

On 7 November 2018 Mr Kroeze gave notice of resignation and finished work on 5 December 2018.

[2] ASD later discovered that Mr Kroeze was working on motorcycles about a kilometre down the road from the ASD premises.

[3] ASD claims that Mr Kroeze breached confidential information and restraint of trade clauses in his employment agreement. It seeks interim orders seeking compliance with those provisions. Mr Kroeze opposes such orders being made.

[4] The claim was filed in the Authority on 10 April 2019. The parties were referred to mediation but that was unsuccessful. The prospect of proceeding directly to an early substantive hearing was raised by the Authority but ASD wished to pursue interim orders. By consent the interim orders applied for were considered on the basis of affidavit evidence with submissions received at an investigation meeting held by telephone on 21 June 2019.

[5] An affidavit was received from Grant Nicolson (director of ASD) with the statement of problem. Mr Kroeze subsequently filed an affidavit. A further affidavit from Mr Nicholson was received on 21 June 2019.

The parties

[6] Part of ASD's business is the importation and sale of Harley Davidson motorcycles. This includes bringing in second hand bikes, servicing and modifying them by alterations to their engines and/or fitting after-market custom parts such as handle bars and other accessories.

[7] After leaving school in 2000, Mr Kroeze undertook motorcycle technician training at polytechnic. He obtained qualification and registration in motorcycle engineering. All his full time positions have been as a motorcycle technician. Before ASD, he worked on various brands of bikes, including Harley Davidson. He also does motorcycle stunt riding.

[8] Mr Koeze's work at ASD included the servicing and compliance¹ of bikes imported from the United States by ASD. He mainly worked on Harley Davidsons. Mr Koeze occasionally covered the role of workshop manager.

[9] Mr Koeze identified some concerns about the ASD workplace which he says motivated his decision to leave. However, when asked by Mr Nicholson why he was leaving, Mr Koeze said that he wanted to spend more time with his family and work less hours.

The employment agreement

[10] The employment agreement between the parties included the following clauses:

11.1 Confidential information

The Employee shall not, whether during the currency of this agreement or after its termination for whatever reason, use, disclose or distribute to any person or entity ... any confidential information, messages, data or trade secrets acquired by the employee in the course of performing their services ... This includes, but is not limited to, information about the Employer's business.

...

11.4 Restraint of Trade

The Employee agrees that for a period of 12 months following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant, agent for any other entity or employer, carry on business in competition with the Employer within New Zealand.

At the employers discretion. (*sic*)

[11] Clause 11.4 is in a different font to the rest of the agreement, has a wider page margin in places and contains the last line as set out above, which is not a complete sentence. It appears to have been taken from elsewhere and inserted into this document.

Mr Kroeze's current work

[12] On 18 October 2018 Mr Koeze incorporated a company Grayskull Garage Limited (Grayskull), of which he is the sole director and shareholder. On the same day Mr Kroeze put on Facebook that he had "Started new job at Grayskull Garage" and reference is made to him being the owner/operator. Mr Kroeze was clearly

¹ New Zealand Transport Agency standards

making preparatory steps for the establishment of a business. However, other than the Facebook entry, there was no evidence that Grayskull carried on business in competition to ASD prior to Mr Kroeze's employment finishing. He continued working at ASD until early December 2018.

[13] Grayskull now operates out of the premises of an automotive business owned by someone else. The Grayskull work, which involves servicing, repairing and modifying motorcycles, including Harley Davidson. Mr Kroeze provided photographic evidence that no signs advertising Grayskull are displayed.

[14] Mr Kroeze's statement to Mr Nicholson on his resignation that he was going to work for the automotive business and that that business did not really do motorcycle work, appears to be true in so far as it went. Mr Kroeze works there on other vehicles as well as independently on the Grayskull work. What he did not say was that he was also setting up his own motorcycle business. Mr Nicholson was upset about that.

Cease and desist letter

[15] On 24 January 2019 ASD's lawyer wrote formally to Mr Kroeze outlining its concerns, seeking undertakings and the payment of its legal costs. Mr Kroeze was advised that if undertakings were not provided the lawyer would seek instructions to commence legal proceedings.

[16] The letter includes reference to Grayskull, after Mr Kroeze finished his ASD work, putting a photograph of a modified motorcycle on Facebook, with the statement:

There's something satisfying about throwing a bunch of parts at a stock bike to make it look like this. This is a build I did a while back.

