IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 219
3023234

	BETWEEN	RUTHERFORD HOTEL HOLDINGS LIMITED Applicant
	A N D	LIAM CLARINGBOLD First Respondent
	A N D	MONACO MANAGEMENT LIMITED Second Respondent
Member of Authority:	David Appleton	
Representatives:	Graeme Malone, Counsel for Applicant First Respondent in person Andrew Marsh, Counsel for Second Respondent	
Investigation Meeting:	14 December 2017 at Nelson	
Submissions Received:	14 & 15 December 2017 from all parties	
Date of Determination:	15 December 2017	

DETERMINATION OF THE
AUTHORITY ON AN INTERIM MATTER

A. **I decline to issue an injunction against Mr Claringbold restraining him from working for the second respondent until 2 January 2018.**

B. **Costs are reserved until after the determination of the remaining issues at a substantive investigation which is yet to be set down, unless all remaining matters are settled at mediation.**

Employment relationship problem

[1] The applicant (Rutherford Hotel) seeks an urgent interim injunction against Mr Claringbold preventing him from working for the second respondent until 2 January 2018. It also seeks an award of damages against Mr Claringbold for breach of a restraint of trade provision and the imposition of a penalty against him pursuant to s.134(1) of the Employment Relations Act 2000 (the Act).

[2] The applicant also seeks an order that Mr Claringbold pay it a sum equal to eight weeks pay less four days pursuant to a clause in his individual employment agreement.

[3] Finally, the applicant also seeks the imposition of a penalty against the second respondent pursuant to s.134(2) of the Act.

[4] This determination disposes only of the application against Mr Claringbold for an injunction preventing him from working for the second respondent until 2 January 2018.

[5] The application for interim injunction was accompanied by an affidavit of Bevan McGillicuddy who is the General Manager of Rutherford Hotel Holdings Limited. Due to of time constraints, I dispensed with the need for the respondents to serve and lodge statements and affidavits in reply, but took evidence orally from Mr McGillicuddy, Mr Claringbold and Mr Scott Sanders, a director of the second respondent.

[6] Although Rutherford Hotel makes an application for an interim injunction against Mr Claringbold, because of the very short period of the restraint remaining, there will be no time for a substantive investigation before the expiry of the restraint period.

Background

[7] Mr Claringbold was employed by the applicant as its Executive Chef at its hotel in Nelson pursuant to an individual employment agreement dated 7 April 2016.

[8] The employment agreement included the following two clauses:

> **10.0 TERMINATION OF EMPLOYMENT:**
>
> Employment may be terminated in accordance with the following provisions:
>
> … (b) Post trial period, eight weeks notice of termination shall be given by either party, or eight weeks shall be paid, or forfeited in lieu of notice, PROVIDED THAT the period that the employer is required to give the employee may be at the employer's option and upon the payment of salary for the balance of notice yet to be worked in lieu of that longer notice period, be reduced to one day. Such payment shall not be counted as annual leave.
>
> **12.0 RESTRAINT OF TRADE:**
>
> (a) In order to protect the employer's proprietary interests, for **8 weeks** from the last day of employment you shall not engage to work for or on behalf of an organisation in direct competition with the employer, nor establish your own business in competition with the employer **within the Nelson/Tasman region**.
>
> (b) For **8 weeks** from the last day of employment you agree not to solicit in competition with the employer the custom of any person who has at any time during the period of your employment by the employer been a customer of the Employer or who shall become a customer of the employer as a result of any tender, negotiations, arrangements or proceedings made or taking place at the date of such termination.
>
> (c) Consideration for this restraint is included in the remuneration package provided in clause 5 of this agreement.
>
> (d) It is acknowledged that in view of your position with the employer and your direct association with the customers of the employer during your employment, the restraint provided for in subclause (a) is fair and reasonable and does not inhibit your ability to earn a reasonable living.
>
> (e) **For clarity, the Employer regards the following businesses to be in competition: hotels, restaurants, cafés and conference venues**.

[9] There was no express clause in the employment agreement which imposed any duty on Mr Claringbold to protect the confidential information of the Rutherford Hotel.

