

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 7  
5367007

BETWEEN            PURE HAIRDRESSING  
                                 LIMITED  
                                 Applicant

AND                    DIONE KOSMIDAKIS  
                                 First Respondent

AND                    FORWARD GO LTD trading as  
                                 GLO HAIRDRESSING  
                                 JOHNSONVILLE LIMITED  
                                 Second Respondent

Member of Authority:    Michele Ryan

Representatives:        Charles McGuinness Counsel for Applicant  
                                 Jills Angus Burney Counsel for First and Second  
                                 Respondents

Investigation Meeting:    17 January 2012 at Wellington

Submissions received:    17 January 2012

Determination:            24 January 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     On 20 December 2011 the applicant Pure Hairdressing Ltd (“Pure”) lodged with the Authority a Statement of Problem which sought (amongst other things) permanent compliance orders requiring the first respondent Ms Dione Kosmidakis (“Ms Kosmidakis”), to comply with a number of express and implied post termination contractual obligations contained in an employment agreement between Ms Kosmidakis and Pure. Pure seeks penalties from the second respondent Forward Go Ltd trading as Glo Hairdressing Johnsonville Ltd (“Glo”). These matters are scheduled to be heard at an investigation meeting on 16-17 February 2012.

[2] Pure also applied to the Authority for orders for an interim injunction and an order to have Ms Komidakis comply with a non-competition clause (restraint of trade). The application was accompanied by an undertaking as to damages and requested the matter be addressed with urgency.

[3] Ms Kosmidakis' Statement in Reply records that she accepts she has acted in breach of the restraint of trade provision contained in the employment agreement but says the restraint was, in all the circumstances, unworkable, onerous and unreasonable. On this basis Ms Kosmidakis says the restraint of trade is unenforceable.

[4] The application for interim injunction was heard on 17 January 2011. As is usual in applications for urgent interim injunctive relief the evidence provided to the Authority was contained in affidavits and/or affirmed statements and was not able to be properly tested. A number of issues and submissions raised in the course of the investigation are not required to be determined in this application and as permitted by s174 of the Employment Relations Act where evidence or submissions which have been received are not relevant to the finding of this application I have not recorded those.

### **Relevant Background Facts and Evidence**

[5] Pure owns and runs a hair salon business at 22 Johnsonville Rd. Ms Kosmidakis worked for Pure and its predecessor, a franchise of Rodney Wayne Hair Salons, for approximately seven years.

[6] Prior to commencing employment with Rodney Wayne in Johnsonville, Ms Kosmidakis worked at a Rodney Wayne salon in Wellington city and on transfer to the Johnsonville salon many of her clients followed her to that location.

[7] Ms Kosmidakis' evidence is that her reasons for leaving employment with Pure were because she had been unable to obtain enough work within hours that were suitable for her and her effective pay has stagnated. She considered it unfair that a bonus was not being paid at her rate of pay whereas a bonus was paid on the rate above her. She also says that over the previous two years she had on many occasions sought to negotiate changes to her roster and have more flexibility to her hours but

these had not been agreed to by her employer. Pure says it has always tried to accommodate Ms Kosmidakis' needs and that she has never questioned her commission or bonus system.

[8] On 12 November 2011 Ms Kosmidakis advised Andrew Fanning, Managing Director of Pure that she was intending to take up a position with Glo, which is located 100 meters away at 72 Johnsonville Rd. Mr Manning responded and raised concerns with Ms Kosmidakis about breaching the restraint of trade provisions, and again on 16 November 2011 when Ms Kosmidakis provided written notice of her resignation when it was agreed that Ms Kosmidakis would work out her four weeks notice.

[9] The restraint of trade contained in the employment agreement signed by the parties on 13 May 2009 is as follows:

**“19. Non-Competition**

*11.1 The Employee shall not at any time, either during the term of this agreement or for a period of twelve (12) months after the termination of this agreement, either directly or indirectly, and whether as principal, partner, agent or employee or howsoever else, carry on the business of hairdressing within a radius of five (5) kilometres or have an interest as a director or shareholder in, or otherwise directly assist, such a business without the express written permission of the Employer.”*

[10] Ms Kosmidakis and Pure agree that the terms of the non-competition clause contained in the employment agreement with the Rodney Wayne franchise in Johnsonville were reproduced exactly in the Pure employment agreement.

[11] The affidavits of Ms Kosmidakis and Mr Fanning reveal there is some dispute between them as to the level of civil engagement each displayed to the other over the following weeks. Mr Fanning and Ms Kosmidakis each describe the other (in various ways) as unreasonable and/or unreceptive when any discussions as to the restraint were attempted.

[12] Mr Fanning deposes that on 17 November 2011 he gave a letter drafted by his solicitor to Ms Kosmidakis which set out Pure's legal position. The letter stated that Pure did not want to prevent Ms Kosmidakis from earning a living and that she was

entitled to seek alternative employment in Wellington outside the five kilometre radius (restraint of trade parameter). The letter sought to remind Ms Kosmidakis of her contractual obligations and advised that if she did not comply with her legal obligations Pure would take legal action which may include an injunction and damages. The letter also set out a conditional offer advising:

*...it is prepared to agree to a reduced period of four months on the basis that you confirm that you will not commence at your new employer/principal during this period.*

....

*If you have any doubts about your obligations please discuss these with Andrew or myself.*

[13] Mr Fanning says that when he physically handed Ms Kosmidakis the letter (17 November 2011) he reiterated that he did not want to prevent her from earning a living but that it was the closeness of Glo that exacerbated the situation.

[14] Ms Kosmidakis attests that on receipt of the letter she was very upset. She immediately went to Glo and sought advice from Caroline Norris, the owner/operator of that business. Ms Norris' evidence is that she did not discuss the letter with Ms Kosmidakis but immediately referred her to a lawyer who she believed represented and advised the NZ Hairdressing Association.

[15] Ms Kosmidakis says she was advised by the lawyer to not discuss any further employment matters with Mr Fanning, to take care in her dealings with clients and to remain professional at all times. She says she was told that the letter of 17 November 2011 did not require a response. On return to Pure she informed Mr Fanning of that advice including that she would not reply to the letter.

[16] Ms Kosmidakis says that she obtained further legal advice some days later. Her affidavit states"

*I was now aware that a restraint of trade could be unlawful in a situation where a person is simply going about their business and trying to maintain working. I thought he was just trying to scare me into retracting my resignation as I had done earlier in the year.*

[17] By way of background Ms Kosmidakis says she had tried to resign from Pure in early 2010 where she had a job offer in Khandallah but she says that Mr Fanning had said Pure would sue her if she did. Mr Fanning says he did indicate that Khandallah was inside the coverage of the restraint. He says that a modest pay increase was agreed and Ms Kosmidakis remained with Pure. Ms Kosmidakis also referred to another position available in Churton Park in which she had considered applying (although she did not specify a date) but that Mr Fanning had advised it was in the restraint of trade radius and would prevent her from working there. She says at the time she felt pressured and decided to stay.

[18] On 8 December 2011 a further letter on behalf of Pure was sent to Ms Kosmidakis which repeated the previously advised potential for legal action. The letter recorded Pure's view that the twelve month restraint was reasonable and reiterated its conditional offer of 17 November 2011 to reduce the duration of the restraint of trade. The letter noted that in this regard there had not been any contact from Ms Kosmidakis' lawyer contrary to prior indications and concluded with an invitation to discuss if there were doubts.

[19] No agreement was reached as to the operation of the restraint and Ms Kosmidakis finished her employment with Pure on 14 December 2011.

[20] On 15 December 2011 Pure sent a letter to Glo detailing the terms of the contractual restraints between it and Ms Kosmidakis. It indicated, amongst other things, that it would be seek injunctions if Ms Kosmidakis commenced work with Glo and sought an undertaking from Glo that it would not employ Ms Kosmidakis in breach of her ongoing obligations.

### **The Issues and Legal Principles**

[21] The legal tests<sup>1</sup> to be considered by the Authority in assessing the application for interim injunction are well settled. The Authority is to determine the following questions:

- a) Is there an arguable case for enforcement of the restraint of trade?

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<sup>1</sup> *American Cyanamid Co v Ethicon Limited* [1975] AC396 and *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited* [1985] 2NZLR 129

- b) If so, is there an adequate alternative remedy other injunctive relief?
- c) If not, where does the balance of convenience lie?
- d) What is the overall justice of the case?

### ***Arguable Case***

#### *Proprietary interest*

[22] A restraint of trade covenant is different to that of other contractual obligations. Such restraints are generally considered unenforceable if the purpose of it is to prevent a worker from his or her right to work in their area of expertise and skill and compete in the free-market. However a restraint of trade can be enforceable if it can be shown that the restraint of trade is reasonably necessary to protect some proprietary interest(s) and is not simply to limit competition<sup>2</sup>.

[23] An employer may possess a proprietary interest in trade secrets, confidential information and its business or trade connections.<sup>3</sup>

[24] Pure submits it has a proprietary interest in its customers and that the restraint between itself and Ms Kosmidakis seeks to protect that interest. Mr Fanning deposed that Ms Kosmidakis is an integral part of the business. She had a lengthy service with it which has allowed her to establish strong connections with clients who attend the salon and as a senior stylist she bills between a quarter to a fifth of Pure's turnover. This evidence was not directly challenged by Ms Kosmidakis although she says many of her clients had followed her from her employment in Wellington city to the Johnsonville salon and had been loyal to her. I take from this evidence that Ms Kosmidakis infers that those clients were not primarily clients of Pure Hairdressing.

[25] Counsel for Pure referred the Authority to *Rodwil Enterprises Ltd v Dominguez* AA 272/07, a case also regarding whether a hair salon had a proprietary interest in its customers. The determination in that case states at paragraph 28:

*I accept that the Applicant has a proprietary interest in its connection with customers provided with hairdressing services by Mr Dominguez as its employee. An interest of that kind has been described this way in Dawnay Day & Co Ltd v de Braconier d'Alphen [1997] IRLR 285 (HC) at 290.*

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<sup>2</sup> *Airgas Compressor Specialists v Bryant* [1998] 2 ERNZ 42

<sup>3</sup> *Ibid* at p53

“This principle is from time to time applied in the hairdressing business. Restrictive covenants are common in that business and from time to time come before the court (see for instance *Steiner (UK) v Spray Court of Appeal*, 1 December 1993). As Hoffman LJ said in that case, it is common knowledge that people are loyal to their hairdressers. That loyalty is founded primarily on the individual hairdresser’s skill in cutting and setting hair, and on his or her pleasant and sympathetic personality. Nevertheless the customer’s loyalty is in law, as Hoffman LJ says, part of the employer’s goodwill. It is the employer who provided the employee with the opportunity to improve his or her skills and to establish and develop a personal relationship with the customer; and it is the employer who has borne the cost of providing attractive premises and facilities which may help to cement the personal relationship (see also *Marion White Ltd v Francis* [1972] 1 WLR 1423, 1429).”

[26] I accept there is an arguable case that Pure Hairdressing does have a proprietary interest in the clients who were attended upon by Ms Kosmidakis.

*Reasonableness of the Restraint*

[27] Once an employer has established 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. If however the restraint is stipulated in such a way as to go beyond the protection sought, the Authority may modify the restraint pursuant to s8 of the Illegal Contracts Act 1970 so as to give effect to the protection required but not to an extent that it would alter the agreement between the parties.

[28] The term of the restraint is 12 months. Mr Fanning deposed that it was imperative for Pure to have an opportunity to rotate the clients to a new stylist and considers 4 months’ rotation or two visits on average for clients to be them in with a new stylist would be necessary as a minimum. I also note that prior to Pure’s proceedings with the Authority it had made two separate conditional offers to Ms Kosmidakis advising that it was willing to reduce the duration of the restraint to four months provided she not commence employment with Glo.

