

**Attention is drawn to the order  
prohibiting publication of certain  
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 561  
3154842

BETWEEN                      CONSET CONSTRUCTION  
   LIMITED  
   Applicant

AND                              SANGEON (JAMES) SONG  
   Respondent

Member of Authority:      Marija Urlich

Representatives:            Stephen Langton, counsel for the Applicant  
   Aaron Lloyd and Hannah King, counsel for the  
   Respondent

Investigation Meeting:     24 November 2021 (Audio Visual link)

Submissions and further    24 and 29 November 2021 from Applicant  
information received:      24 November 2021 and 1 December 2021 from the  
   Respondent

Determination:              15 December 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      Conset Construction Limited (CCL) operates a specialist concrete construction company based in Auckland designing and building large commercial and industrial buildings and other concrete structures. Mr Song was employed by CCL as a project engineer from 9 February 2021 until 22 October having given one month's notice of resignation on 25 September. On or about 26 October he commenced work with a competitor business.

[2] On 1 November 2021 CCL lodged an application alleging Mr Song was in breach of restraint provisions in the employment agreement and seeking compliance orders and damages. An application for interim injunction relating to the restraint clauses in the parties' employment agreement (the IEA), undertaking as to damages and supporting affidavits were also filed. On 2 November the Authority granted the application urgency and directions were made to progress the matter including directing the parties to attend mediation which has occurred.

[3] Mr Song has filed a statement in reply, notice of opposition to the interim injunction and supporting affidavits.

[4] Clause 27 of the IEA contains the restraints the parties agreed to when Mr Song's employment commenced with CCL in February 2021:

**27. RESTRAINT ON OTHER ACTIVITIES**

27.1 The Employee acknowledges that whilst performing his/her duties hereunder, he/she will be privy to confidential information and trade secrets belonging and pertaining to the Employer and associate Companies. The Employee further acknowledges that during the course of employment the Employee may obtain personal knowledge of or influence over customers and employees of the Employer and associate Companies.

27.2 The Employee's remuneration includes consideration for the undertaking by the Employee that he/she will not either during the Employee's employment or for a period of twelve (12) months following the termination for any reason thereof, either for himself/herself or for any other person, Company, or entity, directly or indirectly:

(a) **Non-solicitation of employees** - induce or solicit, or endeavour to induce or solicit, any officer, consultant, director, agent, manager, contractor, adviser or employee of the Employer or associate Companies to terminate his or her employment or relationship with the Employer or associate Companies;

(b) **Non-solicitation of customers** - induce, solicit or endeavour to entice away from the Employer or associate Companies for the purpose of providing services similar or related to those provided by the Employer or associate Companies, any person, company or entity who was at any time within the period of twelve months prior to the ending of the Employees employment, a customer of the Employer or associate Companies or negotiating with the Employer or associate Companies with a view to doing business;

(c) **Restraint of Trade** - carry on business so as to compete with the Employer or associate Companies.

27.3 Each of the undertakings contained in each of the sub-clauses above constitutes a separate undertaking by the Employee and is separately enforceable by the Employer.

27.4 If any undertaking under this clause is subsequently held to be void but would be valid if some part were deleted or the period or areas of application were reduced then such undertaking will apply with such modification as may be necessary to make it valid and effective.

[5] CCL seeks an interim injunction preventing Mr Song from working for the new employer pending determination of the substantive claim. It seeks to enforce the non-compete restraint at cl 27.2.c in particular and says the injunction is necessary because:

- Mr Song is bound by his agreement entered in exchange for good consideration to be restrained from working for a competitor business for 12 months;
- he did not take steps reasonably available to him to seek a declaration as to the reasonableness of the restraint;
- there is the potential for breach of the restraint by disclosing CCL's confidential information given his conduct during his notice period, including not telling CCL he was going to work for a competitor and speaking in a loose manner to a customer about his going to work for the competitor and his access to and knowledge of CCL's confidential information during his employment which he may disclose, either advertently or inadvertently to the competitor; and
- the near impossibility of CCL being able to detect any such breach.

