**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

AA 236/10
5304687

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| | BETWEEN | TOURNAMENT PARKING LIMITED<br>Applicant |
| | AND | PAUL MUNRO<br>Respondent |

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| Member of Authority: | K J Anderson |
| Representatives: | J Rooney, Counsel for Applicant<br>D Organ, Advocate for Respondent |
| Investigation Meeting: | 17 May 2010 at Auckland |
| Determination: | 21 May 2010 |

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## DETERMINATION OF THE AUTHORITY

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### Employment Relationship Problem

[1] By way of an urgent application received by the Authority on 3rd May 2010, the applicant, Tournament Parking Limited ("Tournament") seeks an interim injunction preventing the respondent, Mr Paul Munro, from commencing employment with Wilson Parking New Zealand Limited, in breach of the restraint of trade provisions contained in Mr Munro's employment agreement.

[2] In addition to the *Statement of Problem* and *Statement in Reply* from the respective parties, the Authority has received an initial affidavit and an affidavit in reply from Mr James Brown, Manager, Director and part-owner of Tournament, and an affidavit from Mr Munro. Also there is an affidavit from Mr Stephan Wuffli, General Manager, Wilson Parking New Zealand Limited, in support of Mr Munro's position.

**Background Facts and Evidence**

[3] Tournament leases, manages and operates carparks in Auckland, Hamilton, Wellington and Christchurch. Mr Munro commenced his employment with Tournament in February 2005 in the position of Leasing and Licensing Manager on a salary of $35,000. He was also paid a car allowance of $5,000 and had an entitlement to bonus payments based on percentages of first month rentals for new customers. Mr Munro was employed under the terms and conditions of a written employment agreement; signed on 24th February 2005. From 29th June 2009, Mr Munro was employed as the Business Manager for Tournament and at the time of his resignation, he was on a salary package of approximately $95,000 to $105,000 (including a commission of 5% of weekly net sales) and was provided with a company car rather than being paid a vehicle allowance.

**The Employment Agreement**

[4] The relevant clauses of the employment agreement, for the purposes of the matters before the Authority, are:

> ***11. Confidentiality***
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> ***11.1*** *For the purposes of this clause, "confidential information" means any knowledge or information the Employee may acquire or may have already acquired during the course of the Employee's employment by the Employer concerning the business, operations, affairs, property, customers, clients, or principals of the Employer and shall include, but shall not be restricted to, Call Sheets, Customer Cards, lists of clients and suppliers, payment arrangements, payment rates, financial information and methodologies.*
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> ***11.2*** *The provisions of this clause shall cease to apply to information which enters the public domain other than that directly or indirectly entered through the failure of the Employee to observe its terms.*
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> ***11.3*** *The Employee shall during the continuance of employment and after its termination, however occasioned:*
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> ***11.3.1.*** *not disclose any confidential information to any person other than an employee of the Employer authorised to receive it;*
>
> ***11.3.2.*** *use his best endeavours to prevent the disclosure or publication of any confidential information'*
>
> ***11.3.3*** *not use or attempt to use, any confidential information to his own benefit as distinct from the benefit of the Employer;*
>
> ***11.3.4.*** *not use or attempt to use, any confidential information in any manner which may injure or cause loss, whether directly or indirectly, to the Employer.*
>
> ***11.3.5.*** *not turn his personal knowledge or influence over any employees, clients, suppliers, customers, or contractors of the Employer to his own direct or indirect benefit;*

***11.3.6*** *not make any copies or records of any confidential information, except as expressly permitted by the Employer*

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***11.4*** *The terms and conditions of this agreement shall remain confidential between the Employer, the Employee and their representatives and shall not be disclosed by the Employee without the written consent of the Employer.*

***21. Restraint***

***21.1.*** *The Employee agrees that for a period of one year following the termination of his employment for any reason the Employee will not:*

***21.1.1*** *attempt to encourage or persuade any of the Employer's clients, suppliers and customers with whom the Employee has dealt during the period of 12 months immediately preceding the termination of the Employee's employment and of whose trade circumstances the Employee are* [sic] *aware, to terminate or restrict trade relations with the Employer;*

