IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2022] NZERA 176
3163585

	BETWEEN	ASAAP Limited Applicant
	AND	FRE-NAVY MILLIGAN First Respondent
	AND	AARON GOOCH Second Respondent
	AND	JUST US PAINTING AND DECORATING LIMITED Third Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Adam Mapu, advocate for the Applicant Jeremy McGuire, counsel for the Respondent
Date:	3 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 15 February 2022, ASAAP Limited (ASAAP) lodged with the Authority a statement of problem seeking urgent orders that Fre-Navy Milligan, the first respondent, and Aaron Gooch, the second respondent, comply with their respective post-employment obligations not to disclose confidential information or solicit or do work for specified clients of ASAAP. Breaches of good faith, damages and penalties are also claimed.

[2] Penalties are also sought against Just Us Painting and Decorating Limited ("Just Us"), the third respondent, on the basis that the company had incited, instigated, aided or abetted the breaches. Just Us, says it was not a party to any employment relationship with the applicant

and therefore cannot have breached the employment agreement and asks that the claim against it be struck out, with costs. This will be considered at a substantive investigation meeting, when full submissions can be heard and the evidence can be tested.

[3] At the second case management call on 25 March 2022, following mediation, ASAAP confirmed it was now applying to the Authority for interim relief to have the first and second respondents comply with the non-solicitation and non-work clauses in their employment agreements. The application was accompanied by an undertaking as to damages and requested that the matter be addressed with urgency.

[4] ASAAP had also initially sought an order that the first and second respondents work out their notice. The notice period ended before the Authority heard the matter and that issue can be considered at the substantive investigation meeting.

Investigation Meeting

[5] As is usual in applications for interim relief the evidence provided to the Authority was contained in affidavits or affirmed statements and was not able to be properly tested. Affidavits were received from Adrian Roberts, director of ASAAP, Sharna Lee England, administrator at ASAAP, and Abby Stewart from Bossed and who works with the applicant's representative. Ms Milligan and Mr Gooch filed one affidavit on behalf of them individually and the company, Just Us. They filed a second affidavit after the investigation meeting.

[6] Oral submissions were made by the parties' representatives and both parties provided written submissions. Additional submissions were provided by the first and second respondents on 5 April 2022.

Background

[7] ASAAP is a duly incorporated company carrying on the business of painting and decorating with its registered office in Palmerston North. Adrian Roberts is the sole director and shareholder, and Ms England is his partner and performs administrative duties for ASAAP.

[8] Ms Milligan and Mr Gooch both commenced employment at ASAAP on 23 November 2020. Ms Milligan was employed as a supervisor and tradesperson and Mr Gooch a tradesperson, painter and decorator. They both resigned from ASAAP on 21 February 2022

having decided to work for themselves. They formed the company Just Us which is the third respondent.

[9] Mr Roberts became aware during the notice period that one or more of the first and second respondents had contacted clients of ASAAP and discussed them leaving ASAAP. On 28 January, Mr Roberts says he saw the ASAAP work van that Ms Milligan and Mr Gooch were using at a potential ASAAP job site that involved Dynamic Decorating. Mr Roberts had provided a quote to Dynamic in December 2021 for some painting work. He says Mr Gooch accepted a couple of days later that he and Ms Milligan were checking the job out for themselves.

[10] On 31 January, Mr Roberts says he asked Ms Milligan and Mr Gooch to check the progress at an ASAAP job site at a kindergarten. He was later called by a foreperson at that site, from Dawson and Gerrard, who told him that both respondents had approached another foreperson from Dawson and Gerrard, advising they were available for work and handed out business cards.

[11] Ms England also spoke to Ms Milligan and Mr Gooch that day when they were picking up water blasters about exit interviews. She asked Ms Milligan if she understood the non-solicitation clause in her contract. She says Ms Milligan replied "yes, but its ok because they are not your client, just another business" or words to that effect. Ms England repeated the human resources advice they had received, which was that the first and second respondents could not engage in or solicit customers or clients they had met or worked with while working at ASAAP.

[12] On 31 January, Mr Roberts also informed Ms Milligan that she was not to use the work van for anything outside her employment with ASAAP. Ms Milligan then advised by text that she was not going to work out her notice and later that evening Mr Gooch returned the company vehicles and keys. Mr Roberts says Mr Gooch was abrupt and abusive and using profanities. Neither Ms Milligan or Mr Gooch worked out their notice.