[6] Mr Song opposes the interim injunction sought on the basis that the restraints are unreasonable and unenforceable. He says the steps he has taken are reasonable to protect CCL's interests and refers to the undertakings provided dated 1 November that he will not before 8 March 2022 (a period of four and a half months representing approximately half the period of his employment with CCL) solicit customers or staff and will abide indefinitely by his obligations with respect to confidential information and his further proposal of 12 November that he had not and will not misuse CCL's confidential information, would work for his new employer on a project out of Auckland for up to four and a half months or if that work finished earlier, other arrangements would be made one of which would include being seconded to a related company which does not compete with CCL. In his affidavit dated 19 November 2021 he avers he does not intend to solicit any CCL customers or clients at all.

[7] For completeness CCL offered on 19 November to reduce the non-compete restraint to six months.

[8] The parties have not been able to resolve this employment relationship problem despite their efforts. This determination deals only with CCL's application for interim injunction. Investigation meeting dates of 10 and 11 February 2022 are held for the substantive claim.

### **Non-publication order**

[9] Mr Song seeks non-publication orders in respect of his identity and that of his new employer, Conslab Limited (Conslab), the nature of his employment on the project he is currently working on out of Auckland and his current remuneration. An application for a non-publication order must establish specific adverse consequences arising from the publication of identity that would justify a departure from the fundamental principle of open justice though with lesser weight at an interim setting.<sup>1</sup>

[10] CCL opposes the non-publication orders sought in respect of identity of Mr Song and Conslab and does not oppose the non-publication orders sought in respect of the nature of work and remuneration.

[11] It is accepted the information as to the nature of Mr Song's current work and remuneration is sensitive and that there is no public interest in the material being published even at an interim stage. This is an appropriate matter in which to issue an interim non-publication order. For completeness, the redacted material on Mr Song's affidavit [99] – [101] is so directed.

[12] The Authority orders the information identified at paragraphs 6.1(b) (ii) and (iii) in Mr Song's submission dated 24 November 2021 subject to an interim non-publication order issued under clause 10(1) of the Second Schedule of the Act.

[13] With respect to Mr Song's identity the Authority is not satisfied the concerns raised even at an interim setting about potential damage are so serious and or likely to be exacerbated by publication of identity as to justify the order sought. With respect to

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<sup>1</sup> *Crimson Consulting Limited v Berry* [2017] NZEmpC 94 at [96] and *FVB v XEY* [2020] NZEmpC 82 at [11] – [12].

Conslab, it is a third party and its cooperation in these proceedings is acknowledged but these do not strike me as grounds for the non-publication order sought.

[14] On balance, the requisite high standard has not been met and the interests of justice do not require non-publication of Mr Song and Conslab's identity at an interim setting.<sup>2</sup>

### **The Authority's investigation**

[15] On 16 November 2021 the Authority held a second case management conference with the parties' representatives to progress CCL's interim injunction application at which a timetable for filing evidence and submissions and an investigation meeting date were agreed. The parties have complied with the timetabling directions. By consent the investigation meeting was held by audio visual link.

[16] In determining this matter affidavit evidence of Alan Ross, general manager of CCL, Craig McCarthy, a director of CCL, Mr Song and Timothy Walker, general manager of Conslab has been considered as have the parties' statements of problem and reply, notices of opposition, the documents attached thereto, the parties' submissions and further information filed. Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested and in applying the relevant tests the Authority is not required to resolve any disputes.

### **The relevant law**

[17] Section 127 of the Employment Relations Act 2000 (the Act) confers jurisdiction on the Authority to grant interim reinstatement. In considering CCL's application for interim injunction the Authority is required to consider the following:<sup>3</sup>

- (i) Does CCL have an arguable case that Mr Song has breached the restraint of trade in the employment agreement and an order restraining him from working for Conslab for up to 12 months should be made?