***21.1.2.*** *attempt to encourage or persuade any employee, contractor or consultant of the Employer to terminate their contract or agreement with the Employer;*

***21.1.3.*** *engage in employment or otherwise receive remuneration for services rendered (whether in a contracting capacity or otherwise) from, any individual, company or organisation, whose business involves the leasing, licencing, management, sale, or other dealing or disposition, of carparking services, including, but not limited to Wilson Parking Limited (or any of the Wilson Parking group of companies);*

***21.1.4.*** *purchase, operate, or otherwise be involved in a business that is in competition with the Employer, including, but not limited to Wilson Parking Limited (or any of the Wilson Parking group of companies), except with the prior written consent of the Employer. This does not apply to holding shares in a company listed on the Stock Exchange.*

***21.2.*** *The Employee acknowledges that these constraints are fair and reasonable for the proper preservation of the goodwill of the business of the Employer, and the value of the remuneration, training, and benefits referred to in this agreement are fair and reasonable consideration for the Employee giving the restraints.*

***21.3*** *Should this clause be held to be invalid for any reason, the remainder of this agreement will continue in force and effect as if the invalid provision had been deleted, provided however that the parties to this agreement may negotiate a valid and enforceable provision in replace* [sic] *of the valid provision.*

***26. Employee Acknowledgement***

***27.1*** *The Employee confirms that before entering into this agreement he was supplied with a copy of it in draft, and was advised by the Employer of the right to seek independent advice about its terms, and was given reasonable opportunity to seek advice.*

## The Reason for the Dispute

[5] On 19th April 2010, Mr Munro informed Mr Brown that he was resigning to take a position with Wilson Parking New Zealand Limited ("Wilson"). Mr Munro

gave the contractual one month's notice with the intention of taking up his employment with Wilson on 17th May 2010. The evidence of Mr Brown is that Mr Munro informed that his lawyers and Wilson's lawyers had looked at the restraint provision of Mr Munro's employment agreement and it was thought to be unenforceable. Mr Brown also attests that Mr Munro told him that Wilson had agreed to cover any legal fees that Mr Munro might incur relating to the restraint. Mr Munro says that he does not recall the latter statement and believes it is "*unlikely*" he said this, as at the time that he informed of his resignation, there had been no mention of proceedings to enforce the restraint.

[6] Mr Brown attests that having become aware of Mr Munro's intentions, he instructed lawyers to write to Mr Munro and inform him of his obligations under the restraint and confidentiality provisions of the employment agreement ("the agreement"). Accordingly, a letter dated 19th April 2010 was sent to Mr Munro. As well as reminding Mr Munro of his contractual obligations to Tournament, the letter sought a written undertaking from him, by 4:00p.m, Thursday, 22nd April 2010, that he would comply with the restraint and confidentiality provisions of the agreement. Mr Munro was also informed that while the restraint provisions in the agreement apply for a period of one year, Tournament was prepared to reduce this period to five months, following the expiry of the notice period, that is; the restraint would apply from 16th May to 16th October 2010. Mr Munro was informed that unless an undertaking was received from him within the time specified, Tournament would take legal action to restrain him from breaching his contractual obligations.

[7] The lawyers for Tournament also wrote to Wilson and received a response via a letter dated 22nd April 2010 from the lawyers for Wilson, informing that they believed that the restraint provision was unreasonable in a number of respects, which are set out. Nonetheless, without any obligation to do so, Wilson gave certain undertakings in regard to the role of Mr Munro for the first six months of his employment with Wilson, as well as confirming that it was not entitled to utilise confidential information belonging to Tournament. A meeting between Wilson and Tournament to discuss any concerns relating to Mr Munro's employment was also proposed on a "without prejudice basis" but nothing came of this.

[8] Also on 22nd April 2010, Mr Munro's representative responded informing that he believed that the restraint provision was unreasonable in a number of respects. In particular, the 12 month period, the unlimited geographical area, that there was an inequality of bargaining power between the parties, and there was no, or inadequate consideration given for the restraint. However, Mr Munro was prepared to give an undertaking, albeit not to the extent that Tournament required. In summary, the undertaking related only to refraining from encouraging or persuading any of Tournament's customers or suppliers, to terminate or restrict their trade relations with Tournament, and refraining from encouraging or persuading employees, contractors or consultant's engaged by Tournament, from terminating their agreements with the company.

