

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 31
5445621

BETWEEN SENSİ MERİVALE LIMITED
 trading as MOD'S HAİR
 Applicant

AND SAMANTHA CASEY
 Respondent

Member of Authority: Christine Hickey

Representatives: Phil Payton, Counsel for Applicant
 Jeff Goldstein, Counsel for Respondent

Submissions received: At the investigation meeting

Investigation Meeting: 12 February 2014

Determination: 21 February 2014

DETERMINATION OF THE AUTHORITY

- A. Samantha Casey may not work for Sutherland Todd Hairdressing in its Merivale branch until after 9 May 2014 or the date the substantive determination is made whichever is the sooner.**

Employment relationship problem

[1] Sensi Merivale Limited (Sensi) has applied for an urgent interim injunction, and a final injunction, preventing Ms Casey from committing what Sensi claims is an ongoing breach of a restraint of trade provision at clause 25.1 of her employment agreement.

[2] Ms Casey claims that the restraint of trade provision is not binding on her. In the alternative, she argues that it is unenforceable.

[3] The parties have been directed to attend mediation at the earliest possible opportunity.

[4] As usual in cases on interim injunctions, I have investigated the application by considering the affidavits lodged by both parties, annexed relevant documents and by hearing submissions from both parties. In addition to the Statement of Problem and the Statement in Reply the Authority has received an affidavit from Kimala Temple, a consultant of the Applicant who employed Ms Casey, an affidavit from Julianne Liebeck, the Applicant's director, and an undertaking as to damages from Ms Liebeck. There is also an affidavit from Ms Casey and an affidavit in support of her from Karen Casey, Ms Casey's mother.

[5] While some of the facts have been canvassed in the process the findings I express in this determination are solely in relation to the claim for interim injunction. Final findings of fact and law will be made only once I have had an opportunity to fully test all of the relevant evidence.

[6] The parties have been directed to mediation which will take place on 13 March 2014. The substantive hearing has not been scheduled but the parties have been offered a day in the week beginning 28 April which is very close to the expiry of the 18 week restraint period.

Background facts and evidence

[7] Sensi owns and operates a "*high end hairdressing salon*"¹ called Mod's Hair in Aikmans Road, Merivale.

[8] Ms Casey was offered work in early July 2013 and on 22 July 2013 was given a copy of an employment agreement by Ms Temple. Ms Casey told Ms Temple she would not sign the agreement right then and would take it home and would possibly take some advice on the agreement².

[9] Ms Temple deposes she asked Ms Casey to read through the agreement and:

*... if she had any questions or concerns to either email me, call or speak to me in the salon*³.

¹ Ms Liebeck's affidavit, paragraph 2

² Ms Casey's affidavit, paragraph 5

³ Ms Temple's affidavit, paragraph 6.

[10] Ms Casey began work as a hair stylist on 23 July 2013. Ms Temple deposes that she talked to Ms Casey on 30 July 2013 and asked her if she had signed the agreement:

...she told me that she did [sic] not, but that she would bring it in that week⁴.

[11] Ms Casey deposes that discussion did not take place. Instead, Ms Casey deposes that she read the agreement at home with her mother. They both had concerns about the restraint of trade clause and the training clauses. As a result of her concerns she did not sign the employment agreement and did not bring it back to work. Ms Casey says that if Ms Temple had asked her about the agreement she would have told her that there were aspects they needed to discuss⁵. She did not consider it was up to her to raise her concerns with Ms Temple.

[12] Ms Temple did not follow up again on getting Ms Casey to return the signed agreement during the five months she was employed.

[13] Ms Casey considers that she is not bound by the restraint as she did not:

... agree to any restraint or to any limitation on my ability to work elsewhere⁶.

[14] On 30 December 2013 Ms Casey emailed her resignation to Ms Temple offering two weeks' notice, with her last day to be 13 January 2014. She had accepted work with another hairdressing business in Merivale, Sutherland Todd.

[15] On 3 January 2014, the first working day of the year, Ms Casey came to work and met with Ms Temple. She was told that the Applicant considered her bound by the restraint of trade clause. Ms Temple also told Ms Casey that she would be required to pay back \$50 per month for training she had received as a stylist/colour technician⁷. However, she would not be required to work out her notice period. Ms Casey's final pay, to 13 January 2014, was paid to her on 4 January 2014.