[17] The picture was of a bike owned by ASD, modified by Mr Kroeze when he worked here, which was later sold to an ASD customer. The company was not aware and had not authorised Mr Kroeze to take a photo of it.

[18] After the cease and desist letter Mr Kroeze took that photograph down and has not since re-used it. He did not respond directly to ASD's lawyer.

Orders sought

[19] ASD seeks orders that Mr Kroeze cover up or remove ASD's intellectual property from Grayskull's shop signage and any other use of photos of ASD's bikes. The company also seeks that Mr Kroeze ceases carrying on business in competition to ASD.

[20] Although the evidence is not clear that Grayskull ever had its name up on signs outside the premises, it appears that ASD has achieved its objective regarding signage as Mr Kroeze filed photographic evidence of the absence of Grayskull signage at the front of the premises.

Confidential information

[21] I look at the application of the two clauses in the employment agreement which ASD relies on.

[22] Clause 11.1 prevents confidential information and trade secrets being used. ASD's evidence identified categories of information it sees as confidential but often without specifics. I now look at those categories to assess whether the information has the necessary characteristics of confidentiality..

Processes or product methodology

[23] ASD refers to Mr Kroeze using the processes or product methodology that the company uses to enhance second-hand Harley Davidson bikes. Reference is made to the selection of types of handle bars, exhaust systems, saddlebags etc. However, there is little specific evidence about what it is about what processes ASD uses and whether they could be said to meet the requirement of trade secrets or their equivalent.² Mr Kroeze says that the modification of Harley Davidsons is not exclusive to ASD and the process the company uses were no different from those in other workshops he worked in previously.

² *Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 617 (EWCA) at 627

[24] I struggled with ASD's concept of the "look" of its modified bikes being confidential information when, once sold, the bikes are presumably taken out in public places to be seen by all.

Sourcing of parts and materials

[25] At least without more information, it is hard to see how information regarding the sourcing of parts or servicing material could be said to be the equivalent of a trade secret. Mr Kroeze says that he established relationships with parts suppliers and wholesalers through his other jobs prior to working for ASD.

Customer lists, details and preferences

[26] ASD provided no evidence of Mr Kroeze having physical or electronic lists of customers, nor of him undertaking work for ASD's customers. Mr Kroeze denies ever recording or documenting customer details other than in the course of business at ASD. His evidence is that he has a wide circle of friends in the Bay of Plenty and the Waikato where he previously lived and worked as a motorcycle technician, and using word of mouth to generate business. He denies having contacted ASD clients or used ASD client information.

[27] There is scarce evidence regarding what details or preferences Mr Kroeze is supposed to have of customers to assess whether confidential information could be involved.

Detailed accounting information

[28] This relates to pricing and billing. I was unable to identify on the evidence filed what could be seen as confidential about the pricing or billing practices or systems and so I disregard this.

The promotional method of website advertising

[29] ASD submits that it used Facebook and other social media platforms to advertise, incorporating pictures of the motorbikes which had been customised. No examples were filed. As set out above, Mr Kroeze put a photograph with comment on the Grayskull Facebook page. It was submitted that this infringed ASD's intellectual property or other rights. However, many businesses now advertise via social media using photographs and descriptions of their products. Other than any trademarks or

copyright material used, I struggle to see how that can amount to intellectual property or a basis for a confidential information claim.

Conclusion on confidential information

[30] Although ASD says that Mr Kroeze was “clearly copying and using” the information he gained in his employment, there is no evidence of this.

[31] ASD appears to believe that Mr Kroeze must have acted inappropriately because he was able to establish a business undertaking some of the same activity as ASD. Mr Kroeze has worked in the motorcycle industry for 17 years. The majority of his jobs have included the fitting of after-market parts to bikes, including Harley Davidsons. There is no basis to presume that he would be unable to set up a business without ASD confidential information. I am not satisfied that there is a basis to make orders regarding the confidential information clause.

Restraint of trade

[32] Restraint of trade clauses are prima facie invalid and unenforceable because they are contrary to the public interest in people being able to work.³ The onus is on ASD to establish that the restraint is enforceable and reasonable at the time the agreement was entered into, in the interests of the parties and the public interest.⁴ The company must also establish that the clause is no wider than is required to protect it.⁵

[33] ASD is concerned that Mr Kroeze is using skills which he obtained at ASD for Grayskull. However, restraints are not permitted to prevent an employee from using skills, experience, general knowledge and know how.⁶

[34] Mr Nicholson says that ASD saw a gap in the market over ten years ago for the importation and sale of Harley Davidson motorcycles in New Zealand. However, there is little evidence provided regarding the state of the market today in terms of competitors. Mr Kroeze’s CV refers to him having been involved in the fitting of after-market parts in several previous jobs.