[9] The parties attended mediation on 14th May 2010 but were not able to resolve the issues in question. Mr Marshall was on garden leave for the one month notice period but commenced his employment with Wilson on 17th May 2010.

**The Legal Principles**

[10] Tournament has the onus of proving, on the balance of probabilities, that the terms of the restraint are reasonable and that it goes no further than is reasonably necessary to protect its interests. It is also recognised that restraints of trade in employment agreements are prima facie unlawful and therefore void because they interfere with the freedom to work.

[11] The law regarding interim injunction proceedings in the Authority is well established:[1]

(a) Is there an arguable case?

(b) If so, is there an adequate alternative remedy available to the applicant, for example; damages.

(c) If not, where does the balance of convenience lie?

(d) What is the overall justice of the case?

[12] In respect to contractual restraints of trade, there is probably no better summary than the twenty seven propositions set out by Chief Judge Goddard in

[1] *Airgas Compressor Specialists v Bryant* [1998] 2 ERNZ 42.

*Airgas Compressor Specialists v Bryant* [1998] 2 ERNZ 42 at 53-55. In regard to the circumstances of this matter, the following are particularly relevant:

(1) A covenant in restraint of trade in an employment contract is void as being contrary to the public interest and being void, is incapable of being enforced unless one of two conditions is satisfied.

(2) First, a covenant in restraint of trade can be enforced if it is found to be reasonable as between the parties and with reference to the public interest.

(3) Secondly, such a covenant (although unreasonable) is capable of being enforced if the [Authority] is prepared under the Illegal Contracts Act 1970,[2] to give effect to the contract of which the restraint is a part after so modifying the restraint that it would have been reasonable when the contract was entered into. However, modifying and giving effect to the contract is not the only option that the [Authority] has to consider. It may also:
(i) Delete the provision and give effect to the contract as so amended; or
(ii) Where the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand, decline to enforce the contract.

(4) To determine whether a covenant is reasonable with reference to the interests to the parties, several questions must be asked. First, does the employer have a proprietary interest which is entitled to protection or is the covenant merely an attempt to limit or reduce competition? Secondly, are the duration, geographical ambit and scope too broad? Thirdly, is the covenant prohibitive of competition generally, or is it limited to proscribing the solicitation of clients of the employer? Fourthly, is the net cast wide or confined to a named competitor or reasonably compact class of competitors?

(5) The employer may possess a proprietary interest in trade secrets, confidential information, and its business and trade connections. The employer is entitled to protect its business connection – that is, to prevent the departing employee from enticing its clients or customers. These are the most obvious but not the only examples of legitimate proprietary interest.

(8) The permissible area and duration of the restraint will vary according to the circumstances of each case, and no generalisations are possible.

(9) The nature and extent of the employer's business, the nature of the employee's employment in it, and the range of business activities covered by the covenant should be considered together when examining the time and spatial limits of the covenant. The protection afforded the employer must be no more than adequate for the purpose.

(17) The party relying on a restrictive covenant must establish its reasonableness as between the parties. Once this is achieved the onus of proving that the covenant is contrary to the public interest rests on the party attacking the covenant.

**Is there an arguable case?**

[13] On the evidence currently before the Authority, it appears that Tournament has a prima facie arguable case. This is particularly so because, as of the day of the

[2] Via s.162(f) of the Employment Relations Act 2000.

investigation meeting (17th May 2010), Mr Munro commenced his employment with Wilson, consistent with his signalled intentions to do so, despite his knowledge of and involvement in, these proceedings. While the restraint upon Mr Munro is far-reaching in regard to its purpose, that is, preventing him from taking the knowledge and experience gained at Tournament to another parking industry employer that competes with them, it appears that the primary thrust of the restraint is to prevent Mr Munro being employed by the major competitor of Tournament being - Wilson.