[16] The Applicant did not withhold \$50 per month of employment for the training bond from Ms Casey's final pay.

⁴ Ms Temple's affidavit, paragraph 7.

⁵ Ms Casey's affidavit, paragraphs 6,7 and 9.

⁶ Ibid, paragraph 11.

⁷ Recorded in Schedule 3, Clause 2.1 of the employment agreement.

[17] The relevant clauses of the employment agreement are:

TERM

The provisions of this Agreement shall take effect from the date of execution of this Agreement and shall remain in force until renegotiated or terminated pursuant to any provisions of this Agreement.

...

RESTRAINT OF TRADE

Note: where employment is terminated under clause 4.1, this clause 25 shall not apply and shall have no effect.

The Employee agrees that he or she will not, within a 2.0 kilometre radius of the Employer's business premises, either before or for a period of 18 weeks after this Agreement ends, in any capacity whether directly or indirectly, engage, or be concerned (whether as principal, agent, employee, consultant, or otherwise whatsoever) in any hairdressing businesses.

...

25.4 *The Employee acknowledges that the restraint, the requirement of non solicitation and the restraint upon enticement are reasonable for the protection of the Employer's business and its interests in its clients. The Employee also acknowledges that he or she has received consideration for the restraints by the benefits made under this Agreement.*

[18] On 6 January 2014 Ms Temple telephoned Ms Casey and informed her that if she started work at Sutherland Todd in its Merivale salon, or in any other hairdressing business within a 2 kilometre radius of the Applicant's business, that the Applicant may bring an action for an interim injunction against her.

[19] Ms Casey began work on 14 January with Sutherland Todd hairdressers, which is within 200-400 metres of Mods' Hair.

[20] On 15 January 2014 the Applicant's lawyer, Phil Payton, wrote to Ms Casey notifying her that it considered that she would be in breach of the restraint of trade clause should she begin work at Sutherland Todd before the 18 week period had elapsed. On 16 January 2014 Mr Payton sent a letter to Sutherland Todd informing it that if it continued to employ Ms Casey it would be doing so in breach of the restraint provision.

[21] The parties agree that the 18 week period runs from 3 January 2014. Therefore, if the restraint is binding and unmodified, it would end on 9 May 2014.

Legal principles

[22] In determining an application for interim relief, the legal principles the Authority needs to consider are well established⁸:

- Whether there is an arguable case that Ms Casey is bound by the restraint of trade and that it would be upheld at a substantive hearing. That requires consideration of first, whether Ms Casey is bound by the provision and secondly, whether the restraint is an enforceable one.
- If so, is there an adequate alternative remedy, for example, damages?
- If not, where does the balance of convenience lie in the period before the substantive hearing?
- What does the overall justice of the case require?

[23] The Applicant argues that Ms Casey is bound by the restraint clause although she did not sign the employment agreement. Ms Casey says that the restraint cannot possibly bind her because she never signed the employment agreement, and so was not bound by the terms of that agreement.

[24] The Authority needs to determine:

- Whether there is an arguable case that Ms Casey is bound by the unsigned employment agreement; and
- Whether there is an arguable case that she will be restrained from working in the way set out in clause 25.1 after a substantive consideration of the Applicant's case.

⁸ *Klissers Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); *New Zealand Baking Trades Employees IUOW v General Foods Corp (NZ) Ltd* [1985] NZLR 110 (CA); *Port of Wellington Ltd v. Longworth* [1995] 1 ERNZ 87 (CA) at 91; *Airgas Compressor Specialists v Bryant* [1998] 2 ERNZ 42; *Hally Labels Ltd v. Powell* [2011] NZEmpC 43, (2011) 8 NZELR 532 at [21].

[25] An arguable case means a case where there are some serious or arguable, but not necessarily certain, prospects of success *X v. Y Limited and The New Zealand Stock Exchange* [1992] 1 ERNZ 863.

Is there an arguable case?

Is Ms Casey bound by the terms of an unsigned employment agreement?

