IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2019] NZERA 700
3077195

	BETWEEN	SILVER FERN IMMIGRATION SERVICES 2015 LIMITED Applicant
	AND	GARIMA GUPTA Respondent

Member of Authority:	Robin Arthur
Representatives:	Robert Hucker and Rebecca Selby, counsel for the applicant David Fleming, counsel for the respondent
Investigation Meeting:	5 December 2019
Determination:	9 December 2019

DETERMINATION OF THE AUTHORITY

A. The application of Silver Fern Immigration Services 2015 Limited for an interim injunction enjoining Garima Gupta from certain activities is declined.

B. Costs are reserved.

Employment Relationship Problem

[1] Silver Fern Immigration Services 2015 Limited (SFI) sought an interim injunction enjoining Garima Gupta from certain business activities until the Authority can determine its substantive application that she has breached her post-employment contractual obligations to the company and should be ordered to pay damages and penalties to it.

[2] Ms Gupta had worked for SFI's business providing immigration advisory services for three years up to 15 March 2019. She gave notice of resignation on 17 February 2019. Soon after her notice period expired she began working in her own immigration advisory business, through a company called Trusthaven Immigration Services Limited that she and her husband Bakul Gupta had registered on 7 March 2019.

[3] SFI lodged its application to the Authority on 3 October 2019. It is to be jointly investigated with an earlier application from Ms Gupta, initially lodged on 20 May 2019, in which she claimed SFI owed her arrears of wages for holiday pay, annual leave and bonuses and she had a personal grievance for unjustified disadvantage because she was "overlooked for a salary increase".

[4] The parties attended mediation on 18 July 2019 about Ms Gupta's claim but did not resolve the matter. On 3 September 2019, through a new representative, Ms Gupta lodged an amended statement of problem seeking findings and orders on personal grievances for unjustified disadvantage and constructive dismissal, a dispute over entitlements to annual bonuses, arrears for holiday pay and a penalty for breach of good faith.

[5] On 3 October 2019 the parties were directed to further mediation about Ms Gupta's amended statement of problem and SFI's own application. Those two matters were not resolved in mediation and timetable directions were then set for an investigation meeting to be held on 28, 29 and 30 April 2020.

Investigation of the application for interim orders

[6] Meanwhile SFI asked for its application for interim orders to be determined by the Authority. Ms Gupta and SFI's director Akhil Jain each lodged an affidavit setting out their own account of the facts and referring to relevant, attached documents. At an investigation meeting held for the purpose, counsel for both parties made submissions on the principles applicable in considering whether an interim injunction should be ordered.

[7] The Authority has jurisdiction to make such orders relating to the contractual obligations found in employment agreements.[1] The answer to applications for interim injunctions is not reached by the rigid application of a formula but is given following evaluation of three broad questions: firstly, whether the applicant has an arguable case for the findings and substantive relief sought; secondly, where the balance of convenience lies between now and the Authority's eventual determination of the substantive issues (including whether adequate alternative remedies are likely to be available to the party seeking the injunction); and, thirdly, on standing back and considering the matter as a whole, where the overall justice lies from now until determination of the substantive application.

[8] The merits of the case, insofar as they can be ascertained at the interim injunction stage, are relevant in the assessment of the balance of convenience and the overall justice of the case. The assessment relies on the as-yet-untested evidence in affidavits and what can be discerned from the pleadings and documents provided by the parties.

[9] While the Authority applies the law relating to interim injunctions, as developed and applicable to the employment jurisdiction, its determinations need not set out all evidence received or summarise submissions made by the parties.[2]

Does SFI have an arguable case?

[10] Throughout her employment with SFI Ms Gupta was a provisionally licensed Immigration Adviser. She was one of two advisers working for the company and, according to Mr Jain, was SFI's primary contact with more than half its clients. When Ms Gupta gave four weeks' notice of resignation on 17 February 2019 she gave the reason as being dissatisfaction that Mr Jain had given a pay rise to the other adviser but not her.