[10] Mr Claringbold resigned his employment by way of an email to Mr McGillicuddy sent on 7 November 2017 which stated as follows:

> Please accept this letter as formal and immediate notice of my intent to resign as Executive Chef of Rutherford Hotel Nelson.

[11] Mr Claringbold did not give the eight weeks' notice that was required to be given under the employment agreement, and left immediately. Mr McGillicuddy deposes that, following receipt of Mr Claringbold's resignation, he emailed a letter to Mr Claringbold on 9 November 2017 recording his resignation and reminding him of his obligations under the restraint of trade clause. In the letter of 9 November Mr McGillicuddy records that another individual from the hotel had spoken to Mr Claringbold on 8 November and that Mr Claringbold had confirmed that he had resigned and that he would not be working any notice period.

[12] The letter also stated that, due to the costs incurred to the hotel in covering his shifts and finding a replacement, it would be deducting up to two weeks' pay in lieu of notice from his final pay to help cover those costs. The remainder of the letter set out the text of clauses 10(b) and 12(a) of the employment agreement.

[13] The Authority saw a copy of an email from Mr Claringbold to Mr McGillicuddy sent on Friday, 10 November which stated the following:

> Please be advised that I fully intend to seek employment within the Nelson Tasman region in the next 8 weeks.
>
> I hope that you or the Talley family have any issue with this …! Because you and them can stick you [sic] restraint of trade as far up you [sic] arse as you can get it! You fat prick!
>
> I will now be taking your letter to national and local news papers I'm sure all the good folk of Nelson and New Zealand will be interested in hearing how the multi millionaire family wants to stop hard working local people from making a living. And how you … You fat little prick think that this attitude is ok …
>
> I guess I'll see you in court!

[14] It appears that no response was sent in reply to this email. Mr McGillicuddy deposes that, on around 20 November 2017, he was advised by an ex-staff member that Mr Claringbold was intending to take up employment as Executive Sous Chef at the Grand Mercure Nelson Monaco Hotel (the Monaco Hotel) the following week. He says that he contacted the company's solicitor, Mr Malone, and asked him to forward formal letters to both Mr Claringbold and Monaco Hotel requiring the restraint of trade provision to be complied with, failing which the Rutherford Hotel would seek to enforce the same.

[15] The Authority saw a copy of this letter from Mr Malone to Mr Claringbold dated 22 November which stated that Rutherford Hotel Holdings Limited required an immediate retraction of Mr Claringbold's advice that he intended to breach his restraint of trade provision and take up employment in the industry in the area, and seeking confirmation that he would comply with the restraint of trade provision.

[16] A letter in similar terms was sent by Mr Malone to the Executive Chef of the Grand Mercure Nelson Monaco Hotel.

[17] Mr McGillicuddy advises that no reply was received from Mr Claringbold, although there is evidence that the letter was delivered on 23 November 2017.

[18] Mr Marsh, on behalf of the second respondent, emailed Mr Malone on 23 November, questioning whether the restraint of trade clause that the applicant was seeking to enforce was indeed enforceable. The email also stated the following:

> While we do not agree that there is anything to prevent our client from employing Mr Claringbold, we are happy to discuss with you what your client's specific concerns are as to its alleged proprietary interests and whether there may be some other way in which any legitimate concerns that your client can establish might be able to be addressed. In this regard, we can confirm that our client is aware that Mr Claringbold will be subject to ongoing confidentiality obligations and our client is happy to sign an undertaking that it will not seek or encourage Mr Claringbold to breach those obligations at any time.

[19] Mr Malone replied to Mr Marsh on 4 December stating that he had been ill, and taking issue with the proposition that the restraint of trade was not enforceable. Mr Malone stated that the Rutherford Hotel had no confidence that Mr Claringbold would not seek to cause harm to it through misuse of the confidential information he has "*given the manner in which he left without notice and the damage already suffered by the Hotel as a result of that*".

[20] Mr Marsh responded to Mr Malone's email on 5 December taking issue with Mr Malone's contention regarding the difficulty of enforcing confidentiality provisions and stating that Monaco Management Limited was prepared to work with Rutherford Hotel to ensure that confidential information belonging to Rutherford Hotel was protected. He stated that Monaco was prepared to sign an undertaking in that regard.