The case for the Applicant

[26] The Applicant accepts that the employment agreement is an intended employment agreement under s.64(6) of the Employment Relations Act 2000 (The Act), which provides:

To avoid doubt, an intended agreement must not be treated as the employee's employment agreement if the employee has not—
(a) signed the intended agreement; or
(b) agreed to any of the terms and conditions specified in the intended agreement

[27] Two Employment Court cases have recognised that restraint of trade provisions in unsigned employment agreements can be binding on an employee when there has been express acceptance of the employment contract and the employee remains employed⁹.

[28] In those cases the employees were aware of the restraint of trade provisions and had deliberately not signed their employment agreements. In Mr Royal's case after receiving an intended employment agreement from his employer he sent a written letter of acceptance of the offered employment, took up the job and remained in it for a period of time. That was held to be sufficient to decide that he was bound by the employment agreement which included the restraint provision.

[29] In the Mr McKavanagh's case he represented to other senior employees that he had signed the agreement, although he had not. That was held to be sufficient to decide that his employment was covered by an oral contract based on the draft written contract he had been presented with, which included the restraint provision.

⁹ *Royal v Axon Computer Systems Limited* [1994] 1 ERNZ 312 and *Space Industries (1979) Ltd v McKavanagh* [2000] 1 ERNZ 490

[30] The Authority followed this line of reasoning in *Maccaferri NZ Limited v Langham*¹⁰; in a case where Mr Langham had noticed the restraint of trade provision in the proposed agreement but decided to do nothing in response to the email containing the proposed employment agreement and started work. However, that determination and the Court decisions referred to above were made before s.64(6) of the Act came into effect.

[31] The Applicant submits that Ms Casey is similarly bound by the unsigned agreement because:

- She knew of the restraint of trade provision and although she did not want to be bound by it she did not raise her concern about it at any time, including when she was given the opportunity to do so by Ms Temple on 30 July 2013; and
- She remained employed and accepted the benefits of the agreement, including receiving the training set out in Schedule 3.

[32] The Authority decision in *Brown v Middleton Transport Service Limited*¹¹ considered s.64(6)(b) of the Act. Mr Brown argued that the notice period for redundancy in an unsigned employment agreement did not apply. Despite s.64(6)(b) the Authority member found that Mr Brown's actions, in accepting and undertaking work and failing to notify his employer of any concerns about the agreement, inferred agreement to the draft agreement proffered by the employer:

Agreement may be inferred from a party's conduct. The conduct of an employee who did not protest about the written terms at the time and accepted all the benefits provided by the draft agreement has constituted agreement.¹² Similarly an employee who failed to respond for 5 months was held to have agreed to a counteroffer¹³. There is no reason to depart from that reasoning here.

[33] However, Mr Brown's employment began in May 2011, before s.64(6) came into effect.

¹⁰ ERA Christchurch, CA 37/07, 10 April 2007

¹¹ [2013] NZERA Auckland 317

¹² *Decom Limited v Cleaver*, ERA Christchurch, CA 2A/09, 24 March 2009

¹³ *Whyte v Creative Force Media Ltd* ERA Auckland, AA 23/10, 19 January 2010

[34] Although the issue was not raised in submissions by the Applicant I consider it also relevant to consider the good faith obligations contained in s.4 of the Act. Of particular relevance in this case are ss.4(1) and 4(1A)(a) and (b), which provide:

- (1) The parties to an employment relationship ...*
- (a) must deal with each other in good faith; and*
 - (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything –*
 - (i) to mislead or deceive each other; or*
 - (ii) that is likely to mislead or deceive each other.*

- (1A) The duty of good faith in subsection (1)—*
- (a) is wider in scope than the implied mutual obligations of trust and confidence; and*
 - (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; ...*

[35] It is arguable that an employee who knows of the restraint of trade provision and consciously decides not to agree to it yet begins and carries on in employment never intending to be bound by the restraint is in breach of her duty of good faith. In not telling the employer she does not wish to be bound by the restraint yet beginning and carrying on her employment she is, at least indirectly, doing something that is likely to mislead her employer. In addition, she is failing to be active and constructive and failing to be adequately communicative.

[36] It is arguable that it is not equitable for the party who is in breach of their duty of good faith to gain the benefits of the employment agreement but to be able to escape the burden of the agreement.

The case for the Respondent

[37] The Respondent argues that although the arguable case threshold is a low one there is simply no arguable case that Ms Casey should be bound by the restraint because she is not bound by the employment agreement since she did not sign it.