[14] Notwithstanding that further and substantive examination of the matters going to the enforceability of the restraint provisions of the agreement is required, the forceful reality is, that Mr Munro has already taken up his employment with Wilson, despite the incontrovertible fact that his employment agreement contains a restraint that has not been tested as to its enforceability. Therefore, Mr Munro is prima facie in breach of sub-clauses 21.1.3. and 21.1.4. of his employment agreement and upon the evidence before the Authority, there is a very real concern on the part of Tournament that Mr Munro will, if not purposely, then inadvertently, provide Wilson with information that will increase its competitive edge with consequent damage to the business interests of Tournament.

[15] In response to the concerns of Tournament, the general tenor of Mr Munro's evidence is that he does not have sufficient knowledge of the overall operation of the business of Tournament to such degree, that should he even inadvertently impart to Wilson what he does know, it is unlikely to assist their competitive aspirations. In a similar vein, Mr Wuffli attests that Wilson has been in the industry, in New Zealand, for almost 30 years, compared with Tournament's operation of 13 years, and given Wilson's own experience and management systems, it is very well versed in the industry. The implication appears to be that Wilson is somewhat ambivalent about the value of the knowledge and experience gained by Mr Munro during his employment with Tournament.

***An Arguable Case - The Enforceability of the Restraint of Trade***

[16] Clearly, if the Authority is to restrain Mr Munro, on an interim basis, as sought by Tournament, the onus is upon Tournament to show, at least to the level that an arguable case is established, that the restraint of trade provision is reasonable. In

determining the reasonableness of the restraint, as it pertains to the interests of both parties, a number of questions must be asked:

1. ***Does Tournament have a proprietary interest which is entitled to protection?***

In *Airgas*[3] the Employment Court held that an employer may possess a proprietary interest in trade secrets, confidential information and its business or trade connections. Apart from the evidence of Mr Brown, it is reasonable to conclude that as a business with a very substantial turnover, operating in a competitive environment requiring strategic decision making and a high degree of business management, Tournament has all of the necessary components of a proprietary interest, that can be protected under the restraint of trade. There is a conflict in the evidence (which remains to be tested) from Mr Munro and Mr Brown as to how much knowledge Mr Munro has of the information pertaining to those matters which Tournament regards as key to its business and which it wishes to protect from its competitors. However, I accept that Mr Munro held a senior position and that he, more probably than not, had access to and was responsible for, many matters that are at the commercial heart of the business of Tournament.

[17] Even taking into account those areas, where the evidence as to Mr Munro's knowledge of the operations of Tournament are concerned is in conflict, and subject to testing (in a substantive hearing), this is a very substantial business, but with a small management team, of which I accept Mr Munro was a fundamental part of. This appears to be also reflected in his title (Business Manager), job description, and final remuneration package. It is also of note that Mr Munro will be remunerated at a higher rate in his employment at Wilson than what he was being paid at Tournament. Presumably, Wilson have recognised that Mr Munro has knowledge and experience at a senior level that warrants him being remunerated accordingly.

[18] I conclude that not only does Tournament have a proprietary interest that it is entitled to protect under a restraint of trade, but also, Mr Munro had a sufficient involvement in the operations of the business to warrant the restraint being included in his employment agreement.

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[3] [1998] 2 ERNZ 42.

2. ***Is the geographical ambit of the restraint reasonable?***

[19] Tournament has carparking operations in Auckland, Hamilton, Wellington, and Christchurch. There is no evidence that it has business interests or operations in any other area of New Zealand, nor has any reason been advanced as to why the geographical coverage should be unrestricted. The restraint does not identify any geographical coverage and hence possibly by intention, and certainly by implication, the geographical ambit is currently unlimited. I conclude that the geographical ambit of the restraint is unreasonable as it has the potential to restrict Mr Munro from working in the carparking industry in locations where Tournament does not have a proprietary business interest. It is appropriate that sub-clause 21.1.3. of the restraint clause be modified pursuant to s.8(1)(b) of the Illegal Contracts Act 1970, to reflect that it should only apply to the locations where Tournament has a proven proprietary business interest. An order will follow accordingly.