[13] Then, on 1 February, Mr Roberts learned that a client of ASAAP, Programmed Property Services, had been in discussions with the first and second respondents and may have offered work to Ms Milligan. Mr Roberts was also told that the first and second respondents were working at a school for Dynamic Decorating. Mr Roberts attached a photograph to his affidavit of what is described as the "job board" at Programmed Property Services showing Just Us

Limited on the board. There was no evidence about the photo or where it had come from. On its face it shows what Mr Roberts says it shows and this was not denied by the first and second respondents.

[14] Attached to the statement of problem was a list of ASAAP clients with those that Ms Milligan and Mr Gooch had worked with while employed at ASAAP underlined. Dawson and Gerrard are not underlined. Dynamic Decorating and Programmed Property Services are on the list and underlined which means ASAAP say they are clients that Ms Milligan and Mr Gooch had dealings with while at ASAAP and are restrained from dealing with until the three-month period has ended.

[15] Mr Roberts also attached a screenshot to his affidavit of the quote he gave to Dynamic Decorating in December 2021 of $16,606.75, to show loss incurred by ASAAP caused by the first and second respondents breaching their restraint clauses.

[16] In their affidavit, Ms Milligan and Mr Gooch deny they solicited each other or any of ASAAP's clients. They accept they did tell "one or two people" they intended leaving ASAAP to work for themselves while still employed, but never "chased" any of ASAAP's clients.

[17] They accept they have carried out work for Dynamic Decorating and attached an email from Craig Rastrick, representing Dynamic Decorating, confirming that in December 2021, he saw Mr Gooch in the supermarket. Mr Gooch made it known at that time that he and Ms Milligan were looking at going out on their own. Mr Rastrick says he asked Mr Gooch if he would be interested in subcontracting to Dynamic Decorating during that conversation.

[18] Mr Rastrick also confirmed that the last work ASAAP did for him was in July 2021. He acknowledged there had been discussion about further work for ASAAP, but said he ended up using a different company for that work.

[19] Also attached to the first and second respondents' affidavit was an email dated 28 March from Amak Homes asking if they were available to do work. It was clarified in that email that Amak Homes is a different entity to Amak Construction presumably because Amak Construction are on ASAAP's list of clients that the first and second respondents had done work for while at ASAAP. The first and second respondents argue the restraint should extend to entities controlled by the same person, however, I do not read the restraint clauses as requiring that.

[20] The investigation meeting was adjourned when it became evident the respondents' lawyer did not have some of the attachments to the applicant's affidavits, in particular, the screenshot of the quote. The meeting was adjourned so that could be remedied, and further instructions sought.

[21] On 5 April, after the investigation meeting, a further case management call was held. Mr McGuire confirmed he had the attachments and the parties agreed they were now in a position to provide updated written submissions to the Authority. Ms Milligan and Mr Gooch also provided a second affidavit regarding the attached screenshot of a quote that had not been seen by them. They say they did not get that job.

Employment obligations

[22] Both Ms Milligan and Mr Gooch had identical clauses in their respective employment agreements headed up "Confidential Information" and "Non-Solicitation of Clients and Employees". In Ms Milligan's employment agreement, the three-month restraint was set out in clause 30 and in Mr Gooch's it was in clause 29. They provide the following:

> 24.1 The Employee shall not, whether during their employment or at any time after their termination use, disclose or distribute to any person or entity any confidential information such as but not limited to company turnover, products and/or services, messages, data, trade secrets, client lists, client details, information relation to client deals or personal information about the management and staff acquired by the Employee during their employment, except as necessary for the proper performance of their duties and responsibilities under the agreement or as required by law.
>
> 24.2 This agreement is a confidential agreement between the Employee and Employer and must be treated as such.
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> 30.1 The Employee agrees that for a period of 3 months following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer:
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> > 30.1.1 Seek to solicit or carry out any work of the same nature for any client or customer of the Employer with which the Employee had any contact or dealings whilst employed by the Employer.

30.1.2 Solicit or engage or employ any employee of the Employer with whom the Employee had any dealings whilst employed with the Employer.

30.2 The Employee acknowledges that the provisions contained in this clause are reasonable and no more than sufficient for protection of the operations of the Employer and accepts this restriction fully.

