assessed and paid to Ms McCormick Wilson.

[52] Overall, I find that damages are less likely to be an adequate remedy for Ms McCormick-Wilson if I do not grant the injunction. 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.[9] And there is the possibility of damages not being paid by Ms Dowler.

[53] Added to this analysis is the fact that my conclusion is that Ms McCormick-Wilson has, at this interim stage, a relatively strong cases for breach of clause 24.4 in the IEA (albeit with modification).

[54] Finally, the time consideration. There are two points here:

(a) Granting an interim injunction is moot because "the horse has already bolted". Ms Dowler has set up her business, she has operated for two months and those clients that wish to keep having their hair cut and styled by her have already switched.

(b) Because the time of the restraint period in clause 24.4 is likely to be reduced to three to four months and a determination on the substantive claim is not likely to be made for another three months (i.e. early March 2024 at best) the effect of the interim injunction is to restrict Ms Dowler for more than five months, which is greater than what any modification to the time frame will provide.

[55] On the first point I think, whether there is any utility in granting an interim injunction is arguable and depriving Ms McCormick-Wilson of the opportunity to try and gain some benefit from the injunction is not equitable particularly given that she is, on the face of it, not in the wrong here. To disallow an injunction because this reason informs the balance of convenience, is to effectively allow Ms Dowler to benefit from her own wrongdoing if I do subsequently find she has breach clause 24.4 and this does not seem right to me.

[56] On the second point, I accept if the time period for the restraint in clause 24.4 is reduced to three months by me in a determination on the substantive claims and this is done in March 2024, Ms Dowler will have has been restrained for longer than the three months – likely to be at least five months. However, there are two points on this:

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

(a) If the restraint period in clause 24.4 is three months, then the actual effect of the restraint is that that Ms Dowler would not be able to start setting up her business until 4 January 2024 and given that the setting up would appear to take at least three months to undertake she would not start operating her business until 4 April 2024. So arguably there will be no loss to Ms Dowler in a reduced restraint period.

(b) If the effect of reducing the restraint period in clause 24.4 of the IEA means Ms Dowler has been restrained for longer than necessary this can be compensated by damages. Ms McCormick-Wilson will be aware of this and she has given an undertaking as to damages.

[57] Overall, the balance of convenience weighs in favour of Ms McCormick-Wilson and the granting of an interim injunction.

The overall justice

[58] 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]

[59] To start, there is a serious question to be tried and the balance of convenience favours granting Ms McCormick-Wilson the order she seeks.

[60] Then, when I stand back and look at this case, the overall justice favours granting the orders sought, not just because of the arguable case and the balance of convenience but also because:

(a) Ms Dowler appears to be in the wrong, given the strongly arguable case, including that she started setting up her business whilst still employed by Ms McCormick-Wilson.

(b) Ms Dowler could have sought an Authority determination on the validity and enforceability of clause 24.4 of the IEA before embarking on any activity.

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

(c) Ms Dowler has already had the benefit of operating her business for two months and Ms McCormick-Wilson has not had that chance to protect her business, which is what clause 24.4 entitles her to.

[61] Finally, I have referred to this aspect before when considering interim injunctions but I do so again as it remains persuasive for me. 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*:[11]

> [37] Ultimately, this Court must take appropriate cognisance of the clear signal given by the Court of Appeal in *Fuel Espresso v Hsieh*[12] 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

[62] I am satisfied that Ms McCormick-Wilson has a serious question to be tried in respect of the alleged breach of clause 24.4 of the IEA. And I am satisfied that the balance of convenience and overall justice of this case supports interim orders being made.

[63] The only significant factor is however that the period of time for the injunction should be shorter than 12 months and there will almost certainly be a reduction of this period of time 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:

(a) Ms Dowler shall not engage in any business that competes with Tanglez within an area of 5 kilometres from 5A Archibald Street, Tinwald, Ashburton until further order of the Authority.

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[11] *Stephen Green v Transpacific Industries Group (NZ) Limited* [2011] NZEmpC 6.
[12] *Fuel Espresso Ltd v Hsieh* [2007] NZCA 58.

(b) For the avoidance of doubt, this means Ms Dowler cannot operate her hairdressing business from her home address at 20 Alford Forest Road, Ashburton until further order of the Authority.

[64] Finally, I note that both parties through their representatives indicated a willingness to go back to mediation once I had determined this application, irrespective of the outcome. On that basis I direct the parties to attend mediation to consider resolving the substantive claims and suggest that meditation is undertaken as soon as possible.

Costs

[65] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority