

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 101
3091712

BETWEEN

TCC SYLVIA PARK
LIMITED
First Applicant

TCC NEWMARKET
LIMITED
Second Applicant

AND

HARLIA SANFT
First Respondent

CHRISTINA BROWN
Second Respondent

LCNZ OPERATIONS PTY
LIMITED
Third Respondent

LCNZ FRANCHISING PTY
LIMITED
Fourth Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Laphorne, counsel for Applicants
Harlia Sanft in Person
Christina Brown in Person
Alastair Espie, counsel for Third and Fourth
Respondents

Investigation Meeting: 2 March 2020

Determination: 2 March 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. The applications by TCC Sylvia Park Limited and TCC Newmarket Limited for an injunction enjoining Ms Sanft and Ms Brown from certain activities is declined.

B. Costs are reserved.

Employment relationship problem

[1] TCC Sylvia Park Limited and TCC Newmarket Limited (together TCC) seek interim orders restraining Ms Sanft from working for LCNZ Operations Pty Limited until 8 March 2020 and Ms Brown from working for LCNZ Franchising Pty Limited until 9 April 2020.

[2] TCC's application for interim relief was part of a wider application that Ms Sanft and Ms Brown, in addition to breaching restraint obligations, breached their obligations to act in good faith. TCC seeks orders for permanent injunctions, damages for losses caused by failing to comply with the terms of their employment agreements, special damages and penalties.

[3] TCC also seeks penalties against LCNZ Operations and LCNZ Franchising for aiding and abetting Ms Sanft's and Ms Brown's alleged breaches of the employment agreements.

[4] TCC lodged its application on 13 February 2020. The parties attended mediation on 20 February 2020 but they were unable to resolve the matter. TCC lodged an amended statement of problem on 24 February amending the names of the third and fourth respondents to correct errors made in the original statement of problem.

[5] An undertaking as to damages has been received.

[6] An investigation meeting has been held and the parties have been provided with an opportunity to address me on the principles applicable in considering whether an interim injunction should be ordered.

[7] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and

specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered everything.

Background

[8] The Cosmetic Clinic Group was founded in Australia in 1996. TCC provides beauty and cosmetic medicine treatments including laser hair removal, skincare treatments and cosmetic injectables.

[9] In 2016 TCC was awarded the exclusive country development license for TCC in New Zealand and opened its first clinic in the Sylvia Park shopping mall in Auckland. TCC Sylvia Park owns and operates the Sylvia Park franchise while TCC Newmarket applicant owns and operates a franchise in Newmarket.

[10] Laser Clinics New Zealand Group (LCNZ) also operates franchises which are located in Newmarket and St Lukes. It provides the same beauty treatment services and competes for the same customers as TCC.

[11] There is a shortage of qualified beauty technicians and therapists in Auckland. Auckland is the only region in New Zealand in which the local authority regulates the use of laser equipment for beauty treatment for health and safety reasons. TCC uses cutting edge laser technology and provides some of the most comprehensive training in the industry to its beauty therapists and technicians.

[12] TCC may require newly appointed technicians to undertake up to 25 hours of competency training following an assessment of their competency in using laser equipment. TCC provides advanced laser training for skin rejuvenation, pigmentation, redness and red vein.

[13] Technicians are responsible for providing beauty treatments for TCC clients. Their roles involve significant client contact, including conducting consultations, developing treatment plans and recommending products to support after treatment care.

Ms Sanft

[14] Ms Sanft was employed by TCC Sylvia Park on 6 September 2018 and worked as a Laser Technician until 8 December 2019. The terms and conditions of Ms Sanft's employment were set out in an individual employment agreement signed by Ms Sanft on 21 August 2018.

[15] Ms Sanft's employment agreement contains non-solicitation and restraining provisions at clause 31 which state:

- 31.1 Without the Employer's prior written consent, from the date your employment ends, you are not to solicit or attempt to solicit business from any Customer for the Restraint Period.
- 31.2 Without the Employer's prior written consent, from the date your employment ends, you are not to undertake any paid work for a Competitor for 3 months.
- 31.3 Without the Employer's prior written consent, from the date your employment ends, you are not to solicit, attempt to solicit, entice or encourage any Employer Representative to leave their engagement with the Employer for the Restraint Period.
- 31.4 Without the Employer's prior written consent, from the date your employment ends, you are not to encourage, condone or entice any other person or entity, in which you are interested or by which you are engaged, to engage in conduct which, if you engaged in such conduct personally, would cause you to breach this clause.
- 31.5 In this clause:
 - (i) "Restraint Period" means 9 months.
 - (a) "Customer" means any person or entity:
 - (i) to which the Employer provided services during your employment;
 - (ii) with which the Employer had direct dealings during your employment in relation to the provision (or proposed provision) of services by the Employer to the person or entity; or
 - (iii) which referred business to the Employer during your employment.
 - (b) "Competitor" means any business engaged in the Aesthetic and Laser Clinics industry within a radius of 15 kilometres from the workplace of the Employer in which you were employed;
 - (c) "Employer Representative" means:

- (i) any director or person involved in the management of the Employer;
- (ii) any employee of the Employer who has knowledge of Confidential information or who reported to you or who was engaged in sales or marketing activities during your employment;
- (iii) any employee of the Employer; and
- (iv) any independent contractor of the Employer.

