Note: This determination is subject to an order at [69] prohibiting publication of evidence disclosing some client and commercial information.

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 369
5592424

	BETWEEN	METROPOLITAN GLASS AND GLAZING LIMITED Applicant
	AND	PAUL MEIRING Respondent

Member of Authority:	Robin Arthur
Representatives:	Phillipa Muir and Courtney Walker for the Applicant Gillian Service and Francesca Ryff for the Respondent
Investigation Meeting:	23 November 2015
Determination:	25 November 2015

DETERMINATION OF THE AUTHORITY

A. The application by Metropolitan Glass and Glazing Limited (Metro) for an order enjoining Paul Meiring, on an interim basis, from working in the South Island for Viridian Glass Limited Partnership until after 29 February 2016 and from soliciting business from Metro clients until after 30 November 2015 is declined.

B. Costs are reserved.

Employment Relationship Problem

[1] Metropolitan Glass and Glazing Limited (Metro) sought an interim injunction preventing its former employee Paul Meiring from working for Viridian Glass Limited Partnership (Viridian) for the remainder of a non-competition restraint period

running to 29 February 2016 and from soliciting business from its clients, suppliers and customers up to 30 November 2015.

[2] Mr Meiring worked in various roles for Metro from 1 April 2011 until 31 August 2015. From 1 April 2012 he was Metro's Bay of Plenty manager. From mid-2013 Mr Meiring carried out an additional role as Metro's acting regional manager for the Lower North Island. In the latter role he was part of Metro's Senior Leadership Team (SLT).

[3] Mr Meiring resigned from Metro on 8 May 2015. He did so a few weeks after Metro made an external appointment to a new role of North Island general manager. Mr Meiring was disappointed the role was not advertised and that he did not have the opportunity to apply for it. He expected his role would now revert to solely that of Bay of Plenty manager.

[4] His employment agreement required him to work through a six month notice period but Metro's chief executive officer Nigel Rigby agreed Mr Meiring could leave earlier, that was on 31 August 2015 rather than having to wait until 8 November. In July Mr Rigby asked Mr Meiring to sign a settlement agreement confirming his employment terms – including those relating to confidentiality, intellectual property and restraint of trade. Mr Meiring declined to do so because he considered the draft agreement wrongly described him as having raised an employment relationship problem when all he had done was resign. Mr Rigby explained to Mr Meiring, by email, that he sought such agreements from all senior managers who left so they were clear about their obligations but Mr Rigby did not change his earlier agreement that Mr Meiring could end his employment on 31 August.

[5] Three weeks later – on 21 September 2015 – Mr Meiring began work for Viridian with the job title of Canterbury Regional Manager. The role with Viridian was based in Christchurch, to which Mr Meiring arranged to commute weekly from his home in Tauranga.

[6] Metro and Viridian are competitors in the glass and glazing products market. Both businesses operate nationally and regularly compete for tenders.

[7] Metro took issue with Mr Meiring over taking up a job with Viridian in the South Island. It considered the restraints against competition and solicitation in his

former terms of employment with Metro applied to the whole of New Zealand. It said Mr Meiring had agreed to such a nationwide limit during a discussion at an SLT meeting on 24 September 2014.

[8] Metro was also concerned that a forensic investigation of its electronic records disclosed that, during the months before his employment ended, Mr Meiring sent some business information – which Metro considered highly confidential and commercially sensitive – to his personal email address and he had no justified work-related reason for doing so. The investigation also found some information Metro believed proved Mr Meiring had arranged his new job with Viridian before his employment with Metro ended. Metro considered Mr Meiring deliberately misled Mr Rigby into agreeing to a shorter notice period by not being honest in what he told Mr Rigby about what he planned to do after his employment with Metro ended.

[9] Mr Meiring denied he was subject to a New Zealand-wide restraint. Instead he said the terms of a written employment agreement under which he had worked from 1 April 2012 – signed on taking up the role of Metro's Bay of Plenty manager – clearly identified the geographic scope of the restraint as being the North Island only. No variation to that agreement had been made and recorded in writing by the time his employment ended.

[10] Mr Meiring also denied he had acted wrongly in sending Metro information to his personal email address or that he had misused the information in any way contrary to his confidentiality obligations. He also did not accept he had misled Mr Rigby about his intentions after his employment with Metro ended.

[11] By 3 November 2015 Mr Meiring had provided Metro with a written undertaking that he would abide by his confidentiality and intellectual property obligations and – in respect of the North Island – comply with the non-solicitation and non-competition restraints. He had also provided Metro with a list of some customers in common with Viridian and confirmed he had not and would not accept instructions from or provide services to those customers, and he would not visit any of Metro's clients until after 30 November 2015.

[12] His undertakings had not satisfied Metro which sought the Authority's determination of its interim injunction application.

The application

[13] The interim injunction application, sought on an urgent basis, was part of a wider application that Metro lodged in the Authority. It alleged Mr Meiring, in addition to breaching restraint obligations, had breached terms of his former employment agreement protecting Metro's confidential commercial information and intellectual property by sending certain business documents to his personal email address and breached duties of fidelity and good faith in how he had gone about securing an earlier end to his period of notice with Metro. It sought orders for permanent injunctions (for the remainder of the restraint periods), for compliance with confidentiality and intellectual property terms, for damages for losses caused by failing to comply with those terms, and for penalties for the alleged breaches of those terms and his statutory good faith duties. Metro also lodged an undertaking as to damages in respect of the injunctions sought.

[14] An Authority case management conference, held with the parties' representatives two days after Metro's application was lodged, arranged for Mr Meiring to lodge a statement in reply and for the Authority's investigation of the substantive issues to be notified for 24 and 25 February 2016. The parties were also directed to mediation, on an urgent basis, with arrangements made for them to lodge affidavits and to have submissions heard on the interim injunction application if the matter was not resolved in mediation.

[15] Mediation did not settle the matter and affidavits were lodged from the following witnesses:

(i) Mr Rigby; and
(ii) Metro's human resources manager Rebecca Phillips; and
(iii) Three other members of Metro's SLT: operations general manager Geoffrey Rasmussen; South Island contracts manager Barry Paterson; and product manager Michael Stanford; and
(iv) Metro's IT manager Keith Glover; and
(v) Mr Meiring; and
(vi) Viridian's human resources manager Frances McLean.

[16] At an investigation meeting called for the purpose counsel for Metro and for Mr Meiring provided written and oral submissions about the issues for determination

in the interim injunction application, the facts disclosed by the affidavits, and statutory and case law relevant to the issues.

[17] As permitted by s174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions given but has stated relevant findings of fact and law – to the extent they can be made on affidavit evidence at an interim stage – and expressed a conclusion on whether the interim injunction sought should be granted or declined.

[18] The issues to be determined – at this stage – were:

(i) Whether Metro had an arguable case that Mr Meiring had breached the restraint terms of his employment agreement and, if so, whether the company had an arguable case for a 'permanent' injunction for the unexpired period of the restraint; and

(ii) Where the balance of convenience lay until the Authority held its substantive investigation (in late February 2016) and then issued a determination; and

(iii) Whether the overall justice of the case lay in the period from now until then?

An arguable case?

[19] As submitted by Mr Meiring only one point was truly at issue over the restraint provisions. He did not contest the reasonableness of the restraint provisions found in his written employment agreement – a six month 'non-compete' clause (to apply after serving a six month notice period) and a three month non-solicitation clause for which consideration was accepted to have been included – to protect Metro's strategic interests and relationships with its staff, suppliers and customers. The only point at issue – as to whether there was an arguable case – was the geographic scope of the restraint. Was it only the North Island, as written in his agreement, or had it become nationwide by oral agreement from September 2014?

[20] Metro relied on three propositions (broadly summarised) as establishing an arguable case to the relatively low threshold required at an interim stage.

[21] Firstly, it relied on evidence of four other participants at the SLT meetings in 2014 – Mr Rigby, Ms Phillips, Mr Paterson and Mr Rasmussen – that nationwide

restraints were agreed as appropriate for senior managers. This was said to amount to a variation by agreement of the terms applying to Mr Meiring.

[22] Secondly, Mr Meiring "should be estopped, in the interim, from now contesting the enforceability of the restraint provisions" because he had acquiesced in the SLT meetings to their nationwide application and there were serious questions over whether he acted honestly and in good faith during his notice period (including in how he arranged for that period to be shortened).

[23] Thirdly, in the alternative, there was a serious issue to be investigated as to whether the restraint should be modified to be enforceable, as permitted by a provision in his employment agreement that allowed such modification by a court (or in the present instance, the Authority) if a restriction was found to be unenforceable.

Agreed variation?