[38] Ms Casey relies on the following submissions to establish that the employment agreement is not binding on her:

- In giving Ms Casey the intended agreement only the day before she began work the Applicant failed to meet its obligation under s.63A(2)(c) of the Act to give her reasonable opportunity to seek advice on it.
- In not insisting on Ms Casey give one month's notice but instead accepting 2 weeks' notice and in not requiring Ms Casey to pay back the \$50 per month training bond the Applicant has accepted that terms in the unsigned agreement cannot be relied on by it.
- Similarly to *Smith v Stokes Valley Pharmacy (2009) Ltd*¹⁴, in which the employer could not rely on the s.67A of the Act trial period provision because the employment agreement was not signed before the employment commenced, the Applicant should not be able to rely on the restraint clause because the agreement was not signed before the employment began.
- There was no discussion with Ms Casey on 22 July 2013 when the agreement was given to her about the restraint provision. The agreement was orally entered into between the parties on 22 July 2013 when the essential terms of the hourly rate, the role, the start date and the hours of work were agreed.
- Even before s.64(6) of the Act was enacted the Employment Court would not imply a restraint provision into an unsigned agreement in the absence of the employee having significant status in the company, such as being a shareholder, or a director and owing a fiduciary duty to the employer. Ms Casey was not a senior employee and did not owe that kind of fiduciary duty to the Applicant.
- Ms Casey is not estopped from arguing that she is not bound by the agreement because she did not, by clear words or conduct, create a belief in the Applicant that she was bound by the agreement. Even if she did create that belief there is no evidence that the Applicant relied on the restraint provision to its detriment.
- Section 64(6)(a) of the Act provides that that the intended employment argument must not be treated as Ms Casey's employment agreement because she has not signed it. Section 64(6) did not need to be considered in the *Brown*

¹⁴ [2010] ERNZ 253 (EC)

case because Mr Brown's employment began in May 2011 which is before s.64(6) was in force.

[39] A further relevant matter not raised in submissions is that the agreement itself provides that the provisions of the agreement take effect from the date of execution of the agreement. The agreement was never executed. The employer drafted the intended agreement and it can be argued that if it intended to be able to rely on the provisions of the agreement it should have ensured it was executed.

[40] I will deal with each of the submissions for Ms Casey in turn.

Breach of s.63A

[41] I do not consider that the alleged breach of s.63A(2)(c) of the Act operates to nullify the employment agreement and makes it inequitable for the agreement to be considered binding on Ms Casey. When Ms Casey was given the agreement she says that she told Ms Temple she was likely to take advice on it. In fact, she chose not to do so but s.63A(2)(c) of the Act would not, on its own, act to invalidate an employment agreement.

Employer did not insist on Ms Casey being bound by other terms of the written agreement

[42] It was submitted that the Applicant evidenced that it did not consider itself bound by the intended employment agreement when it did not insist on Ms Casey give one month's notice, as provided for in the employment agreement, but instead accepted 2 weeks' notice and when it did not require Ms Casey to pay back the \$50 per month training bond.

[43] I consider the Applicant would have been entitled to accept two weeks' notice rather than the month's notice set out in the employment agreement even had the agreement been signed. No doubt the reason the Applicant did not withhold \$50 per month from Ms Casey's final pay was because of ss. 4 and 5 of the Wages Protection Act 1983 which provide that an employer cannot deduct any amount from a worker's wages without the worker's written consent. Since she did not sign the employment agreement Ms Casey did not consent in writing to allow the training bond to be deducted from her wages.

Relevance of the employment agreement not being signed

[44] The Respondent's submissions on this point are stronger.

[45] The Applicant seeks to impose a restraint of trade provision on Ms Casey which is prima facie an unlawful provision. Section 64(6)(a) of the Act prevents me from relying on the written intended employment agreement as the actual employment agreement. However, it is evidence of what the Applicant intended to be the agreement particularly as Ms Casey does not dispute that the restraint provision was in the agreement given to her.

[46] Ms Casey's evidence is that she was not happy about the restraint of trade provision. The parties did not discuss that provision at all. Silence may be equivocal as to consent¹⁵. Ms Casey did not indicate her agreement with the written terms of the intended employment agreement.

