IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2022] NZERA 327
3171524

	BETWEEN	MACDONALD INDUSTRIES LIMITED Applicant
	AND	SIMON BESWICK Respondent

Member of Authority:	Philip Cheyne
Representatives:	Richard Upton, counsel for the Applicant Ian Hunt, counsel for the Respondent
Investigation Meeting:	8 July 2022 at Christchurch
Date of Determination:	15 July 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] MacDonald Industries Limited (MIL) is a registered company and operates a business in the plumbing industry. It specialises in the importation and distribution of plumbing products to large scale public commercial projects. Chris Ford is MIL's managing director. Andrew Maddren is also a director. Messrs Ford and Maddren purchased the business in 2020.

[2] Simon Beswick is a qualified plumber. Mr Beswick commenced employment with MIL on 18 January 2021. There is a written employment agreement. It includes a notice period of four weeks and a restraint of trade provision.

[3] Mr Beswick gave notice of resignation on 30 March 2022 to end the employment on 29 April 2022. On 5 April 2022, Mr Beswick emailed Mr Ford, advised he had been offered a South Island Manager's position with a competitor company and sought an arrangement about the restraint of trade provision. Mr Ford asked Mr Beswick to take "Garden Leave", which he did from about 6 April 2022. On 13 April 2022 Mr Beswick advised Mr Ford in writing that he had signed an employment agreement to work as South Island Manager for a competitor. Mr Beswick again sought an arrangement about the restraint of trade provision.

[4] Mr Ford in his response on 20 April 2022 said that he was seeking legal advice and asserted that Mr Beswick had contravened their employment agreement by signing the employment agreement with the competitor. There followed correspondence between MIL's lawyer and Mr Beswick's advisor. An arrangement was not reached.

[5] On 3 May 2022, MIL lodged a statement of problem. MIL seeks an interim injunction requiring Mr Beswick to comply with the restraint of trade; and/or a permanent injunction to the same effect; and/or an order modifying the restraint pursuant to the Contract and Commercial Law Act 2017; and/or a penalty of $10,000.00 against Mr Beswick for breaching the employment agreement (payable to MIL); costs and/or other relief considered just.

[6] This determination resolves the application for an interim injunction. Findings based on the untested affidavits in support and in opposition, attached documents and the counsels' submissions are solely for that purpose. Final findings must await a substantive investigation meeting.

The Authority's investigation

[7] MIL's 3 May 2022 application comprised its statement of problem (without affidavits and relevant documents), an application for urgency and an undertaking for damages. The application was referred to me and I assigned it urgency but with a case management conference to be scheduled after receipt of affidavit(s) and documents in support. The Authority served the documents on counsel for Mr Beswick.

[8] Later, counsel for Mr Beswick sought and I directed a case management conference. It occurred on 17 May 2022. The matter was directed to mediation and MIL was to lodge

affidavits in support and relevant documents by 9.00am on 23 May 2022. Because MIL's directors were by then in Europe, affidavits would be in draft form but accompanied by an undertaking that they would be sworn as soon as practicable without substantive amendment.

[9] MIL did not lodge draft affidavits as directed. Counsel advised that the director he was dealing with was ill and he was awaiting further instructions. Counsel for Mr Beswick sought to have set aside the earlier direction that the matter be accorded urgency and also sought an order dismissing the proceedings for want of prosecution.

[10] There was a case management conference on 27 May 2022. After hearing from counsel, I declined to dismiss the proceedings. I noted that directions to investigate and determine the interim injunction application had not yet been made, given the lack of evidence and documents. I repeated the arrangement about affidavits in draft form. Counsel advised that they would be lodged that day or Monday 30 May 2022. I was also advised that mediation had been scheduled for 17 June 2022.

[11] Draft affidavits for Mr Ford and Mr Maddren were lodged on 30 May 2022. Drafts with attachments were lodged on 31 May 2022. The sworn affidavits with exhibits were lodged on 15 June 2022. Arrangements for Mr Beswick to lodge his statement in reply on or before 10 June 2022 and affidavit(s) in reply on 10 June 2022 were made. A date was set for the investigation meeting. By agreement, the meeting was enlarged to 8 July 2022. The investigation meeting was for counsel to make submissions.

[12] Mr Beswick sought disclosure of some specific documents that he regarded as relevant to his affidavit in reply. The parties did not agree how to manage that and Mr Beswick's affidavit and reply were not lodged in accordance with the timetable. Counsel for MIL sought directions from the Authority. However, I considered that timetabling directions had already been made. A reply and Mr Beswick's affidavit were lodged.