[24] There was evidence from Mr Rigby, Ms Phillips and the three other SLT managers present at their 24 September meeting that the nationwide application of restraint terms was either discussed or that they understood the intended geographical scope was the whole of New Zealand. Mr Paterson, for example, said they had agreed those working in national roles "would be bound by a restraint of trade with national coverage". Ms Phillips and (in his reply affidavit) Mr Rigby also used the phrase: "would be". It was language that indicated an intention to change from that point but not when or how it was to be put into effect. Ms Phillips' notes from the meeting record the length of intended restraint and notice periods discussed but record no reference to the geographic scope.

[25] However if that discussion about a company policy on an aspect of employment agreements (which Mr Rigby deposed as having proposed) did amount to oral agreement to variation of that term, its enforceability faced a significant hurdle found at clause 18 of Mr Meiring's written employment agreement: "No variation to this employment agreement shall be effective unless it is recorded in writing and signed by us both".

[26] At least seven months followed between the SLT supposedly agreeing to a policy of having nationwide restraints for managers at their level and Mr Meiring's resignation in May 2015. No written variations were issued and signed off. It was

not a complex task. It involved changing a single line in a schedule to an employment agreement.

[27] What remained arguable, weakly, was whether an oral agreement could nevertheless be enforced on the basis that was 'how things were done' at Metro and that, in some circumstances (as suggested in some case law), an orally agreed term could be enforceable notwithstanding a requirement for the agreement to be in writing.[1]

Mr Meiring's conduct

[28] Metro submitted that two aspects of Mr Meiring's conduct prior to the end of his employment supported the arguable nature and the overall justice of its case – firstly, apparently suspicious use of its confidential business information before leaving and secondly, what he told Mr Rigby about his plans for after the end of his employment at Metro (in order to secure an early release from his notice period).

[29] The import of those points was to attack Mr Meiring's credibility and the extent to which he could be relied on to honour the terms of his agreement (and his 3 November undertaking). Doubt on that score should, paraphrasing Metro's submission very broadly, strengthen the overall arguability of Metro's case on other points and make it, as a matter of equity and the good faith behaviour required of him during his employment, appropriate to grant the interim injunction sought.

[30] It was plainly arguable that Mr Meiring had access to a full suite of Metro's confidential commercial information in his role. It was such access that made it reasonable for Metro to have a restraint provision in his employment agreement and its reasonableness was not contested by him.[2] It provided protection (for the length of time and within the region identified by the restraint) from either deliberate or inadvertent disclosure of such information to a new employer. It was a point however that became circular because it depended on what was the agreed geographical scope of the restraint.

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[1] Relying on *Designlink Limited v Raymond* (EC, AC24/06, 1 May 2006) at [9]: "[A]n oral variation of a written agreement is not per se unenforceable although the Act's requirement of writing, in particular … is a strong pointer to the desirability of that and as to what the parties may truly have intended." See also *United Pukekohe Limited v Grantley* (HC, CP 273/96, 1 July 1996), a commercial (not employment) case about "a layman's transaction entered into by persons contracting on equal terms" said to involve a "deep seated conflict of evidence which can be resolved only at substantive trial as to whether there were additional oral terms".

[2] *Littlewoods Organisation Limited v Harris* [1978] 1 All ER 1026 at 1033 (Eng CA).

[31] It was also plainly arguable that various identified business documents Mr Meiring had sent to his personal email address, viewed together, amounted to a clutch of protectable confidential information about Metro's sales approach, industry intelligence, and strategy in which it had a legitimate and protectable proprietary interest. Mr Meiring deposed that he sent that material – which he needed for Metro work he did at home during the evenings and weekends – to his personal email address because of problems with connecting remotely with Metro's network. He gave reasons in relation to each document about why he needed to have and use it for Metro-related work at the time. Ms Phillips and Metro's IT manager Keith Glover rebutted that evidence by saying Mr Meiring could have copied the documents to his work laptop to use off-line and disputed his account of problems connecting with Metro's network. At the arguable case level, those doubts were sufficient to support Metro's position.

[32] Metro pointed to one item of evidence as proof of its suspicions that Mr Meiring lied to Mr Rigby in order to get an early release from the notice period. Mr Meiring deposed that he had told Mr Rigby about options he was considering. They included returning to Britain, working in a solar business in the South Island, a possible role with Fletchers, going into business consulting with a friend and taking up a position with a product manufacturer. He also considered starting his own business but deposed that he did not tell Mr Rigby about that. He deposed however that he had not decided what to do next before he finished at Metro and had only met Viridian's CEO to discuss a job after then. Ms McLean, for Viridian, deposed that an offer of employment was made on 15 September 2015.