[47] The prima facie unlawfulness of a restraint of trade provision must be borne in mind when considering whether it can be implied into Ms Casey's employment agreement. It is possible to imply a restraint of trade provision into an employment agreement in the absence of a signed agreement containing such a provision. In the Employment Court case of *Ravensdown Corporation Ltd v Groves*¹⁶ Judge Travis said:

I accept the possibility that a restraint of trade can be implied in appropriate cases, see United Pukekohe Ltd v Grantley [1996] 3 NZLR 762 and Norris v Zealfresh International Ltd [1998] 3 ERNZ 574. Both involved interim injunctions and it was found to be arguable that such a restraint could be implied as part of the presumed intention of the parties. In the former case this followed the sale of a business and in the second the defendant was the most senior employee, a major shareholder and a director of the company and had ensured that another employee of lesser status had accepted a restraint. Those elements are completely missing in the present case¹⁷.

[48] Similarly to the *Ravensdown*, in this case the employee was not a director or major shareholder of the business. She was not a senior employee, let alone the most senior employee.

¹⁵ Burrows Finn & Todd *Law of Contract in New Zealand* Third Ed Lexis Nexis para. 3.4.1 Effect of Silence p 58 citing *Felthouse v Brindley* (1862) 11 CBNS 869; Miller 35 MLR 489.

¹⁶ [1998] 3 ERNZ 947

¹⁷ *Ibid*, at 968

[49] In *Sun Products New Zealand Ltd v Hunter*¹⁸ Judge Colgan (as he then was) granted an interim injunction restraining Sun Products' former general manager, who was also a director and a shareholder of the company. There was a disagreement about whether Mr Hunter had ever signed a proposed employment agreement containing a restraint of trade. The employer contended that he had although it could not locate a signed copy of the agreement. Judge Colgan said:

I am satisfied that the plaintiff has established an arguable case of liability against the first defendant in respect of the restraint. Although by no means certainly an express term of the contract of employment, there is evidence meeting the arguable case test that it is. The restraint is for a relatively short period, appears to be otherwise reasonable, and was arguably the subject of consideration when it was entered into. It is my assessment that at trial such a restraint would be likely to be upheld in its entirety if it had been an expressed term of the contract of employment.

It would be likely to be held to be a reasonable restraint in all the circumstances.

[50] In this case neither party asserts that Ms Casey signed the employment agreement containing the restraint of trade and therefore unlike in *Sun Products* there is no evidence meeting the arguable case test that the restraint is an express term of the contract.

[51] In the Employment Court case of *Smith v Stokes Valley Pharmacy (2009) Ltd* Chief Judge Colgan dealt with an argument that an un-executed employment agreement nevertheless could be relied on to impose a 90-day trial period under s.67A of the Act. The agreement included the clause:

This agreement will start on the day that it is signed by you, and will remain in force until either the Company or you terminate it.

[52] The Chief Judge said:

[100] ... the employer's form of draft agreement contemplated its execution by signature. Once parties sign an employment agreement, they regard themselves and are regarded by others as being bound to the obligations and benefits contained in that agreement. Conversely, until that symbolic, but important act of signing, the form of agreement remains as a draft and, potentially, subject to further negotiation and alteration.

[101] As with most contracts, and employment contracts or agreements in particular, I conclude that the parties did not intend that they would each be bound by the draft written agreement unless

¹⁸ Unreported, Employment Court, AC109/99, Judge Colgan

and until that was executed by the writing of their signatures. ... The application of signatures, in this case and generally, signifies both mutual agreement to the written provisions and a solemn intention to be bound by them. Therefore, these legal consequences do not apply beforehand, at least not if, as in this case, there is an express exclusion of retrospectivity or even if there is an absence of reference to retrospectivity. ...

[103] For these reasons I do not accept that the employer's draft form of employment agreement established the agreed terms and conditions of Ms Smith's employment as from 29 September when she received it, or as from 1 October when she began work for the defendant¹⁹.

[53] I also consider it relevant that the Applicant, which drafted the agreement, included the "Term" clause in it. Similarly to the *Smith* case the clause provides that the provisions of the agreement are only effective once the agreement has been executed. To execute a contract means to sign a contract. That was never done. The Term clause also excludes any retrospective application of the terms of the agreement to the parties.