[13] Despite mediation, the matter was not resolved.

[14] The day before the investigation meeting but without leave, MIL lodged a further affidavit of Mr Maddren, first in draft form, then in sworn form. Mr Beswick objects to

Mr Maddren's second affidavit being read in support of the application for an interim injunction.

[15] Counsel appeared remotely for the investigation meeting, but had helpfully provided written submissions in advance. Counsel set out their respective positions on various procedural matters including Mr Maddren's second affidavit, as well as the approach to interim relief and its application in this case.

[16] I will express relevant findings of fact, state and explain findings on relevant issues of law and express conclusions on matters required to determine this matter. The findings and conclusions are solely for the purpose of this interim injunction application.

Approach to interim injunctions

[17] There is no dispute about the relevant legal principles but it is useful to set them out at this point.

[18] The applicant must establish that there is a serious question to be tried, so that the claim is not vexatious or frivolous. This calls for a judicial evaluation. The balance of convenience must be considered. I need to consider the impact on the parties of granting and refusing an order. Finally, the overall justice of the position is required as a check.[1] The merits of the case, so far as presently ascertainable, are relevant to assessing the balance of convenience and overall justice.[2]

[19] Both counsel also refer to the passage in *Savage* that describes interim injunction as a "holding remedy" pending final determination of the matter. It is characterised as maintaining the status quo, which is the last settled position between the parties. In that case, the status quo was clearly interim reinstatement as ordered by the Authority. The Court then by interim injunction prevented the employer from dismissing the employee for an apparently unrelated disciplinary matter, while the interim reinstatement order remained in effect.[3] It is

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[1] See *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, cited in *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 and *Savage v Wai Shing Ltd* [2019] NZEmpC 141.
[2] *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZSC 60 at [6].
[3] *Savage v Wai Shing Ltd*, n 1.

unexceptional to characterise an interim injunction as a "holding remedy", but the *Savage* circumstances do not arise here.

Is there a serious question to be tried?

[20] Covenants in restraint of trade are *prima facie* unlawful and unenforceable, unless they can be justified as reasonably necessary to protect the proprietary interests of the employer and in the public interest, at the time of the agreement.

[21] MIL must establish an arguable case that it has legitimate proprietary interests and that the restraint is no wider than necessary to protect those interests.[4] The latter question includes consideration of its geographic application and its duration.

What is the proprietary interest requiring protection?

[22] MIL in its statement of problem describes the employment as "Sales Executive/Technical Consultant", the most senior sales role in the regions covered by Mr Beswick and one of the more senior roles in its business. There is support in the affidavits for these assertions. However, there is also evidence that the South Island was shared between Mr Beswick and a long-standing employee. When Mr Beswick was employed, the Lower North Island area was covered on an interim basis by MIL's Auckland "Sales Manager". The evidence is that Mr Beswick "took over" that region from about March 2021.

[23] In his reply, Mr Beswick says that "Technical Consultant" is a lower level position to "Sales Consultant" and that he accepted the latter position. The employment agreement, signed on 18 and 19 November 2020, was for the position of "Sales Executive". However, Mr Beswick says that when he started it changed "very quickly" to be a "Technical Representative", the same as MIL's other sales team members. The title was adjusted to "Technical Consultant" at Mr Beswick's suggestion, he not wanting to make an issue early in his employment about the change from the offered role of "Sales Manager". Mr Beswick says he never received a business card with the title of "Sales Executive". The emails in evidence include "Technical Consultant" in Mr Beswick's signature and the company website

[4] *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153 at [21].

printouts dated in early May 2022 identify most staff including Mr Beswick as "Technical Consultants".

[24] At this point, at best MIL has only a weakly arguable case that Mr Beswick occupied one of the most senior roles in the business, rather than as one of its "Technical Consultants".

[25] MIL also relies on evidence that Mr Beswick "removed and retained" its confidential information. In his first affidavit, Mr Maddren deposes that this includes client/project lists, he "believes" likely to be for Wellington and South Island regions. Mr Beswick's answer is that he backed up information to a "pen drive" as suggested by the "IT consultant" due to technical problems with his work laptop. Mr Beswick deposes that email communications on his MIL account at the time will support this. He no longer has access to that information.