[11] In her resignation email Ms Gupta asked Mr Jain to provide her with a copy of her emails referring to a requirement of the Immigration Advisers Authority (IAA) that she "maintain a backup" of her client files. The Immigration Advisers Code of Conduct states that a licensed immigration adviser must maintain a hard copy or electronic file for each client for "no less than 7 years from closing the file, and make

[1] Employment Relations Act 2000, s 162 and *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205 at [66].
[2] Employment Relations Act 2000, s 174E.

those records available for inspection on request by the Immigration Advisers Authority".[3]

[12] When she left SFI, on 15 March 2019, Ms Gupta kept a copy of client applications she had worked on. This was contrary to what Mr Jain had told her should happen. In the week after giving her notice she had asked SFI's IT provider for a backup of her emails. Mr Jain, on learning of this, wrote to her saying that anything required by IAA would be "considered and respected as and when required". He instructed Ms Gupta not to have any contact with SFI clients during the remainder of her employment and to "refrain from any other activity expect for handing over existing and potential clients". He also reminded her that her employment agreement required her to return any SFI property and information on or before her final day of work and included the following terms:

> **Confidentiality**
>
> The employee agrees to keep confidential information private. Except as part of the proper performance of their job, the employee will not directly or indirectly use, copy, share or permit the use or copying of any confidential information owned by the employer unless they get written permission.
>
> Confidential information means all information owned by the employer that is not in the public domain, and which the employer reasonably regards as private. It includes, but is not limited to:
>
> - Commercial agreements
> - Trade secrets
> - Information about financial affairs
> - Business methods and systems
> - Information and records about clients, potential clients, suppliers and employees
> - Business strategies, including merchandising, budgeting, market analysis, pricing, advertising, products and services
> - Computer software and data
> - Other information not known to the public.
>
> The requirement for confidentiality applies at all times while the employee works for this employer, and after the employment has ended.
>
> **Restraint of trade**
>
> The employee will work, and form relationships with, the employer's clients/customers, staff, suppliers and others with whom the employer has, or is building, a relationship. These relationships are important to the employer's business.
>
> In recognition of the importance of these factors to the employer – and taking into account the pay package set out in this agreement and this offer of

[3] Licensed Immigration Advisers Code of Conduct 2014, standards 26 a and e.

> employment generally – the employee agrees to behave in this way set out in this clause, unless they get the employer's written permission first.
>
> The employee shall not, either during their employment or for 24 months after leaving the business, do the following:
>
> - Directly or indirectly, alone or with any other person, approach or solicit any of the employer's clients, suppliers or customers, or try to persuade them to end or limit their relationships with the employer.
> - Directly or indirectly, alone or with any other person, approach, employ, engage or otherwise try to take away any of the employer's staff or contractors.
>
> The following definition applies to this clause:
>
> - "Client" means any person, organisation, business or entity that the employer has sold to or done business with in the 12 months before the end of the employee's employment.

[13] While Ms Gupta said she completed a handover process for around 40 current clients, she still had contact with some SFI clients during that period through answering emails and phone calls and helping the other adviser to whom she was handing over those files.

[14] Soon after Ms Gupta's employment ended on 15 March Mr Jain learned of contact she had with some clients during her notice period, contrary to his instructions, and found evidence of contact with some clients after then. He learned of this through emails sent to Ms Gupta's previous SFI email address and by checking records of the mobile phone SFI had provided to her for her work. These included three phone calls to one client on dates between 22 February and 15 March. He also learned from a document disclosed with Ms Gupta's September application to the Authority that she had signed a service agreement with that client on 19 March 2019.

[15] He also identified that before her resignation, on dates between 9 February and 16 February, Ms Gupta had forwarded emails regarding three clients to her private email address. Those emails included attachments of some documents regarding those clients' immigration applications such as health and police records.

[16] SFI also identified emails sent to it or Ms Gupta's former SFI email address by three other clients between May and July as indicating Ms Gupta had contact with those clients in relation to immigration applications. One was from a client seeking SFI's permission to approach Ms Gupta to complete her visa application.

[17] Two other items of concern to Mr Jain were identified from review of emails sent on 21 February from Ms Gupta's SFI email address to her private address.

[18] One was an email from SFI's payroll provider that Mr Jain had forwarded to Ms Gupta and the other adviser. It attached a copy of the leave records of both Ms Gupta and the other adviser.

[19] The other email was to Ms Gupta's husband. It attached three documents. The first was an SFI brochure promoting its services. The second was an instruction manual for accessing, editing and managing the software used for the websites of SFI and a related business. It included the passwords for accessing that platform and functions for measuring data on use of the website and sending automated newsletters. The third was a template for social media posts. Ms Gupta's email to her husband read:

> Attached is the online brochure that we used to send to the clients we worked with for them to promote us like recruiters etc.
>
> Second attachment is for SFI website instructions to access it and edit anything on it.
>
> Third attachment is a zip folder for the Photoshop Templates for SFI's social media posts. You can edit these templates using Photoshop. You will need to download Photoshop first via the Adobe Creative Cloud Desktop App.
>
> This is all I have from our new website.

[20] Mr Jain deposed that this information about Ms Gupta's contact with SFI clients and sending herself documents from her SFI showed that she was soliciting SFI clients and using SFI's confidential information to do so. He said SFI incurred loss because its business model relied on providing initial visas to a client, such as work visa, and then getting more fees from them when they came back for help getting further visas, such as residency visas. SFI also relied on its clients referring friends and family to it for further business.

[21] He said that SFI urgently needed orders to restrain Ms Gupta from using confidential information taken and from soliciting SFI's clients.

SFI's submissions on arguability

[22] In light of those circumstances the interim orders SFI sought were that Ms Gupta be enjoined from now until further order of the Authority from:

(a) making contact with or attempting to solicit any clients of SFI (client meaning, as defined in her employment agreement, any person, organisation, business or entity that SFI has sold to or done business with in the 12 months before the end of Ms Gupta's employment);
(b) providing immigration services to any clients of SFI;
(c) using confidential information or documents of SFI; and
(d) disclosing any information or documents of SFI to any person, party or organisation.

[23] SFI had to establish an arguable case that Ms Gupta's actions, as best could be ascertained at this stage, amounted to breaches of her contractual obligations of confidentiality and restraint and that an interim order was the appropriate means for preventing ongoing or further breaches until the Authority could fully examine those allegations and, if she was found to have acted wrongly, make orders for appropriate remedies.

[24] The threshold for establishing that arguable case was relatively low. SFI needed to establish only that the evidence in support of its claims was more than frivolous and vexatious.

[25] It had established that, after her employment with SFI ended, Ms Gupta had contact with at least seven people who were identified as being clients of SFI prior to the end of her employment there. It also established, on Ms Gupta's own evidence regarding her understanding of the requirements of IAA rules for immigration advisers, that she had made and kept copies of the files of clients who she had dealt with while working at SFI. One client was known to have signed a service agreement with TISL and one client wrote to SFI about her wish to use Ms Gupta's services in her new business.

[26] SFI submitted that this evidence supported the inference being drawn that she had, because of that contact and the possession of those records, engaged in conduct that fell within the prohibition of her restraint clause not to approach or solicit SFI's clients or to "try to persuade them to end or limit their relations" with SFI. This met the arguable standard.

[27] And it was also arguable that those restraint provisions would also be enforceable, to some extent at least, as reasonably necessary to protect a legitimate

proprietary interest of SFI in the customer connections developed by Ms Gupta through her work with some of its clients. Accordingly it was also arguable that the restraint, to the extent likely to be enforceable, could appropriately be applied through an interim order to prevent ongoing or further breaches meanwhile.

[28] Similarly, Ms Gupta had arguably taken confidential information of SFI by forwarding to her husband information about how to access SFI's website management platform. There was a separate issue about simply taking the company's property comprising its brochure and social media templates which were clearly, from the content of her email to him, for the purpose of preparing their own business.

[29] The publicly-viewable content of SFI's website, brochure and social media postings were plainly not confidential but how they were constructed or composed was work that SFI had paid for and was its property. While Ms Gupta deposed that she and Mr Gupta had not used the website material, instead using a different structure or design for the TISL website, it was nevertheless of some commercial value to them as a 'short cut' in considering what or what not to do or use in setting up their own business.

[30] However the specifically confidential part of that information was SFI's passwords to access the website management functions. It was not clear on the present evidence whether the access enabled by use of those passwords would have been limited to viewing and editing the structure and functions of the website or would also have allowed access to SFI's database of client information.

[31] It was not arguable though that any interim order was appropriate now in respect of the confidential information comprising the passwords. Having discovered on 21 February that Ms Gupta has forwarded that information to her husband, Mr Jain could or should have arranged for the changing of those passwords at the time.

[32] More complex was the issue of what confidentiality lay between SFI, Ms Gupta and the clients in respect of the contents of those clients' files. Obviously the primary rights rested with those clients, whether they were now using the services of SFI, TISL or some other immigration advisors. All parties had obligations to protect privacy rights in those records but Ms Gupta, arguably, had obligations arising from the requirements of the Immigration Advisers' code of conduct to keep certain records. However, on the low threshold, the issue of whether she had breached

confidentiality obligations to SFI in respect of those records, including by any use of or access to them for the purpose of TISL dealing with any of those clients, was arguable. Consequently it was also arguable that use of or access to those records could appropriately be subject to interim orders.

Ms Gupta's submissions on arguablity

[33] There was only issue raised in Ms Gupta's submissions that required consideration under this heading.

[34] Ms Gupta submitted that SFI could not establish an arguable case for an interim injunction because it had not sought permanent injunctive relief. SFI's statement of problem sought declarations, penalties, damages and costs but no substantive injunctive relief.

[35] Her counsel was not able to identify any case law to support the proposition that an interim injunction could not be ordered without first establishing an arguable case for a substantive permanent injunction. He said he had searched but found nothing, suggesting this was because it was unusual not to have sought permanent injunctive relief.

[36] Accepting that proposition, absent authority, would be to take an unduly narrow and technical approach. On broad principle, there needed to be an arguable case for substantive relief but that relief need not specifically include an ongoing, permanent injunction. The substantive relief, sufficient to ground an order for an interim injunction, could be other measures such as the declarations and orders to pay money that SFI had sought. However, as the outcome reached later in this determination did not rely on this point, it was not necessary to express any firm conclusion on it.

Balance of convenience

[37] The question of the balance of convenience considers the relative injustice that may be caused to SFI if the interim relief it sought was not granted against the burden borne by Ms Gupta during that period if the order was granted. It also considers whether adequate alternative remedies are available to SFI if the interim orders sought are not granted. In the circumstances of this case those matters are best considered

after first evaluating the merits of the parties' positions, as best as they can be discerned on available evidence and likelihoods.

Merits

[38] Restraints of trade, such as the non-solicitation clause found in SFI's employment agreement with Ms Gupta, are prima facie unlawful but may be upheld as valid and enforceable to the extent reasonably necessary to protect the legitimate proprietary interests of the employer.

[39] There is a recognised proprietary interest for an employer in protecting its customer connections. This interest applies where the employee's contact with clients, and the degree of trust and reliance those clients develop in that employee as a result of that contact, means the employee is likely to gain their custom if she or he joins or sets up a completing business.[4]

[40] However, where a departing employee has such 'sway' with customers, the length of time that such a term may apply to protect that interest is limited to how long is reasonably necessary to replace that representative of the business. It allows only for the time reasonably needed either to recruit and train a replacement or have an existing employee take over that area of work, and then to establish contact with the clients. It provides the employer with an opportunity to meet the competition, not a certainty that it will do so.

[41] This is the fundamental flaw with the merits of SFI's case for an interim injunction. While its non-solicitation term was expressly addressed to the legitimate interest in the relationships Ms Gupta would form with SFI clients, its scope was unreasonably and unnecessarily too wide and too long.

[42] Firstly, it defined clients as anyone who had done business with SFI in the 12 months before her employment ended. The term could legitimately only extend to those clients that she had personally dealt with and, by the trusting relationship developed in carrying out their important immigration work, had developed some 'sway' or influence over. It could not, reasonably, extend to clients with whom she had no contact and therefore no personal connection.

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[4] *Airgas Compressor Specialists Ltd v Bryant* [1998] 2 ERNZ 42 at 53-54.

[43] Secondly, SFI submitted that the 24 month of the restraint was reasonable and necessary because it relied on repeat business from clients. Such a lengthy time would simply be preventing competition in the provision of services. It was much longer than reasonably allowable for SFI to establish contact with those clients Ms Gupta had dealt with and to introduce them to the adviser now able to deal with their file, whether that was an existing adviser on SFI's staff or by recruiting a new person.

[44] A reasonable period for that purpose was no longer than six months. Arguably a much shorter period would be reasonable but in the circumstances of this case it was sufficient to say no longer than six months would likely be upheld as the reasonably necessary period.

[45] It was also clear that it was open, in its substantive determination, for the Authority to find that scope of the non-solicitation term, regarding which clients were covered and how long it could run, could be modified. The cumulative requirements of s 83 of the Contract and Commercial Law Act 2017, allowing modification of an unreasonable restraint term, and s 164 of the Employment Relations Act, concerning variation of an individual employment agreement under s 162 of that Act, have already been met to some extent. The obligation of requiring the parties to attend mediation before modifying the term has already been carried out. What remains would be for the Authority to consider, as part of its substantive investigation, whether any remedy other than such an order for modification would be inappropriate or inadequate.[5]

[46] In respect of the holding or use of confidential business information, the issue regarding website access and promotional material has already been dealt with. While there was a question to resolve over the taking of company property in that respect, it added no weight to the merits of awarding an interim injunction.

[47] The merits of the issue of holding client records was a more open question.

[48] At first glance Ms Gupta had a valid reason in respect of her adviser code of conduct obligations to keep those records. SFI's answer, in Mr Jain's email of 22 February, that any IAA requests would be "considered and respected as and when required" was plainly inadequate in that context. For instance an adviser could not

[5] Employment Relations Act 2000, s 164(d).

satisfy her or his obligations, if subject to an IAA audit five years hence, if the employer had meanwhile gone out of business and those records were no longer available.

[49] There was also some ambiguity arising from the Agreement for Supply of Professional Services SFI had clients sign. In the examples provided with Mr Jain's affidavit the parties were defined as "the client" and "the adviser". In each case "the adviser" was described as "Garima Gupta from Silver Fern Immigration Services 2015 Ltd". While this arrangement supported the reasonableness of the customer-connected restraint term in SFI's employment agreement with her, it also made the nature of the relationship with the clients somewhat unclear. While SFI invoiced the clients for the fees incurred for Ms Gupta's services, the agreement defined "the adviser" as meaning the person who holds a license to provide immigration advice. This definition did not refer to the company. It is the individual adviser who holds the licence. The Agreement also included a "sole agency" clause which said that the client would not appoint another agent while the agreement was in force, but included a termination clause that said the agreement remained in force until the later of services having been completed or fees paid. The services to be provided were set out in a schedule not provided in present evidence but the termination clause also said that agreement may be terminated "at an earlier time by either party giving written notice to the other party" (emphasis added).

[50] Contrary to SFI's submission, this was not really analogous to the situation for a lawyer working for a legal firm. In those situations the client is unequivocally the client of the firm or partnership, not the individual lawyer providing services.

[51] The proposition that the available evidence showed Ms Gupta breached the terms of her agreement by soliciting clients of SFI was also not strong. SFI could not expect enforcement of a term that was any wider than what it had contracted for – which in this case prohibited her approaching clients and trying to persuade them to end or limit their relations with SFI. What was available, including the emails from some people who were SFI clients, only showed that they had approached her. The express term did not prohibit approaches to her. And there was nothing directly indicating any attempts by Ms Gupta to approach or persuade them.

[52] In that light some weight must also be given to the following passages in Ms Gupta's affidavit:

> My new company [TISL] has provided immigration services to a few former clients of the applicant. These people approached me and asked me to work for them – I did not approach them and ask them to stop doing business with [SFI].
>
> After I left [SFI] a much larger number of [SFI] clients approached me. I referred them back to [SFI].
> …
> Also, [SFI]'s clients pay in advance for immigration applications. So any client whose file I was working on at the time I left [SFI] had already paid for the work. If I have tried to take their business off [SFI], I would have had to either do the work for free, or ask the clients to pay twice for the same application.

[53] On this assessment the relative merits of SFI's substantive case were not strong and did not favour interim relief meanwhile.

Adequate alternative remedies

[54] SFI submitted an interim injunction was appropriate because damages were notoriously difficult to establish in cases of this type, concerning the soliciting of clients.

[55] Those difficulties are not insurmountable in this case. Mr Jain's affidavit gave an exact assessment of likely losses in respect of four clients he considered were "known" to have been solicited by Ms Gupta. Further, if a substantive inquiry by the Authority found that such breaches were found to have occurred, the inquiry into damages could be carried out by a relatively straightforward comparison of the client lists of SFI and TISL. Having identified any SFI clients that Ms Gupta had dealt with in her last year of employment, who were later provided services by TISL within whatever is held to be the relevant period of restraint, TISL financial records could be analysed to identify resulting income as the amount lost by SFI. There are other factors that may need to be applied to identify a figure for damages but the process is largely an accounting exercise.

[56] One possible impediment to that exercise arises from SFI's pleadings. It has sought orders for Ms Gupta to pay both damages and penalties. The penalty claim may, possibly, generate an entitlement for Ms Gupta to refuse disclosure of some documents relevant to SFI's damages claim on the grounds of the privilege against

self-incrimination in proceedings where a penalty is claimed against the party seeking to invoke the privilege.[6] However that technical question arises from SFI's choice about the scope of remedies it has opted to pursue. It did not support a conclusion that SFI lacked adequate alternative remedies if an interim order was not granted.