[21] In his affidavit, Mr McGillicuddy deposed that he believed that the offer of undertakings was not acceptable, referring to the ability to cause harm to the hotel through misuse of confidential information and the difficulty in establishing and proving that harm. He referred to Monaco being happy to encourage a breach of the restraint of trade provisions to its own advantage so that he did not have any confidence that it would not also encourage or allow a breach of a confidentiality provision if that was also to its advantage. He also said that any undertaking would be largely worthless because it would be difficult or impossible to know if it had been breached. In addition, he said, Monaco may not even know of such a breach.

[22] Mr McGillicuddy also referred to the attitude of Mr Claringbold and the harm he had already caused so that he had no faith that Mr Claringbold would honour any undertaking.

[23] During oral evidence, Mr Claringbold conceded that he had had access to some information which was confidential to the Rutherford Hotel, but that it was limited, and would be of no use to the Monaco Hotel in any event. Both Mr Claringbold and Mr Sanders asserted that the Monaco was not a competitor of the Rutherford Hotel, and that any information of a confidential nature that might be disclosed deliberately or inadvertently by Mr Claringbold within the 19 days left before the expiry of the restraint period would be of no use to it.

[24] Whilst Mr Claringbold indicated in the case management telephone conference call on 13 December that he would be arguing that he had been constructively dismissed (so that the post termination restraint of trade was void by way of repudiation) at the start of the investigation meeting he confirmed that he was no longer pursuing that argument.

The legal principles to be applied

[25] Section 162 of the Act confers on the Authority the discretionary power to make interim injunction and injunction orders. In determining whether an injunction should be granted to Rutherford Hotel, and if so under what conditions, the Authority must be satisfied that Rutherford Hotel can show on a balance of probability that:

(a) there is a serious issue to be tried as to whether Mr Claringbold may be in breach of the clause relied on by Rutherford Hotel; and

(b) the balance of convenience favours Rutherford Hotel, including that alternative remedies would be inadequate.

[26] In addition, I must stand back and consider the overall matter as a whole, and determine where the overall justice of the matter lies.

Restraints of trade clauses in general

[27] The starting point with respect to the enforceability of restraint of trade clauses are that they are unenforceable unless they can be justified as being reasonably necessary to protect the proprietary interests of the former employer and are in the public interest[1].

[28] Reasonableness must be determined by reference to what the parties might reasonably have foreseen at the time of entering into the contract[2]. In the Employment Court case of *Air New Zealand v Kerr*[3] the Employment Court pulled together various strands of authority in paragraphs [23] and [24], as follows (citations omitted):

> [23] The approach to restraint covenants is for the Court to determine what the clause means when properly construed and then to consider whether the employer or former employer has established a legitimate proprietary interest requiring protection. Legitimate proprietary interests have been held to include the protection of customer connections, confidential information and the integrity or stability of the workforce. In the present case the proprietary interest claimed is the protection of confidential information. If such an interest is established, then the issue arises as to whether the restraint provision is shown to be no wider than is reasonably necessary. That in turn requires a consideration of the

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1 *Gallagher Group Limited v Walley* [1999] 1 ERNZ 490 (CA)
2 *Fletcher Aluminium Limited v O'Sullivan* [2001] 2 NZLR 731, [2001] ERNZ 46 CA
3 [2013] NZEmpC 153

> reasonableness of the period of the restraint, its scope and its geographical limits.
>
> [24] The reasonableness of the restraint must be established by the party who seeks to enforce the provision; it is then up to the party resisting enforcement to establish that the restraint is contrary to the public interest. If the Court is satisfied as to these matters then, in the exercise of its discretion, it will need to decide whether or not to grant injunctive relief, either interlocutory or permanent as the case may be.

[29] In paragraph [30] of *Kerr*, His Honour Judge Ford stated the following:

> [30] I prefer Air New Zealand's submissions on this issue. Although there is no question that a restraint covenant to prevent competition *per se* is unlawful, it seems to me that at least since the decision of the English Court of Appeal in *Littlewoods*, the courts have accepted that a non-competition restraint covenant can appropriately be relied upon and enforced in order to protect certain subject matters such as an employer's legitimate proprietary interests. It is up to the employer or former employer, however, to satisfy the Court of the existence of a proprietary interest justifying such protection and unless that threshold is met, then the restraint covenant remains unlawful and unenforceable.