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<sup>2</sup> *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [78] and *XYZ v ABC* [2017] NZEmpC 40, EMPC 69/2017 and *FVB v XEY* [2020] NZEmpC 82 at [11] – [12].

<sup>3</sup> *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [7].

- (ii) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that CCL and Mr Song will incur as a result of the interim injunction being granted (or not granted)?
- (iii) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

### **An arguable case?**

[18] Whether there is an arguable case of breach of the IEA involves an assessment of two questions:

- (i) whether the restraint is a valid restraint, the prima facie position being restraints of trade are contrary to public law and not enforceable; and
- (ii) if the restraint is found to be valid, whether by working for Conslab, Mr Song is in breach of the restraint.

[19] An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success.<sup>4</sup> The threshold for a serious question or arguable case as stated in *McInnes* is that the claim is not frivolous or vexatious:

However, as *Brooks Homes Ltd* makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous. The merits of the case (insofar as they can be ascertained at an interim stage) maybe relevant in assessing the balance of convenience and overall interests of justice...<sup>5</sup>

[20] Mr Song worked for CCL as a project engineer for about nine months. In this role he was mostly involved in the construction stage of CCL's work. CCL says during the course of his duties Mr Song would have had direct access to and used confidential information to create construction drawings and then undertake the construction of buildings including optimising construction drawings during the construction stage and reviewing weekly labour usage and material pricing against budget.<sup>6</sup> CCL says Mr Song had ready access to confidential material through its IT system and that he needed

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<sup>4</sup> *X v Y Ltd v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

<sup>5</sup> *McInnes* above n 1, at [9].

<sup>6</sup> Affidavit Alan Ross [12] and affidavit in reply Alan Ross [11.a].

to access this system in order to fulfil his duties. It says further Mr Song's conduct during his notice period highlights the risk of breach either advertent or inadvertent.

[21] Mr Song says CCL cannot establish even the low threshold of arguable case with respect to clause 27.2(c) because:

- (a) Mr Song is not carrying on business so as to compete with CCL;
- (b) the work he is currently doing for Conslab outside Auckland (or otherwise anticipated) is a different type of work to that he undertook for CCL and he is not and will not be involved in pitching or pricing for work;
- (c) he has given an undertaking to comply with his confidentiality obligations but in any event he has nothing to disclose because he is not involved in any tendering process and he did not access confidential information or trade secrets in such a way that he could retain the information and use it to the detriment of CCL;
- (d) if the Authority were to accept CCL and Conslab are competitors the scope of the restraint is problematic – the wording of the restraint is ambiguous, the geographic scope is unreasonable given Mr Song only worked for CCL in Auckland and the 12-month duration is arbitrary and unreasonable;
- (e) the circumstances in which the restraint was entered is relevant to enforceability – CCL did not draw Mr Song's attention to the restraints when he was offered the position, he did not seek legal advice before entering the IEA because he did not understand he needed to and English is not his first language.

*Is the restraint of trade enforceable?*

[22] This question requires CCL to establish a legitimate proprietary interest in what it seeks to protect by the restraint and that the restraint is no wider than reasonably necessary to protect that interest.<sup>7</sup> CCL seeks to protect its confidential information and trade (customer and installer) relationships. The necessity of a restrictive covenant

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<sup>7</sup> *Air New Zealand v Kerr* [2013] NZEmpC 153 at [23].

to protect confidential information is well established including to protect the inadvertent disclosure of confidential information in subsequent employment.<sup>8</sup>

[23] I am satisfied CCL has established an arguable case that it has confidential information in which it has a proprietary interest capable of being protected by a restraint of trade. I am also satisfied there is evidence beyond the frivolous or vexatious threshold that Mr Song had access to that information and there is a risk he may inadvertently breach the obligation owed to CCL under the restraint and that such a breach would be difficult to detect. Further, I am satisfied Mr Song has gone to work for a competitor of CCL. There is also, and relevantly to the assessment of arguable cases, a dispute between the parties as to the extent and nature of confidential information to which Mr Song may have had access and this could be said to highlight a risk of inadvertent disclosure.