31.6 The restrictions in this clause apply to conduct which is either direct or indirect (e.g. done through an agent of any kind) and regardless of whether the conduct is engaged in for your own benefit or for the benefit or on behalf of any other person or entity.

31.7 Each of the covenants in this clause shall be construed and have effect as if it were the number of separate covenants which results from combining each covenant with each sub-section of the definition in this clause for each defined term referred to in the covenant, with each such resulting covenant being severable from each other such resulting covenant. If any such resulting covenant shall be invalid or unenforceable for any reason, such invalidity or unenforceability shall not prejudice or in any way affect the validity or enforceability of any other such resulting covenants.

31.8 You agree that the restraints contained in this clause are reasonable and that you have received adequate consideration for entering into the restraints.

[16] On 8 November 2019, Ms Sanft gave four weeks' notice of her resignation in accordance with the terms of her employment agreement. Ms Sanft told her employer that the reason she was leaving was due to her personal circumstances.

[17] TCC says it discovered in January 2020 through an online review that Ms Sanft had started working for LCNZ St Lukes.

[18] Ms Sanft obtained a Beauty and Spa Therapies Diploma from Elite International School of Beauty and Spa Therapies in 2018. In her statement in reply Ms Sanft states that she worked 36 hours a week for TCC and was paid \$23 per hour. She completed mandatory training in advanced laser treatments.

[19] After leaving her employment Ms Sanft questioned why she had not received her holiday pay with her final pay on 10 December. Mr Hornibrook advised Ms Sanft TTC was entitled to deduct the costs of all external training incurred by TCC in the last 12 months of her employment.

[20] This is not an accurate portrayal of the terms Ms Sanft has agreed to. By signing her employment agreement Ms Sanft agreed that TCC may retain from any monies owed to her, training costs. However, the clause requires consultation before the money is deducted. There does not appear to have been any consultation about this deduction prior to it being made, thus the need for Ms Sanft's question after receiving her final pay.

[21] Ms Sanft resigned from her job at TCC due to personal circumstances including problems with sleep, anxiety and stress. Ms Sanft's general practitioner referred her to a psychologist and counsellor for therapy sessions in the months leading up to November 2019. Mr Hornibrook says this was a misleading statement. However, in his email to Ms Sanft on 26 December he recognises that Ms Sanft had been suffering from personal stress related issues. He conveyed his sympathy to Ms Sanft that her situation had gotten worse.

[22] Ms Sanft states in her statement in reply that she started working for LCNZ Operations at St Lukes on 9 December as an Assistant Manager. Her role involves administrative duties, managing and directing a team of laser and dermal technicians and performing laser and skin treatments.

[23] Ms Sanft states that she has not provided any confidential information to LCNZ nor has she approached or undertaken any work for customers or clients of TCC.

Ms Brown

[24] Ms Brown was employed by TCC Newmarket from 28 August 2019 until 9 January 2020. The terms and conditions of Ms Brown's employment were set out in an individual employment agreement.

[25] Ms Brown's employment agreement also contains non-solicitation and restraining provisions. Clause 20 of her employment agreement states:

- 20.1 The Employee agrees that during their employment and for the periods set out below following the termination of the Agreement for whatever reason, they will not, either personally, or as an employee, consultant or agent for any other entity:

- (a) for a period of 3 months, carry on business in competition with the Employer within a radius of 15 kilometres from the Employer's premises.
- (b) for a period of 12 months, solicit or carry out any work of the same nature for any client or customer of the Employer with which the Employee had any contact or dealings during the 12 months immediately preceding the termination of the Employee's employment; and
- (c) for a period of 12 months, solicit or engage or employ any employee of the Employer with whom the Employee had any dealings during the 12 months immediately preceding the termination of the Employee's employment.

[26] On 9 December 2019, Ms Brown gave four weeks' notice of resignation in accordance with the terms of her employment agreement. Ms Brown told TCC she was going on holiday and would look for a new role in a different industry afterwards. TCC was informed by other employees that Ms Brown was working for LCNZ.

[27] In her statement in reply, Ms Brown states that she has about eight years' experience in the beauty therapy industry having obtained a qualification in 2013. Ms Brown received training in Intense Pulsed Light therapy, peels and other general beauty treatments from her first employer in the industry. In 2016 she received further training while working at New Zealand Laser Clinics (now called Skin Elixir). This included training in the same types of lasers used at TCC. Later in 2016 Ms Brown did a refresher course in laser treatment.