The issues

[30] The following questions require determination by the Authority at this stage:

(a) Does Rutherford Hotel have a sufficiently arguable case that the injunctive relief sought should be granted?

(b) Are adequate alternative remedies likely to be available to Rutherford Hotel?

(c) Where does the balance of convenience lie between Rutherford Hotel and Mr Claringbold?

(d) Where does the overall justice lie?

Does Rutherford Hotel have a sufficiently arguable case for injunctive relief to be granted?

[31] This question, which can be alternatively expressed as to whether there is an arguable (but not necessarily certain) case that injunctive relief should be granted, requires the Authority to examine a number of sub-issues as follows:

(a) What the clause means when properly construed;

(b) What legitimate proprietary interest the clause purports to protect;

(c) Whether the restraint term is no wider than is reasonably necessary (considering the reasonableness of the period of restraint, its scope and geographical limits); and

(d) Whether there has been any real breach of the terms.

What the clause means

[32] It has been confirmed in *Kerr* that the construction of a restraint covenant requires the same principles of interpretation as are to be applied in the construction of any other contractual term. These principles were affirmed by the Supreme Court in *Vector Gas Limited v Bay of Plenty Energy Limited*[4]. The first principle was first stated in these terms:

> Interpretation is the ascertainment of the meaning which a document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

[33] I am satisfied that the meaning of clause 12.0(a) is clear and that the restraint is intended to prevent Mr Claringbold from working for competing businesses based in the Nelson/Tasman region for the period of eight weeks from the last day of his employment with Rutherford Hotel.

[34] A competing business is defined in clause 12.0(e). However, I shall address below whether that definition is too wide and goes further than is necessary to protect the legitimate business interests of the Rutherford.

What legitimate proprietary interest the clause purports to protect

[35] Obviously, a restraint covenant that prevents competition *per se* is unlawful and unenforceable. However, a non-competition restraint covenant can be relied on and enforced in order to protect an employer's legitimate proprietary interest. The onus is on Rutherford Hotel to satisfy the Authority that there is a proprietary interest justifying such protection.

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4 [2010] NZSC 5; [2010] 2 NZLR 444 at [61]

[36] The proprietary interest that Rutherford Hotel seeks to protect is that of its confidential information. The Rutherford Hotel asserts that, as an executive chef, Mr Claringbold took a position in the Rutherford's management team giving access to and detailed knowledge of hotel operations including the following:

(a) Costings;

(b) Daily and weekly performance data, including revenue;

(c) Menu information (current and proposed);

(d) Promotional and strategic planning in respect of restaurants, conferences and hotel bookings generally;

(e) Employment agreements, wage rates and contact details, including phone numbers for all kitchen staff;

(f) Procurement pricing and suppliers for foodstuffs, beverages and other items associated with the hotel's restaurants, cafes and bars;

(g) Knowledge of all existing conference business and tentative business which was yet to confirm, including existing and tentative conference business which required offsite dinners as part of the conference, and contact email addresses of conference organisers and contact details of guests who had reservations.

[37] The Employment Court in *Kerr* accepted, as cited above, that a restraint of trade clause can be utilised to protect confidential information because of the inherent difficulties in drawing the line between confidential information and non-confidential information, and the difficulty of proving a breach when the information is of such a character that an employee can carry it away in his head. There is also the risk of inadvertent disclosure of confidential information.

[38] For some reason the Rutherford Hotel did not have a clause in its individual employment agreement with Mr Claringbold preventing him from misusing confidential information. Therefore, there has been no express definition of what the applicant considers to be confidential information.