[23] These clauses mean that any client or customer of ASAAP's who Ms Milligan and Mr Gooch had contact or dealings with when they were employed at ASAAP would be out of bounds for three months after their employment ended. Of ASAAP's list of 20 clients, 10 are underlined. Mr Robert's affidavit indicated that he believes the first and second respondents have worked for two clients on that list.

[24] I note the confidentiality clauses are not time limited and because no evidence was provided on breaches of confidential information, other than a general inference, the interim orders will only deal with the non-solicitation and non-dealing clauses.

Last day of employment

[25] There is a dispute between the parties about the last day of employment. This date affects the end date for the three-month restraints. If the first and second respondents resigned on 21 January 2022, the last day of employment would be 18 February, at the end of the four weeks notice period. In that case the post contractual obligations expire three months later on 18 May 2022. If, as the first and second respondents submit, the employment relationship came to an end on 31 January then the post-employment obligations expired on 28 February 2022.

[26] It was submitted this was the final date of employment on the basis that the actions of the first and second respondents, including Ms Milligan's text that she would not be working out her notice and Mr Gooch returning the vehicle, amounted a unilateral resignation by the first and second respondents and that it was effective immediately.

[27] The following clauses in the employment agreements are relevant to when the employment relationship was terminated (noting that the same provisions appear in both the first and second respondent's employment agreements but with different numbering):

> The Employee is required to give 4 weeks' notice of resignation in writing to the Employer.
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> The Employer, at its discretion, may elect to pay the Employee in lieu for all or part of such notice and not require the Employee to work, or may direct the Employee to undertake any duties, whether related to the Employee's position or not, as the Employer may think fit during the notice period.
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> Unless the Employee's employment is otherwise terminated by the Employer during the notice period the Employee remains bound by the terms and conditions of employment until the expiry of the notice period.

[28] The notice period commenced from 21 January when they gave notice of resignation. The employment agreements require four weeks' notice. While there is discretion for the employer to pay the employee their notice in lieu, there was no evidence that this was the case.

[29] This appears to be a situation where the employees' gave notice but later chose not to work out their notice and there is no evidence the employer took steps to terminate their employment, which means that employment ended on 18 February 2022 at the end of the notice period.

Interim relief

[30] When breaches of the parties' employment agreements are alleged, the Authority has jurisdiction to issue compliance orders coupled with an application for urgency, or alternatively a compliance order can be sought together with an interim injunction.[1]

[31] The legal tests to be considered by the Authority in assessing the application for interim relief are well settled.[2] The principles relating to interim injunctions were set out by the Court of Appeal in *NZ Tax Refunds Ltd v Brooks Homes Ltd*:[3]

> The applicant must first establish that there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous. Next, the balance of convenience must

[1] *WN v Auckland International Airport Ltd* [2021] NZEmpC 153.
[2] *American Cyanide Co v Ethicon Limited* [1975] AC 396, *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited* [1985] 2 NZLR 129, *WN v Auckland International Airport Limited* [2021] NZEmpC 153 [15 September 2021], *NZ Tax Refunds Ltd v Brook Homes Ltd* [2013] NZCA 90 at [12] – [13] and *Savage v Wai Shing Ltd* [2019] NZEmpC 141 at [32].
[3] *NZ Tax Refunds Ltd v Brook Homes Ltd* [2013] NZCA 90 at [12] – [13].

> be considered. This requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. Finally, an assessment of the overall justice of the position is required as a check.
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> The grant of an interim injunction involves, of course, the exercise of a discretion … This is subject to the qualification, however, that whether there is a serious question to be tried is an issue which calls for judicial evaluation rather than the exercise of a discretion.

[32] The Employment Court recently observed in *Savage v Wai Shing Ltd* [4]

> An interim injunction is fundamentally different to a permanent injunction. Under the general law, at the interim stage the parties legal or equitable rights are uncertain. At that time, the object is to preserve the Court's ability to give effect to the parties substantive legal or equitable rights at trial. It has been described as a 'holding remedy' to address a present position until the merits of the case can be fully adjudicated; or as a process to 'hold the ring' pending final determination of the merits or other disposal of the dispute. It does so by maintaining the status quo, which is the last settled position between the parties.

[33] Therefore, in considering ASAAP's application for interim orders the Authority is required to consider the following:

(i) Whether there is an arguable case for enforcement of the restraint clauses?

(ii) Where the balance of convenience lies pending the substantive investigation and final determination of ASAAP's claim?

(iii) Whether there is an adequate alternative remedy other than injunctive relief available, such as damages?