[29] The restraint of 12 months may be of a longer duration than needed to protect the proprietary interest Pure claims it requires. In *Rodwil Enterprises*<sup>4</sup> the Authority accepted that a restraint of three months and three kilometres in the circumstances would be enforceable and referred to *Servilles Ltd v Whiting*<sup>5</sup> and commented:

*The Employment Court has found on an interim basis...that a restraint of six months in a five kilometre radius was arguably not unreasonable in a case involving a hairstylist and a former employer.*

[30] In *Walley v Gallagher Group* [1998] 3 ERNZ 1153 Colgan J reviewed a number of authorities and found that:

*The 21 cases analysed reveal that it is exceptional for a restraint of even one year's duration, let alone longer, to have been found to be reasonable. There are, however, cases where up to several years' restraint have been held to be reasonable but these are rare.*

[31] I am not willing to make a final determination on the reasonableness of the duration of the restraint until the matter can be properly tested. For the present application I find that there is an arguable case that the duration of restraint may be reasonable although the information before the Authority at this point lends itself to the possibility of a modification to 3-4 month's in duration following the full investigation meeting.

[32] The restraint provides for a radius of five kilometres. Pure submits that a geographical area of five kilometres around the salon is not overly onerous and does not prevent Ms Kosmidakis from earning a living or carrying out her trade. It says that Ms Kosmidakis' new employment at a salon which is 100 metres away has significantly exacerbated the situation and it is this factor that has largely contributed to its application to have the restraint enforced.

[33] Conversely Ms Kosmidakis says the restraint is unreasonable and it is not an option for her to be outside the 5km zone due to child care and after school responsibilities.

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<sup>4</sup> *Rodwil Enterprises Ltd v Dominguez* AA 272/07

<sup>5</sup> unreported, EC, 2 June 200, AC47/00 Colgan J

[34] In terms of the geographic limits I find it is arguable that such a provision is necessary and therefore reasonable to protect the proprietary interest that Pure claims, and in the particular circumstances where the proximity of Ms Kosmidakis' new employer is so close.

*Adequate consideration for the restraint*

[35] No evidence was put before the Authority by either of those parties representatives as to what exchange (or otherwise) was made by Pure for the restraint contained in Ms Kosmidakis' employment agreement. No suggestion was made that Ms Kosmidakis entered into the employment agreement under duress. There was evidence that covenants of restraint of trade are usual for those working within the hairdressing industry. In this regard it appears accepted by both Ms Kosmidakis and Pure that consideration for the restraint was made by the exchange of promises of employment, services undertaken and payments made, and that this was adequate to both parties.<sup>6</sup>

*Arguable Case Summary*

[36] In summary I find there is an arguable case for Pure that it has a proprietary interest in its clients' custom and it is arguable that the restraint is reasonable and enforceable. Pure has established to a sufficient degree an arguable case for substantive relief.

*Adequate alternative remedy*

[37] The second question is whether there is an adequate remedy alternative to the injunctive relief that Pure seeks.

[38] Counsel for Ms Kosmidakis and Pure each provided submissions as to the difficulties in properly assessing the financial cost which has occurred or will occur as a direct consequence of the breach of a restraint of trade.

[39] Pure did not provide much by way of evidence about damages that have resulted or are reasonably likely to occur for it. It says this is because the competition between hair salons in Johnsonville is extreme and it is fearful that any determination which evidences its specific figures may provide an advantage to the competition. Mr

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<sup>6</sup> Fuel Expresso Ltd v Hsieh [2007] ERNZ 60

Fanning did however state that 24 clients attended by Ms Kosmidakis with an average spend of around \$100 each equates to \$2,400 in lost revenue per week for Pure Hairdressing. It says this is the kind of loss that could financially put it below its break-even point.

[40] Ms Kosmidakis submits the financial loss has not been adequately quantified but that the particular customers that have been identified as having left Pure and obtained services at her new employer's premises are personal acquaintances of hers. I take this to mean she should not be liable to Pure for the loss of that custom.