3. ***Is the term of the restraint reasonable?***

[20] The term of the restraint is for "a period of one year." It seems to me that in the circumstances, a period of one year is at the upper limit as to what is reasonable. In this I am cognisant of the findings in *Walley v Gallagher Group Ltd* [1998] 3 ERNZ 1153, where Colgan J. reviewed the authorities and concluded that a restraint of 12 months was at the upper end of a range of restraint appropriate for a qualified and experienced professional person. He found that:

> The 21 cases analysed reveal that it is exceptional for a restraint of even 1 year's duration, let alone longer, to have been found to be reasonable. There are however, cases where up to several years' restraint have been held to be reasonable but these are rare: *Cooney v Welsh* [1993] 1 ERNZ 407 (CA) and *Marine Helicopters Ltd v Stevenson* [1996] 1 ERNZ 472 (EC).

[21] I also recognise that Tournament, in an apparent endeavour to avoid matters progressing to litigation, proposed that the term of the restraint should be for five months following the expiry of the notice period, i.e. to 16th October 2010, albeit Tournament says that this time frame is less than it prefers in order to make appropriate adjustments to its business to protect it against the possibility that Mr Munro may impart important information to Wilson. But even without this undertaking from Tournament, and taking into account all of the circumstances in regard to whether the restraint should be enforced, particularly and most importantly, that Mr Munro may not be able to work in his chosen employment for a given period, I would have in any event have modified the term of the restraint to six months,

consistent with the findings, in similar circumstances, of the Employment Court in *Credit Consultants Debt Services v Wilson (No 3)* [2007] ERNZ 252 at 263. The modification pursuant to the Illegal Contracts Act, will be to reduce the period of one year down to five months and an order will follow accordingly.

## 4. **Was there adequate consideration for the restraint?**

[22] Mr Munro says that he was not paid adequate consideration for the restraint and that in a similar vein, there was an inequality of bargaining power. It is commonly accepted that at the time that he entered into the employment agreement (24th February 2005) he was paid $35,000 plus a car allowance of $5,000 and had an entitlement to bonus payments based on percentages of first month rentals for new customers. It is the argument for Mr Munro that the remuneration did not contain any component that could be considered to be fair consideration for the scope of the restraint. The Court of Appeal has recently considered the matter of consideration in *Fuel Expresso Ltd v Hsieh* [2007] 3 ERNZ 60. The Court stated that:

> 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 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 the restraint of trade clause. It is also a very-well settled principal of contract law that even mutual promises can be consideration for each other. As Treitel G H, *Law of Contract* (9th ed) London, Sweet & Maxwell, 1995, 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 on the case of mutual promises.

[23] While the Court of Appeal went on to hold, that on more extreme facts than existed in *Fuel Expresso*, where there is "a low salary set against a harsh restraint," it could be more relevant to the Courts discretion in regard to the adequacy of consideration, this did not arise there. Nor do I find that it arises in the circumstances of Mr Munro. The evidence is that Mr Munro had gross earnings of $66,857 from February 2005 to February 2006. Applying *Fuel Expresso*, that is more than adequate consideration for the bargain entered into in February 2005. While the issue about any possible inequality of bargaining between the parties was not really pursued by Mr Munro, I note that at clause 27 of the agreement, Mr Munro confirms that before entering into it, he was supplied with a copy of it in draft, and was advised by his employer of the right to seek independent advice. There is no evidence that Mr Munro

was ever dissatisfied with the terms of the agreement until he decided to seek employment elsewhere.

***Arguable case summary***

[24] On the basis of the above findings and subject to the identified modifications for which orders will follow, I find that the restraint of trade is reasonable and that Tournament has established to a sufficient degree that there is an arguable case for enforcing the restraint.

**Is there an alternative remedy available?**

[25] Having found that there is an arguable case, the question then arises as to whether there is another remedy available to Tournament other than restraining Mr Munro as sought. At this early stage of Mr Munro's departure from the employment from Tournament to Wilson, it is not possible to identify the damages that may be incurred by Tournament due to Mr Munro breaching the restraint provision of his employment agreement. However, given the information that has been conveyed to the Authority in regard to the annual turnover of Tournament, it seems that if the concerns of Tournament were to be realised, the potential cost to the business in revenue lost, due to Wilson obtaining a competitive advantage, could be quite substantial, albeit difficult to specifically identify. But in any event, it can reasonably be assumed that it would be beyond the financial means of Mr Munro to repair in the form of monetary damages, hence I must conclude that there is not an alternative remedy available to Tournament.