[24] The next question is whether the restraint is no wider than is necessary to protect CCL's proprietary interests. In *Kerr* the court said this question requires consideration of the duration of the restraint, its scope and geographical limit.

[25] CCL's claim the 12 month length of the restraint is reasonable is somewhat undermined by its offer to Mr Song to reduce it to 6 months. That said it is what the parties agreed at the time the IEA was entered. It is weakly arguable that the length of restraint is reasonable.

[26] There is ambiguity in the wording of the scope of the non-compete clause including the geographical scope of the restraint. During his employment with CCL his place of employment was Auckland.<sup>9</sup> It is difficult to see how the geographical scope of the non-compete restraint could reasonably be interpreted to extend nationally but again, it is weakly arguable given the IEA is silent on the issue.

#### *Breach of restraint*

[27] Conslab is a competitor of CCL. Mr Song is now working for Conslab in a role similar to the one he performed for CCL and is doing so within twelve months of his

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<sup>8</sup> *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252; *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97.

<sup>9</sup> IEA, clause 6.

employment with CCL ending. There is an arguable case in respect of Mr Song's alleged breach of clause 27 of the IEA.

### *Conclusion*

[28] CCL has met the threshold for arguable case in that the case is not frivolous or vexatious.

### **Balance of convenience**

[29] This ground for consideration involves the relevant detriment or injury the parties will incur if interim injunction is granted or not. An assessment of what might happen if the interim position is reversed in any substantive determination including consideration of whether damages can adequately compensate any harm if reinstatement is not ordered is also to be made.

[30] The risk of inadvertent disclosure of confidential information and the difficulty of detection of such disclosure has been established to the low standard required at this stage. It is accepted that any assessment of damages would be very difficult. That said Mr Song has provided undertakings including an undertaking of indefinite duration in respect of the confidentiality obligations, he is working outside Auckland in a geographical location in which he did not work for CCL for a period likely up to and beyond the proposed investigation meeting dates and there is no specific evidence the current Conslab project he is working on overlaps with any CCL project either current or proposed. Given this the risk apprehended by CCL is a neutral factor in the assessment of balance convenience.

[31] Mr Song has given evidence of the detriment he would likely suffer if the injunction sought was granted including financial and professional detriment and the current detriment incurred to his family life now that he is working outside of Auckland which he has adopted to address CCL's concerns.

[32] Considering all the relevant factors the balance of convenience favours Mr Song.

## **Overall justice**

[33] Standing back from the detail of the claim where on balance does the overall justice lie? This has been described by the Court of Appeal as:

The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.<sup>10</sup>

[34] CCL has established an arguable case the restraint it seeks to enforce is reasonable and that there is a risk of inadvertent breach. It is not a strong case – CCL’s actions indicate the duration of the restraint is longer by half than is reasonably necessary and there is ambiguity in the wording of the confidentiality restraint including the geographical scope. The evidence of Mr Song’s inclination to breach is not strong though it is accepted inadvertent breach is a possibility. These concerns are ameliorated somewhat by the undertaking Mr Song has provided in relation to CCL’s confidential information, that he is working out of Auckland on a project which the evidence suggests has no overlap with CCL’s interests and on which he is likely to remain working until at least the substantive hearing. Given this and the detriment Mr Song is likely to suffer if the injunction was granted weigh against granting the injunction sought.

## **Outcome**

[35] The interim injunction application is declined.

## **Costs**

[36] Costs are reserved and will be dealt after determination of the substantive investigation.

Marija Urlich  
Member of the Employment Relations Authority

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<sup>10</sup> *NZ Tax Refunds Limited v Brooks Homes Limited* [2013] NZCA 90 at [47].