[33] Metro submitted Mr Meiring's account was at odds with some information gleaned from a forensic analysis of his work phone and laptop computer. This included the contents of a text message exchange between him and his nephew and phone records showing he was in regular contact with Viridian in his final months of his employment at Metro.

[34] A message from Mr Meiring's nephew on 8 July 2015 included this comment: "Apparently you are moving to the South Island too and leaving the business so some big changes coming up soon". On 22 August 2015 a message to him from Mr Meiring included this sentence (which began with a reference to his fiancé) and as

written was: "Lisa and I are waiting to see what happens with the new employer – I am only starting three 3rd week September before counting the trip to SA out but it is looking unlikely". The reference to what looked unlikely appeared to be a response to an earlier question from his nephew about whether Mr Meiring could travel to a family wedding. The other part of the sentence – in Metro's submission – showed Mr Meiring already had firm plans to start working for a new employer in the third week of September which Metro said was not just coincidentally the very same week that Mr Meiring started work for Viridian in Christchurch.

[35] Mr Meiring's explanation was the sentence referred to the prospect of working in a solar energy business, not Viridian. The prospect did not eventuate but was something he had discussed with Viridian's chairman, Robert Famularo. He also agreed that Mr Famularo could pass his name on to Viridian's CEO to talk about job opportunities. Mr Meiring deposed he had known Mr Famularo socially for more than 25 years and they regularly played tennis together. His contact with Mr Famularo was also Mr Meiring's explanation for his regular phone contact with Viridian revealed in the phone records. It was also his explanation for one email he admitted sending Mr Famularo about an announcement of price increases by a product importer, which Mr Rigby had deposed was Metro's confidential information. Mr Meiring, however, deposed that the information was a standard industry price list and was about a point that he and Mr Rigby had discussed with Mr Famularo earlier that year.

[36] The content of the text messages established an arguable case, on the low threshold, that Mr Meiring may not have been totally frank about when he began job inquiries or plans with Viridian. In itself however it did not establish that he had lied to Mr Rigby. Mr Rigby's affidavit deposed to having understood Mr Meiring did not have plans other than "taking some time out for a while" but not to having asked any direct questions about whether Mr Meiring planned to work for any competitors to Metro.

[37] The affidavit evidence on both aspects of Mr Meiring's conduct – in emailing business documents and what he said in the text message – was relevant to issues about alleged breaches of the duties of fidelity and good faith to be tested in the substantive investigation. However it did not make the central single issue for the interim injunction application – whether there was an arguable case that Mr Meiring

was subject to a greater geographical restraint than he accepted – inherently any more or less arguable. Even accepting, for the sake of Metro's argument, that he had acted suspiciously with its business documents and had not been frank with Mr Rigby, it did not make it more likely that he was subject to an orally-agreed variation substituting a nationwide restraint for the North Island term written into his employment agreement. Rather his conduct was a factor to be weighed when considering the overall justice of the matter, in the interim period.

Modification?

[38] Metro proposed that, as an alternative means of seeking relief, it could arguably seek modification of Mr Meiring's written term of geographical restraint through the Authority applying section 8 of the Illegal Contracts Act 1970 (the ICA) to modify a provision of an employment agreement that "constitutes an unreasonable restraint of trade". The statutory discretion provided to the Authority allows for a restraint provision to be modified so that it would have been reasonable at the time that the employment agreement was entered into and to give effect to the term as modified.

[39] Metro accepted it would be unusual for a geographic restraint to be expanded to a wider area than stated in the existing written term – and provided no previous examples of ICA s 8 having been applied to do so – but submitted the circumstances in Mr Meiring's case (as alleged by Metro) were unusual.

[40] However, to succeed at the substantive investigation on that argument, Metro would have to establish that, at the time that Mr Meiring entered the employment agreement he signed on taking up the Bay of Plenty manager's role, a North Island restraint was unreasonable and a nationwide restraint was reasonable. It was an argument with so little likelihood of success, it cannot pass even the low threshold for an arguable case. It would impose a bargain significantly different from the one agreed by the parties at the time and provide the employer with more than was bargained for.[3] In *Welsh v Cooney* the Court of Appeal, referring to the statutory power to modify restraint provisions, observed:[4]

[3] See "*Restraints of Trade: Getting it right – understanding the essential elements of an enforceable restraint of trade*", Peter Chemis and Jennifer Howes, NZLS Employment Law conference papers 2014 at 273.
[4] [1993] 1 ERNZ 407 (CA).