[41] Ms Kosmidakis gave evidence of her financial situation. She states she has no savings and everything she earns is taken up with her weekly outgoings for her and her family. She shares custody of her two children and the expenses associated with child rearing. Caroline Norris advised the Authority that Glo is not assuming Ms Kosmidakis' costs in this matter.

[42] Although the evidence relating to Pure damages is relatively limited, if the lost revenue continues to crystallize at the rate it says is currently occurring then the loss to it may be substantial. It also appears that Ms Kosmidakis' financial position would prohibit her from satisfying almost any award of damages if made against her. In these circumstances I do not consider that there is an adequate alternative remedy for Pure should it be successful in its substantive application.

### ***Balance of convenience***

[43] In *Tournament Parking Ltd v Munroe*<sup>7</sup> the Authority helpfully described any assessment of the balance of convenience as a weighing up of the respective hardships that may arise between this determination and a final determination if the interim relief sought by the employer is granted. One aspect in an assessment of the balance of convenience is to consider the respondent's ability to pay damages if ultimately found to have caused a loss to the employer.

[44] Pure has given broad evidence on what it considers its losses will be and has made an undertaking as to damages if the Authority does order an interim injunction but later it finds Pure unsuccessful in its claims.

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<sup>7</sup> *Tournament Parking Ltd v Munroe* AA236/10

[45] I have already found from Ms Kosmidakis' evidence that she is unlikely to be able to pay damages should the Authority not grant an interim injunction but later finds her liable for damages occurred.

[46] Ms Kosmidakis says the balance of convenience favours her in that she is reliant on her weekly income continuing to support her child caring and custody responsibilities.

[47] Pure provided to the Authority information from 'Trade Me' dated on or about the weekend of 14/15 January 2012 which evidenced at least 12 positions available for a senior stylist in either Wellington or Lower Hutt as evidence that Ms Kosmidakis would be able to obtain work and income until a final determination was made. These positions are outside the 5 kilometre radius.

[48] Caroline Norris attested that Glo is bound by its agreement with Ms Kosmidakis to provide employment as a senior stylist.

[49] Caroline Norris states that she has looked at the possibility of moving Ms Kosmidakis to a hairdressing salon in Mana owned by her business partner outside the 5 kilometre geographical restraint. She says that clients would be confused and disadvantaged by this arrangement and it is unworkable.

[50] Caroline Norris deposed that between Christmas and New Year one of its senior hair stylists was required to leave its employ due to his residency status. She says if the Authority was to uphold the injunctive relief Glo would be in breach of its franchise agreement in terms of staffing required to be on the shop floor. It says it will be unable to retain its full opening hours if Ms Kosmidakis was prevented from working for it. She says this would effectively provide an advantage to Pure as it would reduce competition against it. I was not provided with a copy of the franchise agreement so am unable to assess what, if any, remedial or alternative action is available to Glo in these circumstances. I accept that injunctive action against Ms Kosmidakis may cause inconvenience to Glo but agree with the submissions provided by Pure that Glo was effectively on notice when it became aware of the restraint on 17 November 2011 and that legal action was likely to ensue. There was no evidence

before the Authority to evidence that Glo took any action to mitigate the effect of that action on its business prior to proceedings lodged on 20 December 2011.

[51] I find in the circumstances described above that although the balance of convenience is finely balanced it appears there are alternative avenues for Ms Kosmidakis to obtain work and income in the interim. The balance of convenience favours Pure.

### **Overall justice**

[52] The fourth question relates to the overall justice of the matter. The Authority is required to stand back from the minutiae of the previous tests and determine where the overall justice of the case lies until the substantive investigation.