***Where does the balance of convenience lie?***

[26] Any assessment of the balance of convenience must weigh up the respective hardships that may arise if the interim relief sought by Tournament is granted. It has been submitted for Tournament that if the restraint is not enforced, Tournament will suffer loss in respect of which it will not be adequately compensated for by an award of damages. And even if Mr Munro is found to have contributed substantively to any damages (which are notoriously difficult to identify[4]), by the imparting of his knowledge of Tournament's strategic information and trade secrets to Wilson, it is

[4] *Credit Consultants Debt Services v Wilson* (ibid).

unlikely he will be able to pay for any such damage. On the other hand, Tournament has provided an undertaking as to any damages that may be warranted following a substantive hearing of the matters at issue, and as a substantial company, it is able to pay these.

[27] Mr Munro has attested that if the restraint were to be enforced and he is unable to work for Wilson, even if he were able to obtain alternative employment in another industry utilising his other skills and experience, (some of which he says is outdated), the income earned would be "far below" what he currently earns within the parking industry. Mr Munro further attests that he has a wife and two very young children along with mortgage commitments to sustain, hence he cannot afford to take a salary reduction as a result of taking employment in another industry, even if Wilson were prepared to retain a position for him until the expiry of the restraint period.

[28] If it was just about the respective resources of the parties, the balance of convenience would favour Mr Munro. However, I must also take into account that Mr Munro made a conscious decision to commit a prima facie breach of the restraint provision of his employment agreement by taking up employment with Wilson. And whether deliberately or inadvertently, he imparts knowledge to Wilson, that has the potential to damage the business interests of Tournament and the opportunity for it to obtain redress is problematic. In the round, I find that the balance of convenience is marginal either way.

**What is the overall justice of the case?**

[29] The remedy of injunction is discretionary and so at this point the Authority must stand back from the overall detail of the tests of arguable case and balance of convenience and assess whether the overall justice of the case warrants the making of the injunction sought.[5] Mr Munro raises two particular matters that it is appropriate to address under this head. The first is related to sub-clause 21.3. of the employment agreement. It provides that:

> *Should this clause be held to be invalid for any reason, the remainder of this agreement will continue in force and effect as if the invalid provision had been deleted, provided however that the parties to this agreement may negotiate a valid and enforceable provision in replace* [sic] *of the invalid provision.*

[5] *Century Yuasa Batteries (NZ) Ltd v Johnson* 11 November 2004, unreported, Colgan J, AC 65/04.

[30] As Mr Organ has submitted this is "an unusual clause." I agree. It is difficult to ascertain what application it has and it is badly drafted. Mr Organ submits that it "*pre-empts and avoids a possible variation of the employment agreement pursuant to section 8 of the Illegal Contracts Act and section 162(f) of the Employment Relations Act 2000*." Mr Organ submits that in the event that clause 21 is for any reason, found to be invalid (unreasonable), then the clause is deleted and the parties may then negotiate a valid and enforceable provision to replace it. Perhaps that perception of the provision could apply in the event that the parties sought a determination from the Authority under s.161(1)(a) of the Employment Relations Act, as indeed it would have been prudent for Mr Munro to have done before resigning from his employment. However, I do not accept that the sub-clause can have the effect of preventing the application of s.8 of the Illegal Contracts Act when a prima facie breach of the restraint exists.

[31] As I have indicated above, I have found that the restraint is unreasonable in regard to its term and geographical ambit and it is my intention to make orders modifying those specific terms, but I do not accept that the affect of such modification should be to delete the clause in total and hence leave Tournament without a restraint to enforce. Surely, such an outcome would be perverse.