> "… [N]o doubt normally the Court will be slow to alter any part of a covenant so as to make it more restrictive on the employee. Nevertheless there may be cases where that is appropriate, particularly when accompanied by other changes which make the revised covenant as a whole less onerous for the employee."

[41] The revision suggested by Metro – from North Island to the whole of New Zealand – would not make the restraints as a whole less onerous for Mr Meiring.

[42] Further, according to his affidavit, Mr Meiring had expressly discussed with Metro's then-CEO Andrew Bailey (not Mr Rigby) the reasons for the North Island restraint and agreed to that term. It was the geographic scope proposed by Metro in the written agreement given to Mr Meiring for his acceptance in 2012. It would be difficult retrospectively for Metro to sustain an argument that what the company asked for (and Mr Meiring agreed to by signing the written agreement) was unreasonable at the time and that it was now reasonable to substitute a wider restraint and give that effect.

Intention

[43] Metro had foreshadowed an argument, in its statement of problem, that the North Island restraint in Mr Meiring's 2012 employment agreement could not have been what the company intended and was a mistake amendable to correction by application of the Contractual Mistakes Act 1977. In answer to a question asked during submissions Metro's counsel said there was insufficient affidavit evidence to support the argument at the interim stage. Mr Meiring's evidence of having discussed the restraint with Mr Bailey at the time suggested that was so. Ms Phillips's evidence that the North Island restraint was a mistake and it was inconceivable that Metro would have agreed to it was somewhat undermined by the fact that she did not work for Metro at the time. Neither was Mr Rigby its CEO at the time. Significantly different evidence from Mr Bailey would be necessary at a substantive investigation for that argument to succeed.

[44] A further point regarding intention was the restraint clause in Mr Meiring's first written employment agreement with Metro that applied for his first year in 2011 while working as a customer project manager. It provided for a three month restraint for the whole of New Zealand. It was not sufficient however to establish that the subsequent agreement of a North Island restraint area for his Bay of Plenty role in

2012 should have been nationwide or that Metro would have intended at the time for Mr Meiring to be subject to a national restraint.

The balance of convenience?

[45] Assessment of the balance of convenience required consideration of the relative hardships in the interim period for Metro and Mr Meiring, depending on whether or not the interim injunction sought was granted. It concerned the effects on Mr Meiring if he was not permitted to work for Viridian when he might later be found not to be subject to the alleged nationwide restraint after all. It also concerned the impact on Metro, with potential losses of business that competition from Mr Meiring in his role at Viridian might cause, if he was allowed to continue but a nationwide restraint was later held to have been a valid and enforceable term of his former employment agreement with Metro.

[46] It included considering who was better placed to bear that burden meanwhile as well as protecting the ability of each party to meet any obligations that might later be found to apply to them (such as having to pay damages). The balance favoured Metro on the latter point. If called upon through its undertaking as to damages, Metro was likely better placed – as a large business – to pay Mr Meiring for lost salary and other expenses that he might incur if he were prevented from working for Viridian from now until expiry of the non-compete restraint period on 29 February 2016. That conclusion assumed his employment with Viridian would continue after then if he was forced to stand down for that period but there was no evidence that it would not or that, if he lost his job, that Metro would not be able to meet an award of damages that might then run into some hundreds of thousands for his loss of future earnings.

[47] Mr Meiring did not disclose significant assets to meet any prospective award of damages that might result from losses of business to Metro if he was found in a substantive investigation to have breached a valid nationwide restraint and to have caused such losses by his work for Viridian from Christchurch. The relative hardship though would likely fall hardest on him as he deposed he was his family's main income earner with a large mortgage to pay along with usual day to day family expenses.

[48] Mr Meiring's relatively modest means also supported another factor in Metro's favour in assessing the balance – whether, without an interim injunction

meanwhile, Metro could ultimately be adequately compensated for any losses by an award of damages. He could be assumed not to be able to meet an award of damages if there were substantial commercial losses proven, although there was no affidavit evidence about just how big such amounts might be. On the other hand, the fact that he had a mortgage indicated he owned at least part of a property asset that could be taken in satisfaction of an award of damages.