[26] To counter Mr Beswick's affidavit, MIL lodged Mr Maddren's second affidavit. I agree with counsel for Mr Beswick that it should not be read in support of the application for an interim injunction to uphold the restraint of trade provision. If thought relevant to the present application, MIL should have disclosed the first forensic report and related instructions (including for a second forensic investigation) in its first affidavits. Given my directions, it should have sought leave to produce the second report and the second affidavit. MIL's approach has left Mr Beswick without an opportunity to respond to the second report and second affidavit. The prejudicial effect of Mr Maddren's second affidavit greatly exceeds its probative value as to whether MIL can establish a legitimate proprietary interest requiring protection, the issue that arises on this application.

[27] In its statement of problem, MIL claims that Mr Beswick participated in senior strategy meetings, was instrumental in developing regional sales strategies, was exposed to significant amounts of its commercial information, led pitches for key business, was responsible for client relationships in his regions, had insights and involvement in its unique product combinations, and was aware of confidential pricing information associated with its offerings.

[28] There is evidence that MIL imports and distributes specialist products in a narrow part of the plumbing sector. It operates in the commercial market providing specialised plumbing

fixtures for public projects such as hospitals, custodial facilities, stadiums, airports and transport hubs and other public spaces. There is typically a long lead time in the sector.

[29] There is evidence that Mr Beswick in his work had discussions with the directors about supplier costs, delivery times and prices. Except for the "end price" this information is said to be highly sensitive. Mr Maddren says that Mr Beswick had exposure to "all confidential information" except for MIL's daily gross profit reports. However, Mr Maddren notes that in January 2022 MIL restricted access to its supplier and landed costs, so Mr Beswick (and others) did not have that access thereafter. He says that Mr Beswick was privy to special pricing for various project orders. Mr Beswick developed client relationships and was also involved in developing MIL's strategies for growth.

[30] Trade and customer connections and relationships can amount to proprietary information capable of protection. Here, I accept that MIL can establish a weakly arguable case to uphold a restraint of trade provision to protect these connections after Mr Beswick's employment ended following his resignation.

[31] On its own, supplier product specifications are not likely to be confidential information or trade secrets, amounting to MIL's proprietary information capable of protection. There is also evidence that MIL on its website sets out products and specifications for products it supplies. At best for MIL, product specifications may simply be knowledge acquired by Mr Beswick during his employment by MIL, but not its property.[5] However, there is some evidence of MIL's own products that arguably show a protectable proprietary interest.

[32] The concern that Mr Beswick can use "learnings" from working with MIL to adapt offerings that a competitor might provide to customers or for competitors to start offering new products appears to be a concern about competition, not proprietary information. At best, MIL has a weakly arguable case that these "learnings" include some protectable interest.

[33] Mr Beswick disputes the level of his involvement in senior strategy meetings, development of regional sales strategies, access and exposure to commercial information and confidential pricing information. However, at this point I accept that MIL can show an

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[5] *Green v Transpacific Industries Group (NZ) Limited* [2011] NZEmpC 6 at 27.

arguable case that there is such confidential information that Mr Beswick had access to and which would support a restraint of trade provision.

[34] The employment agreement and position description offer little assistance with identifying MIL's proprietary interests.

[35] Overall, MIL can show an arguable case that a restraint of trade was reasonably necessary to protect its proprietary interests.

Geographic application of the restraint

[36] Clause 15 of the signed employment agreement says:

> Should our employment relationship end, we may elect to enforce a 'Restraint of Trade' preventing you from being involved in a business that competes directly or indirectly with MacDonald. Any restraint expectations will be agreed and recorded in 'Appendix One – What is Specific to You'. The period and geographic limits will be no greater than is reasonably necessary to protect MacDonald proprietary information.

[37] Appendix one includes:

> **Position**
> Sales Executive
> …
> **Location**
> You will be based at Unit 3, 32 Hayton Rd, Sockburn, Christchurch, however your sales Territory will be the Lower North Island and South Island and/or as directed by your Manager.
> …
> **Restraint of Trade**
> Period: 12 months
> Within 300 km radius from Employer's business

[38] Schedule 3: Job Description includes:

> **POSITION DECRIPTION**
>
Position Title	Sales Executive
Reporting To	Chris Ford
Location	Christchurch

> …

[39] Clause 15 read with Appendix one provides for a 12 month restraint of trade preventing Mr Beswick from being involved in a business that competes with MIL within 300 km of the Hayton Road address. That treats "Employer's business" as meaning the specified address written under "Location" in Appendix one. It would also be consistent with the

POSITION DESCRIPTION showing “Location Christchurch”. It is consistent with “radius”, which indicates a specified centre.