[39] It is therefore useful to refer to the English High Court judgment in *Faccenda Chicken Limited v Fowler*[5]. In *Faccenda Chicken* the Court categorised confidential information acquired by an employee as falling into three classes. These were expressed to be as follows:

> First there is information which because of its trivial character or its easy accessibility from public sources of information cannot be regarded by reasonable persons or by the law as confidential at all. The servant is at liberty to impart it during his service or afterwards to anyone he pleases, even his master's competitor. …
>
> Second, there is information which the servant must treat as confidential, (either because he is expressly told it is confidential, or because from its character it obviously is so), but which once learned necessarily remains in the servant's head and becomes part of his own skill and knowledge applied in the course of his master's business. So long as the employment continues, he cannot otherwise use or disclose such information without infidelity and therefore breach of contract. But when he is no longer in the same service, the law allows him to use his skill and knowledge for his own benefit in competition with his former master … If an employer wants to protect information of this kind, he can do so by an express stipulation restraining the servant from competing with him (within reasonable limits of time and space) after the termination of his employment. …
>
> Third, however, there are to my mind specific trade secrets so confidential that even though they may necessarily have been learned by heart and even though the servant may have left the service they cannot lawfully be used for anyone's benefit but the master's.…

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5 [1985] FSR 105 [1985] 1 All ER 724 (Ch)

[40] The court in *Faccenda* also held that, while the employee remains in the employment of the employer, the implied obligations impose a duty of good faith or fidelity on the employee. The extent of the duty of good faith will vary according to the nature of the contract. However, after the termination of employment, the implied obligations become more limited in scope. A former employee is not allowed to use or disclose information which is of a sufficiently high degree of confidentiality so as to amount to a trade secret. The obligation does not extend to all information obtained during his employment and in particular may not cover information which is only confidential in the sense that unauthorised disclosure of such information to a third party while the employment subsisted would be a breach of the duty of good faith.

[41] In *Kerr* at [44] Judge Ford stated that, in New Zealand, it would appear from the authorities that, in appropriate cases, the courts are prepared to extend protection through restricted covenants to confidential information encompassed more within the second category of information in *Faccenda Chicken* rather than the third, contrary to the view in the English courts. Mr Malone asserted that the confidential information that the Rutherford sought to protect was not in the nature of the third *Faccenda* category of confidential information, but in the second category. Mr Marsh did not seek to argue against that proposition, and I accept it is likely to be the case.

[42] It is also strongly arguable, in my view, that a restraint of trade clause preventing an employee from working for a direct competitor for a limited period is justifiable where there is no express confidentiality clause in the employee's employment agreement and where the confidential information that needs to be protected is not a trade secret, but falls within the second *Faccenda* category of confidential information.

[43] I accept that some of the information that Rutherford Hotel says Mr Claringbold was given access to during his employment is of the nature of confidential information falling within the second category outlined in *Faccenda Chicken*. That is, namely, information about Rutherford Hotel's 'tentative' (i.e., prospective) conference business and identities and contact details of casual staff working for the Rutherford.

[44] It may be that other limited aspects of the information Mr Claringbold was given access to is potentially of a confidential nature, such as its strategies. However, I accept the evidence of Mr Sanders that the strategy of the Rutherford is of no interest to the Monaco, as the Monaco is a part of the international Accor chain, which has its own marketing strategy.

[45] I therefore am satisfied that there is a legitimate proprietary interest belonging to Rutherford Hotel that is in need of protection and that a limited restraint of trade clause is justified to do so.

Does the restraint of trade clause go wider than is reasonably necessary?

[46] The period of eight weeks does appear to be, on its face, a reasonable period of time. The information that it would seek to protect from misuse is not of the kind to need protection for a significant period of time but eight weeks would give the Rutherford time to contact prospective corporate clients to seek to consolidate customer connections.

[47] Is the clause reasonable in terms of its geographical scope? That question cannot be considered in isolation. I certainly accept that a hotel such as the Rutherford will attract business customers for its conference facilities from the Nelson/Tasman area, and that it will be vying with other conference venues within the Nelson/Tasman region for the same business to an extent, as some of the larger wineries offer such facilities.

[48] Rutherford Hotel and Monaco are both situated in the city of Nelson, and the fact that the Rutherford is in the city centre and the Monaco is in 'the suburbs' of Nelson will make little difference as far as conference business is concerned. It is plain that the Rutherford has much larger facilities than the Monaco, and that the Monaco is not a competitor for large conferences (above 100 attendees) but below that number the two businesses compete for the same conference business.