³ *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97 at [37]

⁴ *Ibid* at [41]

⁵ *Pottinger v Kelly Services (New Zealand) Ltd* [2102] NZEmpC 101 at [17]

⁶ *Transpacific Industries* at [42]

[35] I found some of the evidence for ASD to be over-reaching or speculative, without apparent evidential foundation. For example, there is a statement in Mr Nicholson's affidavit that Mr Kroeze "continues to have a strong influence over ASD clients" without it being clear why this might be the case. There was no evidence of Mr Kroeze having any contact with ASD clients since he finished with the company.

[36] ASD submits that it is able to adjust the effect of the clause itself by use of the reference to at the employer's discretion at the end of the clause. I am not satisfied that that is the case. The sentence is incomplete. There is no statement about what is at the employer's discretion. In any event, s 8 of the Illegal Contracts Act 1970 allows for the deletion and modification of provisions where illegality is found.

Is there a proprietary interest or trade secret to be protected?

[37] It is not sufficient that the former employee operates in competition. What must be established is some proprietary interest or trade secret to be protected.⁷ Proprietary interests include trade connections and confidential information.

[38] ASD implied there might be a proprietary interest in photographs. However, without examining that prospect in detail, I note that Mr Kroeze took down the photo on receipt of the letter from ASD's lawyer and has not repeated use of photos.

Trade connections

[39] The statement of problem refers to it being apparent that Mr Kroeze is using ASD's trade connections for the sourcing of parts and/or servicing materials to service and do up bikes. However, ASD has not identified these sources nor provided indication of any difficulty in locating these services through an internet search, for example. Mr Kroeze says he developed connections with suppliers through previous work and there was no evidence for ASD to contradict this.

[40] Mr Nicholson refers to Mr Kroeze having a direct association with ASD clients and their friends (potential clients), through his work for the company. Mr Kroeze says that dealing with customers was undertaken by the workshop manager and he had little dealing with Harley Davidson clients. However, given that this is an interim application on untested affidavit evidence I accept that Mr Kroeze had some client contact. The restraint of trade can rely on these trade connections.

Confidential information and trade secrets

⁷ Ibid at [20]

[41] As noted above, it was not established on the evidence that ASD established confidential information or trade secrets.

What activities are restricted?

[42] Given that I accept for the purposes of the interim application that Mr Kroeze had customer connections which could provide a basis for the restraint, I now look at other aspects of the clause. The restriction is that Mr Kroeze shall not either personally, or as an employee, consultant or agent for any other entity or employer carry on business in competition with the employer.

[43] ASD imports and sells Harley Davidsons. Grayskull does not do that. However, it does also modify motorcycles, which is what Grayskull does. Mr Kroeze would be prevented from doing that if the restraint is enforced.

[44] ASD submits that the restraint of trade did not prevent Mr Kroeze working on other types of motorcycles or on cars or trailers. However, Mr Kroeze's qualification, registration and predominant work experience are related to motorcycles. The extent to which he was able to undertake work on things other than motorcycles, was not much explored in the evidence. However, he has undertaken some work for the automotive business.

Is the period of the restraint reasonable?

[45] The restraint is for a period of 12 months following the termination of employment. I do not consider that such a lengthy restraint is reasonable for an employee such as Mr Kroeze. Without wishing to disrespect his skills as a senior technician, he was not a highly paid executive. At the time of appointment he was paid \$29 gross per hours, although this has since gone up to \$30. On an annual basis this equates to a little over \$60,000.

[46] I consider that a period of three months would have been sufficient for ASD to contact customers and attempt to sure up their business.

Conclusion on restraint of trade

[47] Having concluded that the length of the restraint is unreasonable, I could have considered modification under the Illegal Contracts Act. However, the claim initially reached the Authority over four months after Mr Kroeze's termination of employment, when the clause started running. The time is now well past a period

which may have been reasonable for the restraint. I therefore do not modify the restraint and make no interim compliance orders on the basis of it.

[48] I do not need to consider whether the geographical cover of the restraint clause is reasonable, but note that although the clause covered the whole of New Zealand, ASD was only attempting to enforce a 40km radius from its Mt Maunganui premises.

Costs

[49] Costs are reserved.

Nicola Craig

Member of the Employment Relations Authority