[40] There is a dispute about whether the restraint of trade covers the “Lower North Island” and/or a radius of 300 km from that sales Territory. Reading “Employer’s business” as including a reference to “Lower North Island” is problematic. If that phrase refers to “Lower North Island”, it must also refer to “South Island” and other regions “as directed by your Manager”. If “Employer’s business” is merely a synonym for the assigned “sales Territory”, MIL would be able to expand (or reduce) the scope of the restraint as of right. It also renders “300 km radius” uncertain – how do you identify the limits of “Lower North Island” to find the point from which to measure 300 km? The evidence is that MIL does not have an office in Wellington. If the geographical area for the restraint had been intended to match the “sales Territory”, MIL could have expressed it that way in the agreement it drafted. MIL has not made out an arguable case that the terms of the restraint apply to “Lower North Island”.

[41] There is an arguable case that clause 15 and Appendix one prevents Mr Beswick from being involved in a business that competes with MIL within 300 km of the Hayton Road address.

[42] There is little evidence to establish what work Mr Beswick has done in his employment with the competitor. He apparently started there on 23 May 2022. However, it is a South Island position, so I accept it is arguable that Mr Beswick is involved in a competitor business, in breach of the restraint.

Duration of the restraint

[43] I am satisfied that a twelve month restraint here is not reasonably necessary to protect MIL’s interests, even to an arguable standard.

[44] Reference is made to lead-in time for sales. I am also referred to the specialist nature of MIL’s business. However, these are not distinctive factors. Similar arguments could be made in many businesses.

[45] Two cases are also cited in support of the twelve month restraint.

[46] In *Hally Labels Ltd v Powell*,[6] the Employment Court upheld a twelve month restraint in the case of a business development manager, despite describing it as at the higher end of what had been found to be reasonable. At the time of the agreement, the employee held a senior position, was one of its key employees in establishing and developing its business, had worked for the employer for a long time and had substantial bargaining power. The Court expressly took into account that the employer had agreed to pay half the employee's annual base salary for the twelve month period.

[47] The foregoing factors do not feature in the present case, except the weakly arguable case that Mr Beswick was in a senior position. Given these factors, *Hally* does not support an arguable case that twelve months duration is reasonably necessary here.

[48] In *James & Wells Patent and Trade Mark Attorney v Snoep*,[7] the Employment Court found that a twelve month restraint duration was at the upper end of, but not beyond, the range of what was reasonable in the circumstances. The respondent although a salaried partner was an employee of the firm. There was a restraint that he would not practice as a patent attorney for any of the firm's existing clients for twelve months from the last day of his employment. If he had left before being trained, qualified and registered, the restraint would not have applied. However, the employee resigned after then. Less than a month after his resignation the ex-employee, having established his own practice, started doing patent attorney work for a significant client of the employer. The Court took into account that the restraint only prevented the ex-employee from doing patent attorney work for the employer's existing clients. He was able to do patent attorney work for others and could work (except as a patent attorney) for the employer's existing clients. The very limited circumstances in which the restraint operated meant the duration, although at the "upper end", was not unreasonable.

[49] In this matter, the restraint provision does not share the limiting features of the provision in *Snoep*. The restraint is not limited to MIL's existing clients and it prevents Mr Beswick from doing any work for a competitor within the geographic area. The reasoning in *Snoep* does not support a twelve month restraint here, even to an arguable standard.

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[6] *Hally Labels Ltd v Powell* [2011] NZEmpC 63.
[7] *James & Wells Patent and Trade Mark Attorney v Snoep* [2009] ERNZ 284.

[50] I find the duration exceeds what could be reasonable, even on an arguable standard.

[51] To cover the possibility of that finding, Counsel submitted that the Authority's power under s 83 of the Contract and Commercial Law Act 2017 (CCLA) together with sections 162 and 164 of the Employment Relations Act 2000, must be considered at the substantive investigation stage. Counsel then submits that the restraint should be enforced at this point, given the "holding remedy" nature of an interim injunction.

[52] There is a difficulty with the submission. The Employment Court confirmed that there is no presumption that a court will modify a restraint of trade provision so as to make it reasonable, as distinct from exercising the other options available under the CCLA such as deleting it or declining to enforce it.[8] Treating the restraint now as capable of modification in due course to make it reasonable, given the circumstances of this case, is in effect a presumption in favour of modification.