(iv) Where does the overall justice of this case lie until the substantive matter can be determined?

Seriously arguable case?

[4] *Savage v Wai Shing Ltd* [2019] NZEmpC 141 at [32]

[34] The issue for determination is whether or not there is a seriously arguable case for enforcement of confidentiality, non-solicitation and non-work clauses in Ms Milligan and Mr Gooch's employment agreements with ASAAP. This necessarily requires consideration of the lawfulness of restraint clauses.

[35] The threshold for a serious question is that the claim is not frivolous or vexatious.

[36] With reference to ASAAP's client list, if the clauses are enforceable, Ms Milligan and Mr Gooch are prevented from soliciting or working for the 10 clients of ASAAP, underlined on the list attached to Mr Roberts' affidavit.

[37] The starting point is that restraint of trade clauses will only be enforceable if they can be shown to be necessary to protect a legitimate interest of the employer and are no wider than is necessary for that purpose.[5]

Do ASAAP have a legitimate proprietary interest?

[38] ASAAP claims a proprietary interest over its customer relationships and confidential information. ASAAP says the restraint clauses are narrow in scope and are necessary to prevent the first and second respondents exploiting the relationships obtained during their time with ASAAP and to avoid a springboard advantage for unfair competition.

[39] The first and second respondents submit that no evidence of a propriety interest was provided, and that Ms Milligan and Mr Gooch were never part of the administration and management of the back office and therefore had no say or control or access to ASAAP's confidential information.

[40] ASAAP must identify some advantage or asset inherent in the business which can be regarded as the employer's property. An employer is not entitled to protections against mere competition on the part of a former employee.[6] Where there is a risk of the former employer's clients being enticed away, information held about those clients by employees at a fairly junior level may not be sufficiently sensitive to amount to information of a proprietary nature.[7]

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[5] *Air New Zealand v Kerr* [2013] NZEmpC 153 at [23].
[6] *Stenhouse Australia Limited v Phillips* (1974) AC 391 (PC) at 400.
[7] *Broadcasting Corp of New Zealand Ltd v Neilsen* (1988) 2 NZELC 96,040 (HC) at 96,049.

[41] One recognised category of propriety interests are business or trade connections, often referred to as client relationships, developed or sustained by an employee during their employment. An employee may be reasonably restrained from soliciting clients or customers they had particular knowledge of or contact with during the employment. This includes situations where customers have relied on the skill of the employee or dealt with them exclusively so this personal connection may sway those customers into moving their business from the employer to the employees' new activity.[8]

[42] Ms Milligan held a foreperson role, so was not in a junior position in the company and both parties agreed there is a competitive market in their location for the services they provide. ASAAP and Just Us are competing in the same market for the same customers and clients.

[43] ASAAP is also a relatively new business and the first and second respondent has worked with half of its client base. In these circumstances trade connections would be important to protect in terms of preparing to meet the competition.

[44] I am satisfied, albeit based on untested affidavit evidence, that there is a seriously arguable case for enforcement of the restraint clauses because it is likely ASAAP will be able to claim a proprietary interest in its trade connections with clients.

Reasonableness of duration and scope

[45] The first and second respondents submit the restraint clauses were unreasonable and should be deleted in their entirety or modified by the Authority at least in terms of the time period.

[46] Once an employer has established a legitimate proprietary interest, it then needs to demonstrate that the restraint is reasonable and does not go beyond protecting that interest any more than is necessary. The length of time reasonably allowed for a restraint protecting a proprietary interest in a customer connection is not longer than the period adequate to give the former employer an opportunity to prepare to meet the competition. It is not so long as to provide for the certainty of winning that competition or simply to enjoy a competitive edge over others also seeking to do business with the same clients.[9]

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[8] *Airgas Compressor Specialists Ltd v Bryant* [1988] 2 ERNZ 42 at 53.
[9] Above n6, at 402.

[47] I note the restriction on working for "any client" the first and second respondents "had contact or dealings with" while employed by ASAAP, appears at first blush to be very wide in scope. It could include clients who they had minimal contact with and did not work with which appears to be wider than a proprietary interest in trade connections could encompass.

[48] ASAAP is also a relatively young business, and they have provided a list of 20 clients of which there are 10 they say the first and second respondents would be restrained from soliciting or doing work for. With that clarification, 10 potential clients is not so wide in scope as to suggest that it has been interpreted to include clients' of ASAAP the first and second respondents had only fleeting dealings with.