[49] The adequacy of a potential damages award is, however, also subject to the well-known difficulty associated with quantifying losses from misuse of confidential information.[5] It is inherently difficult to, firstly, gather comprehensive information from or about clients who might have accepted (for example) a better price from a competitor offered with the benefit of confidential information that a former employee took and used in gaining business for his or her new employer and then, secondly, to calculate future losses that resulted from that misuse. That element of the balance favoured Metro.

[50] There was though no certainty of such losses. Metro, as a leader in its market, was also well placed to use its extensive customer contact, supplier relationships and market expertise to manage those risks in that interim period. It also had the benefit of the 3 November undertaking given by Mr Meiring about observing his undisputed obligations (regarding confidentiality, intellectual property and the North Island restraints) and an undertaking Viridian had given not to instruct him to do anything contrary to those undertakings.

[51] Metro rightly noted that the delay, in waiting for the substantive investigation meeting in late February and then however long a determination might take to be issued (realistically say a total of four months from now), was a factor to be weighed in the balance. It was a factor of relative and regrettable inconvenience to both parties equally. Neither was there any delay by either party in how they had conducted themselves either before or during this proceeding that was relevant.

[52] Standing back and weighing all the elements in the balance, I concluded that the relative inconvenience (including risks) was greater for Mr Meiring than Metro.

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[5] *Credit Consultants Debt Services NZ Limited v Wilson (No 3)* [2007] 1 ERNZ 252

Overall justice

[53] Having concluded there were some elements where Metro had established an arguable case, but the balance of inconvenience was greater on Mr Meiring if an interim injunction was granted, the application needed to be resolved on an assessment of the overall justice between the parties from now until the substantive investigation and determination.

[54] The assessment had to be relatively robust. It was made in a short timeframe, on the basis of untested affidavit evidence and documents attached to those affidavits. The practical reality was also that the interim result could be the substantive outcome, because the substantive investigation was scheduled to be held only a few days from the end of the non-compete period, and sometimes such matters do not proceed to that substantive investigation anyway.

[55] For the reasons set out in the remainder of this determination I concluded, in exercise of the discretion to do so, that the overall justice of the case favoured declining Metro's application for an interim injunction.

Strength of the case and public policy considerations

[56] Although arguable, Metro's case about a greater agreed and enforceable geographical scope of the restraint was very weak. Mr Meiring had contracted for a restraint area in the North Island only. Metro relied on a supposed oral agreement to a nationwide restraint that was then not documented or formalised in any way in the seven months before Mr Meiring resigned or the 11 months before he left the employment. The failure was contrary to Metro's contractual obligation to record and sign agreed variations in writing.

[57] The prospect of Metro securing a modification of the applicable terms – and thereby substituting a nationwide restraint area – was similarly so weak that it could not outweigh other factors to prevent the interim injunction being declined.

[58] Both parties relied in their submissions on a statement in the Court of Appeal's decision in *Fuel Espresso v Hsieh*, a case on an interim injunction application

involving a restraint of trade. The relevant passage – with emphasis added in bold – said this:[6]

> The restraint is plainly reasonable. **Agreements are made to be kept.** Mr Hsieh was employed and trained, but then left in 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.

[59] Metro submitted this principle favoured its application. I have not agreed with that view. The surrounding words made it clear that – in the *Fuel Espresso* case – the employee had what the Court called 'a clear contractual provision'. It was in writing and unequivocal. The party closest to that situation in the present case was Mr Meiring. He had a clear, written term in his employment agreement that stated the restraint area was the North Island and he did not challenge that was reasonable. What was indisputably clear and 'made to be kept' did not go as far as Metro alleged.

[60] The public policy consideration expressed by the Court in *Fuel Expresso* plainly favoured Mr Meiring as a matter of overall justice in this case. Also relevant was the public interest in preventing misuse of an employer's property (which includes proprietary interest in confidential information) but I did not consider the evidence was sufficient to say this interest was so at risk in Metro's case that the interim injunction sought was warranted. Similarly, another public policy consideration, Mr Meiring's freedom to work and use his skills and experience (provided he was not doing so in breach of clear terms of restraint) did not support the injunction being granted.

Party conduct

[61] Metro's evidence and submissions made strong criticisms of Mr Meiring's honesty and credibility prior to leaving its employment.