[53] The circumstances to which I refer include advice on 5 April about a competitor's offer, commencement of garden leave then, confirmation on 13 April of intended employment with the competitor followed by delay until 30 May 2022 before these proceedings could be regarded as having been properly lodged, despite the Authority according urgency at the time the unsupported statement of problem was lodged on 3 May 2022. MIL has also signalled its intention to lodge an amended statement of problem based on the allegations now set out in Mr Maddren's second affidavit. Given that, substantive investigation by the Authority concerning the employment relationship problem (including the restraint) would be some months away, at the earliest. Then before exercising powers to vary the restraint, the Authority must identify the problem and direct mediation. If an interim injunction now is allowed as a "holding remedy" on the basis of eventual modification, it would in effect treat the restraint as drafted as *prima facie* lawful and enforceable.

[54] Counsel for Mr Beswick submits that I should delete the restraint and give effect to the employment agreement as amended. Whether that is an appropriate exercise of the Authority's discretion must await a substantive investigation meeting including compliance with s 164 of the Employment Relations Act 2000.

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[8] *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97 at [63].

[55] At best, MIL has a weakly arguable case that the duration might be modified to make the restraint at the time of the agreement reasonable.

[56] In summary, although it is weakly arguable that Mr Beswick held a senior role, it is arguable that in his role he had access to some confidential proprietary information that would support a restraint of trade provision. There is an arguable case that the restraint as drafted applies within 300 km of the Hayton Road address. It is not arguable that it applies generally to the Lower North Island. It is arguable that Mr Beswick has breached the restraint through his employment with the competitor. The duration exceeds what could be necessary, even on an arguable case. There is a weakly arguable case that is might be modified to make the restraint reasonable and enforceable. On this basis, I find that MIL has shown that there is a serious question to be tried.

Balance of Convenience

[57] MIL says the losses to Mr Beswick could be adequately addressed through an award of damages, should it eventually be unsuccessful. I note that the application includes an undertaking signed by Mr Maddren on 2 May 2022. No direct evidence has been provided to establish MIL's capacity to pay damages. However, it appears that MIL is a reasonably substantial company continuing in trade so would likely be able to meet its undertaking.

[58] MIL points out that there is no evidence to establish that Mr Beswick would be able to meet a substantial award of commercial damages if it later succeeds but Mr Beswick is not prevented from working for the competitor in the meantime. Absent evidence to the contrary, I accept it is likely that an award of damages in due course against Mr Beswick would not be a sufficient remedy for MIL.

[59] MIL says it is feasible that Mr Beswick could find alternative employment in the plumbing industry that does not infringe the restraint. However, Mr Beswick says that it would be difficult for him to work for a company in the plumbing industry in Christchurch that does not directly or indirectly compete with MIL. Mr Beswick's skills and experience are likely to lead him to work for either a direct or an indirect competitor. The extension of the restraint to cover indirect competitors means that, in the face of an interim injunction, Mr Beswick would be likely to have difficulty obtaining employment utilising his skills and

experience that he held before his employment by MIL. Despite that, an interim injunction would not necessarily exclude Mr Beswick from work within his skills and experience.

[60] MIL says that Mr Beswick's decision to resign was his alone, knowing that he was subject to a restraint as contractually agreed and he then began employment with a competitor. It says it should not bear the consequences of Mr Beswick' actions. Nothing turns on what motivated Mr Beswick's resignation. Mr Beswick gave notice, as he was entitled to do. The point about consequences assumes the enforceability of the restraint, as drafted by MIL. It adds little to the present assessment.

[61] There is a submission that, without an interim injunction, Mr Beswick would be able to work for the competitor while retaining MIL's confidential information, leaving MIL without any protection. The employment agreement does not include other express provisions that MIL could rely on. The point supports the application.

[62] The points about damages as a remedy and the absence of other express protections cause me to conclude that the balance of convenience favours MIL.

Overall Justice

[63] I find that overall justice favours Mr Beswick, not MIL.

[64] MIL says it has "clean hands", and is critical of Mr Beswick's credibility. I put aside the criticisms of Mr Beswick's credibility, to the extent they are based on Mr Maddren's second affidavit. The documented exchanges leading up to and following the resignation do not establish any issue about Mr Beswick's credibility at this point. I proceed on the basis that "clean hands" and credibility points do not weigh more heavily for MIL than for Mr Beswick.

[65] Standing back, there are two factors that count against an interim injunction.

[66] First is the applicant's delay in getting the proceedings in a form that allowed the claim to be progressed. This is the less significant factor.

[67] More importantly, MIL only has a weakly arguable case for the duration of the restraint to be modified in a way that would give it effect now.

[68] These factors are significant and count against the application.

Conclusion

[69] The claim for an interim injunction is dismissed.

[70] Costs are reserved. A case management conference will be arranged soon to discuss future arrangements.

Philip Cheyne
Member of the Employment Relations Authority