[49] However, the restraint also purports to prevent Mr Claringbold from working for any hotel, restaurant or café within the Nelson/Tasman region. This goes too far in my view. This means that Mr Claringbold is effectively prevented from plying his trade within an area of over 10,000 square kilometres, in which over 100,000 people

live[6]. It cannot be feasible that every single hotel, restaurant and café is a competitor to the Rutherford. The Rutherford Hotel is a high end urban style hotel in Nelson, with two restaurants (one biased towards seafood, the other Japanese) and a café. The restaurants offer the sort of fare that one would expect in a high end hotel, with commensurate prices, and have an extensive wine list. The café is smart, and again, offers high end café food.

[50] Mr Malone says that the definitions in clause 12.0 (e) have to be read in the context of the clause itself. That is, an organisation in direct competition. However, that is, with respect, a circular argument, as clause 12.0 (e) defines what an organisation in direct competition is. It will not always be clear which entities will be the Rutherford's direct competitors, as demonstrated by the dispute between Monaco and Rutherford as to whether the Monaco is truly a competitor or not. In other words, 'organisation in direct competition' needs to be defined, because of the large variety of hotels, restaurants and cafes in existence in the area of restraint.

[51] It cannot possibly be the case that every single hotel, restaurant and café in the Nelson/Tasman region is a competitor of the Rutherford. That would include budget hotels, lodges, Indian and other restaurants offering non-Japanese ethnic style cuisine, BYOB restaurants and greasy spoon cafes. These are not competitors of the Rutherford.

[52] The unreasonableness of this restraint is illustrated by Mr Claringbold's evidence that, if he was prevented from working for the Monaco until 2 January 2018, his financial situation would mean that he would have to travel outside the region every day to work, so he could pay his rent and day to day expenses.

[53] My conclusion is that the restraint goes further than is necessary to protect the proprietary interests of the Rutherford.

[6] These are very approximate figures.

[54] Section 83 of the Contract and Commercial Law Act 2017[7] provides as follows:

> **83 Restraints of trade**
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> (1) The court may, if a provision of a contract constitutes an unreasonable restraint of trade,—
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> > (a) delete the provision and give effect to the contract as amended; or
> >
> > (b) modify the provision so that, at the time the contract was entered into, the provision as modified would have been reasonable, and give effect to the contract as modified; or
> >
> > (c) decline to enforce the contract if the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand.
>
> (2) The court may modify a provision even if the modification cannot be effected by deleting words from the provision.

[55] Section 164 of the Act provides as follows:

> **164 Application to individual employment agreements of law relating to contracts**
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> Where the Authority, has, under section 69(1)(b) or section 162, the power to make an order cancelling or varying an individual employment agreement or any term of such an agreement, the Authority may make such an order only if—
>
> > (a) the Authority (whether or not it gave any direction under section 159(1)(b) in relation to the matter)—
> >
> > > (i) has identified the problem in relation to the agreement; and
> > >
> > > (ii) has directed the parties to attempt in good faith to resolve that problem; and
> >
> > (b) the parties have attempted in good faith to resolve the problem relating to the agreement by using mediation; and
> >
> > (c) despite the use of mediation, the problem has not been resolved; and

[7] In force from 1 September 2017, s83 replaces s8 of the Illegal Contracts Act 1970, and applies to any contract regardless of whether it is made before or after the commencement of the enactment.

> (d) the Authority is satisfied that any remedy other than such an order would be inappropriate or inadequate.

[56] In the Court of Appeal case of *Cooney v Welsh*[8], the Court stated[9]

> Section 8(1)(b)[10] has the term "modify". This can mean moderate or limit or confine; but it can also simply mean vary or change in part. As a matter of jurisdiction we see no reason why it should not bear the latter and broader meaning, but no 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.

[57] I believe that, in theory, the restraint of trade clause could be modified to narrow the scope of the definition of competing business so it is more realistic. It could do so by defining the terms 'hotel', 'restaurant' and 'café' to define more precisely the kind of businesses that are true competitors of the Rutherford. This could be done by reference to revenue, or the use of terms such as 'high end', 'up market' and so forth.