[32] Mr Munro also draws attention to the confidentiality clause in the agreement (clause 11). He has given an undertaking that he will adhere to this provision. As I understand it, his position is that this should give Tournament all the protection it needs, given the content of the clause. At first glance this appears to be a reasonable argument. However, Tournament says that clause 11 does not provide it with sufficient protection against the potential damage that might flow from Mr Munro being employed by Wilson during the restraint period. The experience of the Authority is that it is difficult to quantify actual damage in such cases and then to recover such and hence I must accept that there is some merit in Tournament's arguments also, albeit at this point in the proceedings all potential actions and effects are speculative.

[33] Finally, in regard to the overall justice of the case, I am cognisant of the position of the Court of Appeal in *Fuel Expresso*[6] in regard to the enforceability of a

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[6] Ibid

restraint of trade. Having found that the restraint was "plainly reasonable" the Court went on to state that:

> Agreements are made to be kept. Mr Hsieh was employed and trained, but then 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.

[34] And so it is with Mr Munro, I conclude. He has left the employment of Tournament "in the face of a clear contractual provision preventing him from doing what he has done." Perhaps he relied on advice from various sources that there would not be any serious consequences by doing so because the restraint could not be enforced. Whether it was a calculated gamble by Mr Munro that the restraint was unenforceable and hence he would be secure in taking up employment with Wilson, I do not know, but if this is so, it seems to me that it was rather foolhardy for him to take such a gamble without putting the enforceability of the restraint to the test. An avenue was available to him via s.161 of the Employment Relations Act 2000 to do so, prior to leaving his employment with Tournament.

[35] Looking at the overall justice of the case, I conclude that it is both just and equitable to grant the interim order

**Determination**

[36] I have found that subject to the following modifications, the restraint of trade is reasonable to such degree that an interim order is appropriate. Also pursuant to s.164 of the Employment Relations Act 2000, I am satisfied that I have identified the problem in relation to the employment agreement and I have directed the parties to attempt in good faith to resolve that problem via the use of mediation but the problem has not been resolved; and I am satisfied that any other remedy other than a modification of the restraint provision of the agreement would be inappropriate or inadequate.

[37] Via s.162 of the Employment Relations Act, pursuant to s.8(b) of the Illegal Contracts Act 1970, clause 21 of the agreement is modified to be enforced as follows:

> **21. Restraint**
>
> **21.1.** The Employee agrees that for a period of five months following the termination of his employment, for any reason, the Employee will not:

**21.1.1** attempt to encourage or persuade any of the Employer's clients, suppliers and customers with whom the Employee has dealt during the period of 12 months immediately preceding the termination of the Employee's employment and of whose trade circumstances the Employee is aware, to terminate or restrict trade relations with the Employer;

**21.1.2.** attempt to encourage or persuade any employee, contractor or consultant of the Employer to terminate their contract or agreement with the Employer;

**21.1.3.** engage in employment, or otherwise receive remuneration for services rendered (whether in a contracting capacity or otherwise), from any individual, company or organisation, whose business involves the leasing, licencing, management, sale, or other dealing or disposition, of carparking services in Auckland, Hamilton, Wellington or Christchurch, including, but not limited to Wilson Parking Limited (or any of the Wilson Parking group of companies);

**21.1.4.** purchase, operate, or otherwise be involved in a business that is in competition with the Employer, operating in Auckland, Hamilton, Wellington or Christchurch, including, but not limited to Wilson Parking Limited (or any of the Wilson Parking group of companies), except with the prior written consent of the Employer. This does not apply to holding shares in a company listed on the Stock Exchange.

**21.2.** The Employee acknowledges that these constraints are fair and reasonable for the proper preservation of the goodwill of the business of the Employer, and the value of the remuneration, training, and benefits referred to in this agreement are fair and reasonable consideration for the Employee giving the restraints.

**21.3.** Should this clause be held to be invalid for any reason, the remainder of this agreement will continue in force and effect as if the invalid provision had been deleted, provided however that the parties to this agreement may negotiate a valid and enforceable provision in replacement of the invalid provision.

[38] It is the order of the Authority that Mr Munro must, from the date of this determination, adhere to the conditions of the restraint as set out above until such time as the substantive investigation meeting is held and a final determination is issued, or such other time as the Authority may order upon the application of the parties.

**Costs**

[39] Costs are reserved pending a final determination on the substantive matter.

**K J Anderson**
**Member of the Employment Relations Authority**