[54] It is arguable that the employer's intended employment agreement did not establish the terms and conditions of Ms Casey's employment from 22 July 2013 when she received it or from 23 July 2013 when she began work.

[55] It is arguable that although Ms Casey worked and received pay and training there was insufficient indication of her agreement with the agreement as a whole to imply the restraint of trade into her employment agreement.

Conclusion as to whether there is an arguable case that Ms Casey is bound by the restraint provision

[56] There are credible arguments that go both ways. Therefore, I consider there is an arguable case, although not necessarily a certain case, that Ms Casey is bound by the restraint provision despite it being contained in an unsigned intended employment agreement.

Is the restraint as drafted reasonable?

[57] The Applicant has the onus of proving, on the balance of probabilities, that the terms of the restraint are reasonable and that the restraint goes no further than is reasonably necessary to protect its interests.

¹⁹ Ibid; at p273 and 274

[58] Restraints of trade in employment agreements are *prima facie* unlawful and therefore void because they are against the public interest in that they interfere with an employee's freedom to work in their chosen field. However, restraint provisions may be valid and enforceable so long as they are necessary to protect a proprietary interest of the employer and are in the public interest. Restraint provisions in hairdressing businesses have been held to be enforceable.

[59] The Applicant submits it has a proprietary interest in retaining its customers and Ms Casey has been exposed to its customers in her employment. Ms Temple deposes that the majority of the Applicant's clients live within 2 kilometres of its premises and the restraint clause was drafted with that in mind. She also deposes that the duration of 18 weeks was drafted to reflect:

... the average repeat business of our clients, which is 6 weeks, and this allows a new stylist three appointments to build a new relationship with clients. ... Samantha built relationships with clients of the applicant that she dealt with and working a mere 200 metres for the applicant creates a very real danger of loss being suffered by the applicant.

[60] The Applicant submits that therefore the restraint clause is reasonable in all the circumstances.

[61] In opposition, the Respondent submits:

- The clause as drafted is a non-competition clause, which has the sole effect of preventing Ms Casey from working elsewhere, and therefore is not an enforceable restraint of trade.
- The restraint provision had to be reasonable at the time it was entered into. However, the only interest the Applicant seeks to protect is the relationships Ms Casey built up with its customers while she was employed by it. Those relationships did not exist at the time the agreement was entered into and therefore it was not reasonable to include a restraint provision at the time.
- The Applicant does not have a proprietary interest to be protected because the only interest the Applicant seeks to protect is the relationships Ms Casey built with its clients during her 5 month period of employment. Clients are not a proprietary interest and are free to go where they like.

[62] Case law has established that a hairdressing business has a proprietary interest in its connections with its customers. For example, in the English case of *Dawnay Day & Co Ltd v de Braconier d'Alphen*²⁰ the Court said:

...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).

[63] Ms Casey deposes:

*I would on average see 30 clients a week. Clients would usually return after about 4, 6, or 8 weeks. The vast majority of clients I saw were existing clients of the company with many of them being very longstanding clients*²¹.

[64] Ms Casey's recognition that she worked with clients who were, in the main, established clients of the Applicant suggests that the proprietary interest the Applicant claims is a real one worth protecting.

[65] In the Employment Court case of *Servilles Limited v Whiting*²² Judge Colgan found that a restraint of six months post-employment within a five kilometre radius was arguably not unreasonable. Judge Colgan imposed a shorter term of three months in his interim decision. The matter was resolved by that decision being made permanent by consent.

[66] In the case of *Pure Hairdressing Ltd v Kosmidakis*²³ the Authority upheld a restraint of 12 months for a five kilometre radius, on an interim basis, holding that it was arguable the duration of the restraint was reasonable. However, the member signalled that the restraint might be shortened to a period of 3-4 months upon substantive consideration.

²⁰ [1997] IRLR 285 (HC) at 290

²¹ Ms Casey's affidavit, paragraph 17

²² Unreported, 2 June 2000, AC47/00, Colgan J

²³ [2012] NZERA Wellington 7

[67] In *Rodwill Enterprises Ltd v Dominguez*²⁴ the Authority accepted that a restraint period of three months and three kilometres was enforceable and awarded damages for breach of the restraint.

[68] I note that in the three cases above the employees had restraint of trade provisions in their signed employment agreements.