[57] And even if there were some difficulty accessing some TISL records on the grounds of a privilege against disclosure, some alternative sources of information may be available, obtainable by witness summons if necessary, from clients directly or from records held by Immigration New Zealand.

Effects on SFI

[58] SFI submitted it would "continue to lose business and money" if the interim orders it sought were not made as, otherwise, it said Ms Gupta would continue to solicit its clients. The submission was not compelling because were no strong evidence of continual or growing loss of clients by SFI as a result of activities by Ms Gupta that were outside the requirements on the non-solicitation term.

[59] The latest activity in issue appeared to be July and despite Mr Jain's affidavit not being lodged until early October, he reported no identified new instances of breaches. As Ms Gupta's counsel submitted, even if she had solicited clients (which was denied, the loss of that business was a harm that had occurred several months ago. There was no continual or ongoing flow of clients that an interim order was needed to staunch.

Effects on Ms Gupta

[60] There was no evidence that Ms Gupta's ability to earn a living would suffer any significant impact if she was subject to interim orders preventing any further dealings with any SFI clients in the intervening period. However to do so would impose a requirement that went beyond the bounds of what scope of restraint is likely to be modified and upheld in any substantive investigation. That risk did not favour an interim order particularly given, if the Authority's later substantive investigation did find she had acted in breach of the term (to the extent it was found reasonable and enforceable), she would then have to account to SFI for its resulting losses in whatever period that was.

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[6] *New Zealand Meat Workers Union v South Pacific Meats Limited* [2015] NZEmpC 138 at [83]-[84].

Effects on third parties

[61] The relevant third parties in this case were those clients of SFI who might wish to approach Ms Gupta for immigration advisory services. Interim orders, particularly by this time well beyond the six month period of restraint likely to be found reasonable, would be an unreasonable fetter on their freedom to use the provider of services that they choose (subject to meeting the terms of whatever service agreements they have already entered with SFI, to the extent the requirements of such agreements are themselves lawful and enforceable). Public policy considerations against restricting competition and in favour of the freedom of individuals to seek services weighed against an interim order and its potential effects on those clients.

[62] Weighing the various factors discussed the balance of convenience did not favour granting the interim orders SFI sought.

Overall justice

[63] Standing back and assessing the overall justice of the matter at this interim stage favoured declining SFI's application for an interim injunction. Three factors were decisive in reaching this conclusion.

[64] Firstly, SFI's application was made much too late in the piece. Its explanation for its delay was inadequate. Most of the information on which it relied was known to SFI in March and April and certainly before it attended mediation with Ms Gupta in mid-July. Some allowance could then be made, as SFI's counsel submitted it should, for a period of two or so weeks following the July mediation when the parties' representatives continued to discuss resolution. However this did not account for the delay through all of August and September before SFI's application was lodged in early October. It said there was at least one significant new piece of information in Ms Gupta's amended statement of problem lodged on 3 September (that was a copy of TISL's service agreement with one former SFI client) but, even then, a further month had elapsed before SFI's application was lodged.

[65] Secondly, an interim order now would give SFI a period of competitive protection from non-solicitation that is longer than the six month period likely, at the outside, to be upheld as the extent of a reasonable and necessary restraint. Having finished employment with SFI in mid-March, that six month period ended in mid-October. Interim orders would extend that restraint, if granted for the entire interim

period, to the Authority's notified investigation meeting in April 2020 and, unless ordered otherwise, until when its determination was issued in the weeks after then. SFI would get what amounted to more than a year-long restraint.

[66] Thirdly, whatever elements of SFI's case that may be found to have merit in the Authority's substantive investigation, if it proceeds, can be adequately addressed by orders for damages or penalties. The case for interim orders meanwhile has not been compellingly established.

[67] Accordingly, SFI's application for interim orders is declined.

Costs

[68] Costs in respect of the outcome of this application are reserved.

[69] At the investigation meeting held to hear submissions on this application I noted, in the presence of the parties, some concern that both parties' respective substantive applications had aspects that, realistically assessed, overreached what could be claimed with a reasonable expectation of success. Both risk the prospect that the time, effort and cost expended will exceed the value of the result to them. Counsel had the opportunity to comment on that observation and I encouraged the parties to discuss the concerns noted further with their legal advisers.

Robin Arthur
Member of the Employment Relations Authority