[58] However, the parties have not been to mediation, and s 164 of the Act makes clear that I may not modify the clause unless s 164 of the Act has first been complied with. Given the urgency of this matter, the very limited time remaining of the restraint period, and the remote prospect of mediation occurring before the end of the year, I decline to direct the parties to mediation at this stage, and declare that the restraint of trade clause is unenforceable as presently drafted as it is too wide in scope.

[59] Although I need to go no further, I shall briefly address the remaining issues, as it may be of assistance to the parties.

Are adequate alternative remedies likely to be available to Rutherford Hotel?

[60] I accept that the Rutherford Hotel would have difficulty in quantifying any damage sustained through the loss of a prospective conference client, as it would be hard to prove that it lost a client due to the misuse of confidential information.

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[8] [1993] 1 ERNZ 407

[61] However, it would be very easy to identify the loss of a casual member of staff, and relatively easy to quantify the cost of having to replace a casual member of staff who might be poached because of a misuse of confidential contact information by Mr Claringbold.

[62] On balance, alternative remedies are not going to be available for every breach that could realistically occur.

Undertakings from Monaco and Mr Claringbold

[63] Mr Marsh points out that the Monaco Hotel has offered to give an undertaking to the Rutherford Hotel that it will not seek or encourage Mr Claringbold to breach his obligations of confidentiality. Mr Claringbold also stated in writing on 13 December that he would not disseminate any confidential information belonging to the Rutherford. The Rutherford Hotel rejects these offers on the basis that there is no guarantee that the undertakings will be complied with by Mr Claringbold.

[64] First, I note the contents of Mr Claringbold's email to Mr McGillicuddy dated 10 November 2017 in which he expressly stated that he fully intended to breach the restraint of trade clause. Indeed, he did so in an abusive and insulting way, although he now expresses regret for doing so, saying he acted in the heat of the moment. However, that initial expression of defiance is a legitimate reason for the applicant to harbour doubts about the sincerity of Mr Claringbold.

[65] However, I am also mindful that, even if Mr Claringbold did disclose confidential information to the Monaco within the next 19 days, it is not likely that the Monaco would be able to do anything useful with that information. In addition, there is no reason for the Rutherford to doubt the Monaco's sincerity in undertaking not to use any such information. The Monaco's assertion that it did not believe the clause was enforceable is not grounds for holding that it will necessarily breach an undertaking.

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[9] At 410
[10] Of the Illegal Contracts Act 1970.

[66] Furthermore, although Mr Claringbold started working at the Monaco on 21 November, he has only worked for six days because he and Mr Sanders agreed that he would stand down because of the dispute about the restraint. He stood down on 22 November, after having worked for one day, and then came back to work on 5 December for five days because he needed the money. He then stood down again from 10 December. This arguably shows that Mr Claringbold and the Monaco are sincere in their offers to give undertakings.

[67] On balance, I believe that the offer of undertakings from the Monaco not to use any confidential information it may acquire between now and 2 January is a genuine one, and weighs in the balance against the granting of the injunction.

Who does the balance of convenience favour?

[68] In considering this question, I must balance any prejudice that Mr Claringbold is likely to suffer if the interim relief is granted against any prejudice that the Rutherford Hotel is likely to suffer if it is not.

[69] The prejudice that Mr Claringbold is likely to suffer is clear. He would be prevented from working for 19 days in the Nelson/Tasman region. He would receive no pay during that period unless he travelled outside of the area of the restraint, or found work for which he has no training or experience. Mr Sanders did say that he would hold his job open for him however.

[70] If the restraint of trade was not enforced, then the Rutherford Hotel would have to live with the risk that Mr Claringbold would disclose to a competitor confidential information to its disadvantage within the next 19 days. Of course, 39 days have already elapsed between the date when Mr Claringbold left the employment of the Rutherford Hotel and 26 days since the Rutherford Hotel discovered that Mr Claringbold was working for a direct competitor.

[71] There was no really cogent and convincing explanation for this delay. Mr McGillicuddy says he left it in the hands of the company lawyer, Mr Malone, after 20 November. Mr Malone was ill for several days between 22 November and 4 December. However, if there was a real concern that confidential information was going to be disclosed to a competitor, so as to cause real harm to the Rutherford, senior management would have taken steps to ensure that the injunction was applied

for much sooner. This is especially the case given the relatively short period of the restraint left at that time.