[69] If I find it that the restraint is arguably reasonable to protect the Applicant's proprietary interest in its client relationships then Ms Casey concedes that the proximity of her new employer to the Applicant's premises (within 200-400 metres) would fall within a reasonably drafted restraint.

Conclusion on whether there is an arguable case the restraint would be upheld after a substantive hearing

[70] Setting aside the consideration of whether Ms Casey is bound at all by the restraint provision in an unsigned agreement I consider it strongly arguable that the restraint provision would be upheld, perhaps in a modified form for a shorter duration to say three months (13 weeks), after a substantive hearing.

Where does the balance of convenience lie?

[71] The balance of convenience test requires a consideration of the relative positions of the parties and a weighing up of the respective hardships that may arise if the interim relief is granted. This includes consideration of whether there is an adequate alternative remedy.

[72] Interim relief is designed to protect applicants from injury which cannot be adequately compensated in damages if they are successful at a substantive hearing. The remedy is discretionary. The Applicant's need for protection from losing clients needs to be balanced against damage to the Respondent from being unable to exercise her right to work and earn income, if the Applicant fails at the substantive hearing.

[73] The Applicant argues that the loss that may be suffered by the potential permanent loss of a customer's ongoing business is unable to be quantified. Therefore, damages are an inadequate remedy for the Applicant and instead it requires

²⁴ Auckland ERA, AA272/07, 3 September 2007

a reasonable opportunity to retain its customers, specifically those which Ms Casey had contact with while in its employ.

[74] There is no evidence at all from Ms Casey of her ability to reimburse the Applicant in the event there is a proven claim for damages. On the other side I accept Ms Liebeck's affidavit evidence that the turnover for the Applicant's business was \$2,122,900 inclusive of GST for the 2013 calendar year. Therefore, I consider the Applicant in a strong position to compensate Ms Casey for any lost wages in the event the restraint is not upheld after a substantive hearing.

[75] For Ms Casey the principal argument for not granting the interim order is that she would possibly be without income if she cannot work. I have no evidence on whether if the injunction is granted Sutherland Todd will keep Ms Casey's job open for her once the injuncted period is over. I have no evidence at all of Sutherland Todd's ability to accommodate any restrictions on Ms Casey's ability to work for it in the short term. However, I note that it has a branch in Rangiora, which is well outside the restraint area. I also note that Ms Casey is not restrained from working anywhere in Christchurch outside of a 2 kilometre radius, such as in Riccarton.

[76] Overall, I consider the balance of convenience favours the Applicant.

Overall justice

[77] The Authority is required to stand back and determine where the overall justice of the case lies until the substantive investigation and determination. I have found there is an arguable case that Ms Casey is bound by the restraint and that it is also arguable that it is a reasonable restraint, with some possible amendment, and that would be upheld after a substantive investigation.

[78] Ms Casey was informed by Ms Temple on 3 January 2014 that if she took up work at Sutherland Todd she would be in breach of the restraint provision and action could be taken against her. Ms Temple telephoned her on 6 January and conveyed the legal advice the Applicant had received that despite being unsigned the employment agreement was binding. Despite that Ms Casey began working for Sutherland Todd on 14 January. And despite the letter from the Applicant's lawyer to her on 15 January 2014, and to her employer on 16 January, she has continued working arguably in breach of the restraint.

[79] Ms Casey could have sought her own legal advice immediately upon being informed by Ms Temple that the Applicant considered her bound by the restraint. Instead it appears Ms Casey did not seek legal advice until after the Applicant had filed these proceedings on 20 January 2014. In addition, Ms Casey could have sought a declaration from the Authority as to whether or not the employment agreement was binding on her before seeking and accepting employment within the 2 kilometre radius. She did not do so and relied, perhaps naively and unwisely, on her belief that an unsigned agreement did not bind her.

[80] However, I accept that in the absence of an interim injunction the Applicant will be disadvantaged and I consider it just and equitable to grant the interim order meaning that Samantha Casey is bound by clause 25.1 of the employment agreement and must cease working for Sutherland Todd in its Merivale branch until 9 May 2014 or a substantive determination of the matter, whichever is the sooner.

Costs

[81] Costs are reserved for consideration after the substantive matter is heard.

Christine Hickey

Member of the Employment Relations Authority