[49] There is no geographical limitation and no non-compete clauses in the restraints on the first and second respondents and a three-month period was recently accepted as being reasonable in the Authority in relation to restraint of trade clauses.[10]

[50] In these circumstances, the restraints appear to be sufficiently limited in scope and duration so as to allow ASAAP time to prepare to meet the competition, as opposed to being anti-competitive.

The non-solicitation and non-work clauses

[51] The first and second respondents submit that the clauses preventing them from doing any work for ASAAP clients they had contact with is not clear and on that basis also unenforceable. The inference is that the first and second respondents knew about the non-solicitation clause (and solicitation is denied), but did not have knowledge of the non-work clause, which is also denied, despite the email from Dynamic Decorating confirming a breach of the non-work clause in relation to it.

[52] Ms Milligan confirmed she was aware of what the restraint clauses meant on 31 January when she referenced a different interpretation to Ms England's which tends to indicate that at that time, Ms Milligan had considered the meaning of the clauses but discounted it. The clauses are straight forward and set out in language that is easy to understand. I note that when reading the employment agreements, clause 30.2 (or 29.2) draw attention to the restraints.

[10] Above n 11 at 61.

[53] While solicitation is denied by the first and second respondents, I anticipate it will be a focus at the substantive hearing. However, the restraint clause has two parts to it, solicitation and non-work. Dynamic Decorating and Programme Property Services are listed as clients that Ms Milligan and Mr Gooch had dealings with when they were employed at ASAAP. That was not denied by Ms Milligan and Mr Gooch which means it appears breaches have already occurred. Although hard to determine until the evidence is tested, it is likely one or more breaches occurred prior to the notice period ending. Certainly, it is seriously arguable that there is a case for enforcement of the restraint clauses regardless of when the breaches first occured.

Balance of convenience

[54] This part of the analysis involves a weighing exercise and requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order.

[55] ASAAP says it has already experienced the loss of two customer relationships, and that it did not win the contract quoted on in December 2021 it says, is further evidence of a loss of that business relationship.

[56] I have already touched on the reasonableness and the scope and duration of the clauses, insofar as they can be assessed at this stage. The first and second respondents can solicit and do work for any clients they wish to do business with other than the underlined ones on ASAAP's list. They have enquiries about work from at least one other entity (Amak Homes). In these circumstances, they appear free to earn a living, just not by working with the ten specified clients of ASAAP.

[57] The first and second respondents submit because of the issues raised about the restraint clauses, including ambiguity of the clauses, and their denials of any breaches, that damages will be an adequate remedy, should the clauses be found later to be enforceable.

[58] ASAAP takes the position that because the period of restraint is still in force, and there is evidence of a breach, that damages alone would not be an adequate remedy. The ability of the first and second respondents to meet the cost of damages if awarded at a later date was of concern to ASAAP and no financial information was provided by the first and second respondents.

[59] The first and second respondents have set themselves up in business this year and any decision the Authority makes would need to take into account the effect interim orders have on their ability to earn a living.

[60] Based on the affidavit evidence, I am satisfied breaches of the non-work clauses are likely to have occurred. Noting this, and that the three- month period is still in force and that damages are more than likely not an adequate remedy, I find that the balance of convenience falls in favour of ASAAP.

Overall justice

[61] Currently the restraint clauses are still in force, there is an admission that the non-work clause has been breached, whether there has also been solicitation will likely be a focus of the substantive matter and damages do not appear to be an adequate remedy.

[62] While compliance with their post-employment obligations will impact on Ms Milligan and Mr Gooch, the impact is limited to a subset of ASAAP's clients and time limited and the first and second respondents still have an opportunity to argue the restraints were not reasonable at the substantive hearing.

[63] On the other hand, ASAAP, entered into agreements with the first and second respondents that have not been honoured and appear to have been breached, if not from the date the employment ended, then from very soon after. I am satisfied that the overall interest of justice falls in favour of ASAAP.

Interim orders

[64] Fre-Navy Milligan and Arron Gooch are ordered to comply with the restraints of non-solicitation and non-dealing set out in their respective employment agreements with ASAAP.

[65] The issue as to whether or not the company aided and abetted the actions of the first and second respondents will be addressed at the substantive investigation meeting.

Costs

[66] Costs are reserved pending a final determination on the substantive matters.[11]

Sarah Kennedy
Member of the Employment Relations Authority

[11] For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1