[53] Ms Kosmidakis conceded that she has ostensibly breached the restraint of trade but submits the overall justice of the case should rest in her favour. She attests that her personal circumstances have changed in the past two years and she needs to work within the five kilometre radius of the restraint so that she can attend to child care responsibilities. Her evidence is that in the last year she has sought suitable employment elsewhere but Pure has threatened her as to the restraint. She says she has made attempts to renegotiate alternative hours of work and an increase in remuneration but that Pure has not agreed to those changes. She submits the terms of the restraint are unworkable because Pure has refused to provide permission to allow her to work within the geographical restraint. She believes she has been singled out compared to three past colleagues subject to the same restraint as herself who subsequently obtained employment in breach of the restraint but no action was taken by Pure against those individuals.

[54] Ms Kosmidakis also says that the agreement is outdated. Her evidence was that Mr Fanning is “*determined to prevent me leaving [Pure] – regardless of how many kilometres I moved – one way or another they [clients] would go to where I worked whether he likes it or not*”. I take from her evidence that it is her perspective that Pure wishes to prevent her from working anywhere other than Pure.

[55] Pure submits that Ms Komidakis should have sought a declaration from the Authority that the restraint was unenforceable prior to obtaining employment within

the prohibited radius, but did not. I accept that submission. Pure agrees that past employees have left its employ and worked in breach of the restraint but attests that in each of those instances the employee held a junior position and did not have the strong customer connections that Ms Kosmidakis has as a senior hairstylist. There was also some evidence put before the Authority that Mr Fanning may have breached his own restraints prior to the incorporation of Pure and that he has attempted to employ other hairdressers in breach of their restraints. Mr Fanning denies these allegations. I do not consider the statements made in support of these claims in regards to other employee's or Mr Fanning are relevant to my considerations in this application and I accord no weight to them.

[56] Caroline Norris proffered some information that the restraint in which Ms Kosmidakis is bound is no longer considered good practice by some members of the NZ Hairdressing Association. However the Authority cannot dismiss the restraint agreed between Ms Kosmidakis and Pure on the basis that it is no longer favoured by the industry and this evidence is not relevant to these proceedings.

[57] In regard to the overall justice of the case the Authority accepts that Ms Kosmidakis may have felt frustrated by Pure's refusal to agree to alter her terms and conditions during the latter part of her employment with Pure and her sense of unfairness when Pure advised her of its intention to restrain her when she sought employment elsewhere within her community. However Ms Kosmidakis freely agreed to the terms of restraint to apply if and when she decided to leave Pure and work elsewhere. She has now left Pure to work elsewhere and Pure relies on the particular terms of that restraint as applying exactly in these circumstances. The Court of Appeal in *Fuel Expresso v Hsieh*<sup>8</sup> at paragraph [21] states:

*Agreements are made to be kept. Mr Hsieh was employed and trained, but then left in the face of 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 interlocutory injunction.*

[58] The fact that Pure had not provided permission to have Ms Kosmidakis work within the prohibited time and geography limits does not render the restraint unreasonable or onerous. The Authority is not able to make a finding that that an

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<sup>8</sup> [2007] ERNZ 60

otherwise lawful term of contract is void or justifiably breached solely on the grounds that the relevant parties have not reached agreement as to a variation of it.

[59] It seems apparent from the letters of 17 November and 8 December 2011 that Pure made some attempts to discuss the restraint but on Ms Kosmidakis' own evidence and perhaps as a result of advice she did not think she needed to engage. Instead, in breach of the restraint and in particular to the five kilometre prohibition, she commenced employment 100 metres down the road the day following the conclusion of her employment with Pure.

[60] It is clear that Ms Kosmidakis is a highly competent and skilled senior stylist who provides excellent service to the customers she serves. I do not think the action taken by Pure in this application would have occurred if she was not very good at her chosen career. However standing back and looking at the matter as a whole, the overall justice supports an interim injunction until the matter can be finally determined.

### **Order**

[61] It is the order of the Authority that the terms of clause 19.11.1 of the employment agreement between Ms Kosmidakis and Pure Hairdressing Ltd are enforced until the substantive investigation meeting and final determination. Ms Kosmidakis is not to be employed by Forward Go Ltd trading as Glo Hairdressing Johnsonville Ltd.

### **Costs**

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

Michele Ryan  
Member of the Employment Relations Authority