[72] It has been established in case law that delay is a factor that may disqualify an applicant from injunctive relief. It was clear from the evidence that the applicant was completely unaware that Mr Claringbold had arranged for a stand down between 22 November and 4 December. It, therefore, believed that Mr Claringbold was working during that time in breach of the restraint of trade clause. By the time it lodged the proceedings in the Authority it believed that he had been working there for 18 days.

[73] On balance, given the risk that the Rutherford was prepared to take between 21 November and 8 December, the date it sent its statement of claim to the Authority, I believe that the balance of convenience lies with Mr Claringbold. More harm is likely to be suffered by him in being restrained from working for the Monaco until 2 January than the harm that is likely to be suffered by the Rutherford in him doing so.

Where does the overall justice lie?

[74] As at 10 November 2017, there appeared to have been a real risk that Mr Claringbold intended to wilfully breach a restraint of trade provision he had willingly entered into. He was privy to certain information which was confidential to the Rutherford, which he knew was confidential. The restraint of trade clause at 12.0 (a) was the only express provision that could be relied upon by the Rutherford to protect its confidential information.

[75] The Monaco Hotel is a competitor of the Rutherford, at least as far as some of its conference business is concerned. It is less obviously so with respect to its restaurant and accommodation, as they are likely to appeal to a different client base. However, I accept that, at certain times, there may be a potential overlap in clientele for both the restaurant and the accommodation.

[76] However, despite this, the Rutherford was not so worried about the risk of possible misuse of the confidential information that Mr Claringbold had and the possible harm that misuse could cause it, that it acted immediately to seek an injunction as soon as it knew that Mr Claringbold was working for the Monaco. As far as it was aware, Mr Claringbold was working for the Monaco continuously from 21 November to 8 December.

[77] I agree with Mr Malone that the position that Mr Claringbold holds with the Monaco (Executive Sous Chef) does not definitively protect the applicant from him disclosing confidential information (although it may make it a little less likely) but that argument makes it all the more puzzling that no action was taken to seek an injunction sooner.

[78] There are now only 19 days left between today and 2 January, when the restraint ends. As far as the Rutherford knew, Mr Claringbold had already worked for the Monaco for 18 days when it lodged its statement of problem with the Authority. That does not demonstrate a genuine concern about a harmful misuse of its confidential information.

[79] Furthermore, Mr McGillicuddy said in evidence that he sometimes agreed not to put a restraint of trade clause in the employment agreements of some staff, and sometimes decided not to enforce the restraints. He explained that not including a restraint was a matter of negotiation. Sometimes they needed a staff member urgently, and were prepared to take the risk.

[80] This is, of course, a choice for the applicant to make. However, it does suggest that the nature of the confidential information it now seeks to protect, to which some of the staff without restraint clauses also had access, is not valued quite as highly as it suggests. When Mr McGillicuddy decided not to include a restraint clause in an employment agreement, he could not have known what the employee would decide to do at the end of his employment, and whether the employment would end in dispute.

[81] On balance, even if the restraint clause had not been drafted too widely to be enforceable, I would have determined that it was not appropriate to restrain Mr Claringbold from working for the Monaco until 2 January 2018. However, as it is, the clause is not enforceable, as it goes further than is necessary to protect the confidential information of the applicant, and I am unable to modify the clause given the requirements of s 164 of the Act and the constraints of time which would render the modification nugatory.

Conclusion

[82] I decline to issue an injunction against Mr Claringbold restraining him from working for the second respondent until 2 January 2018.

Direction

[83] I direct the parties to attend mediation in order to attempt to settle the remaining claims against Mr Claringbold and the second respondent. If all remaining matters cannot be settled, then the applicant is to inform the Authority, and a case management directions conference call will be held in order to set down a substantive investigation meeting.

Costs

[84] Costs are reserved until after the determination of the remaining issues at a substantive investigation, which is yet to be set down, unless all remaining matters, including costs, are settled at mediation.

David Appleton
Member of the Employment Relations Authority