[62] Mr Meiring had responded with explanations about his use of confidential information. He deposed to having deleted the emails once he left Metro but admitted having sent one on to Mr Famularo (and gave a cogent explanation of the reason for having done so and about whether its contents were confidential in any event). He provided an undertaking to comply with his obligations and an assurance about what he had done and would do in respect of Metro clients prior to the expiry of the

[6] *Fuel Espresso Limited v Hsieh* [2007] ERNZ 60 at [21]

solicitation restraint on 30 November. He also deposed that he "absolutely" stood by those undertakings and had no intention of breaching them.

[63] Metro criticised Mr Meiring for not having made clear that he did not accept the nationwide restraint supposedly agreed at the September 2014 SLT meeting. It was not a compelling point. Even accepting the matter may have been discussed and agreed as Metro's policy at that meeting, he had no apparent reason to comment on it at the time (or dishonestly withhold his true view, if it was different then) as his intention to leave the business was not formed until April 2015 when he was passed over for a position that he had hoped to get.

[64] Similarly he could not fairly be criticised for rejecting a 'settlement agreement' put to him in July 2015. The draft given to him wrongly purported to resolve an 'employment relationship problem' when there was not one. It said nothing to indicate Metro considered the restraint was wider than what was in Mr Meiring's employment agreement. In fact Mr Rigby's covering email stated the agreement was "no different to your employment contract" and was "just a clarification of what the company commits to and a reminder of your obligations".

[65] The other side of that equation was Metro's own conduct. In its submissions Metro denied that it had "dropped the ball". However it had done so, firstly from September 2014 by not properly documenting its supposed agreement with SLT members to a nationwide restraint. It did so again in July 2015 when Mr Meiring did not accept the supposed settlement agreement. It was, as described by Metro's counsel, "in hindsight, a red flag". However at the time it was also an opportunity for Mr Rigby to clarify the terms on which Mr Meiring would leave Metro, including by negotiating a nationwide restraint in return for an earlier release for Mr Meiring from his notice period. Failing that Mr Rigby could have exercised Metro's contractual right to have Mr Meiring serve the full period.

[66] The most compelling sentence in the affidavits of the respective witnesses was this, stated by Mr Meiring and referring to the terms of his employment agreement: "I have planned my life around this signed document and have done everything I can to comply with it". His conduct in taking up a job with Viridian outside the North Island was – in my assessment of any likely outcome of a substantive investigation – not in

breach of those terms and consequently did not warrant preventing him from working there meanwhile.

Practical considerations

[67] Metro's submissions downplayed the value to it of the undertakings provided by Mr Meiring and Viridian about their conduct during the remainder of the restraint periods and his observation of confidentiality obligations. Mr Meiring, at the very least through these proceedings, will be acutely aware that his actions will be subject to close vigilance by Metro for any breach of those obligations and undertakings by him. While some information may be hard to gather, Metro's position in the market and close relationships with many clients and suppliers mean that Mr Meiring must be aware of the risk that any such breaches could readily be disclosed with subsequent cost and consequence to him. In that light, as a practical observation and mindful of judicial observations of a tendency for employers to exaggerate a need for protection, Metro's interests may not be as vulnerable as suggested in its evidence.[7]

Third party inconvenience

[68] There was some risk that Viridian, as a third party but intimately involved through its employment of Mr Meiring, might have been inconvenienced if he had to stand down from work for a period. It was not a factor I considered weighed at all in the assessment of overall justice in this case. Mr Meiring deposed as to having discussed the scope of his restraint with Viridian's CEO prior to being offered employment there and consequently making arrangements for him to work as its Canterbury regional manager. If the conclusion on weighing other factors had supported granting the interim injunction, I would have considered that Viridian simply had to 'wear' the inconvenience as a consequence of recruiting a manager from a competitor as a foreseeable risk in a robust business environment.

Prohibition on publication of commercial information

[69] Under clause 10 of Schedule 2 of the Act publication is prohibited of the following information from the affidavits lodged by the parties and the exhibits attached to those affidavits:[8]

(i) The names of clients of Metro; and

[7] *Air New Zealand v Kerr* [2013] NZEmpC 153 at [77].
[8] *H v A Limited* [2014] NZEmpC 92 at [80].

(ii) Financial and confidential company information not otherwise already in the public domain.

[70] No prohibited information is included in the text of this determination.

Costs

[71] Costs in respect of the interim injunction application are reserved.

Robin Arthur
Member of the Employment Relations Authority