[28] Ms Brown completed mandatory training in advanced laser treatment while working for TCC Manukau. She had done this type of training before and while it showed her TCC's way of doing things the procedures were already familiar to her.

[29] Ms Brown sustained a knee injury in November 2019. This made clinic work difficult as she was on her feet all day. Ms Brown decided to leave the clinic work to focus on her health. She decided to look for administrative work, which she could manage during her recovery.

[30] In late November 2019, Ms Brown received a notification via email from the Seek website that LCNZ Franchising was looking for an Area Manager. She applied for the role but did not hear back until late December.

[31] Ms Brown commenced a period of ACC on 4 December as a result of her knee injury. She was off work until 27 or 28 December when she returned on limited hours, working four hours each day.

[32] Ms Brown was under the care of a physiotherapist who told her the knee injury would take months, rather than weeks to heal and much longer if she continued to work the long hours for TCC. It was at that time Ms Brown made the decision to resign from her employment.

[33] In her emailed resignation she explained to her manager that she had decided to take time away from clinic work. Ms Brown told her manager that she was thinking of returning to Gisborne and looking for a new role in administration.

[34] After her resignation had been submitted and while Ms Brown was still in her notice period (albeit not working) she was told her application for the Area Manager position at LCNZ was unsuccessful but she had been short listed for a different administrative role which was later offered to her.

[35] Ms Brown returned to TCC to work out the remainder of her notice period from 1 to 9 January 2020. During this time she was restricted to working four hours a day.

[36] Ms Brown started working for LCNZ Franchising on 13 January 2020. Her position is Clinic Co-ordinator. The role involves administrative duties which she says she largely performs at home.

[37] In her statement in reply Ms Brown states that since she commenced working for LCNZ she has not undertaken any laser therapy work, has not disclosed any confidential information or undertaken any work for customers or clients of TCC.

[38] In its statement in reply LCNZ confirms Ms Brown's role is administrative, that she works from home, does not work in a front of house capacity nor does she have any customer contact.

Interim application

[39] The answer to applications for interim injunctions is not reached by the rigid application of a formula but is given after evaluation of three broad questions:

- a) Whether TCC has an arguable case for the findings and substantive relief sought;
- b) Where does the balance of convenience lie between now and the Authority's eventual determination of the substantive issues; and
- c) Standing back and considering the matter as a whole, where does the overall justice lie from now until determination of the substantive application.

[40] The merits of this 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. Final findings of fact and law will be made only once I have had an opportunity to fully test all of the relevant evidence.

[41] At the commencement of the investigation meeting Ms Sanft and Ms Brown confirmed by way of affirmation the truthfulness of the statements made in each of their statements in reply. While not strictly in affidavit form I have accepted these statements as being their sworn testimony.

[42] Any findings of fact made by the Authority in this determination are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses have been examined about their evidence where necessary.

Does TCC have an arguable case?

[43] An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success.¹ This case involves a question about whether there has been a breach of the restraint of trade provision in the employment agreement signed by Ms Sanft and Ms Brown.

[44] As a matter of public policy restraints of trade are unlawful unless they can be justified as reasonably necessary to protect the proprietary interests of the employer in the public interest. This is because they interfere with an employee's freedom to work

¹ *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 863.

in their chosen field. The employer bears the onus to establish that the restrictive covenants are reasonable.²

[45] Relevant factors in assessing whether a restraint is reasonably necessary include the nature of the employee's role and the employer's business, the geographical scope, its nature and the duration of the restraint.

[46] In seeking to enforce a restraint, TCC needs to show that it has a legitimate proprietary interest and that the restraint is no wider than is reasonably necessary to protect that interest.³

[47] Reaching a conclusion on whether there is an arguable case will require assessing:⁴

- a) What the clauses mean when properly construed;
- b) What legitimate proprietary interest does the clause purport 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 its geographical limits); and
- d) Whether there has been any real breach of the terms.

What the clauses mean

[48] It is the non-compete aspect to the restraint terms in both employment agreements that are under scrutiny in this case.

Ms Sanft

In Ms Sanft's employment agreement the restraint has four parts:

- a) It applies for a period of three months following termination of Ms Sanft's employment;
- b) It prohibits Ms Sanft from undertaking any paid work for that period of time for a competitor;

² *Pottinger & Ors v Kelly Services (NZ) Limited* [2012] NZEmpC 101 at [16....? (footnotes are not set out)

³ *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153 at [23].

⁴ *Air New Zealand Limited v Kerr* [2013] NZEmpC 153 at

- c) The restriction on carrying out work for a competitor encompasses any business engaged in the aesthetic and laser clinics industry within a 15 kilometer radius of Sylvia Park being the location at which Ms Sanft was employed; and
- d) TCC may provide written consent for Ms Sanft to undertake the paid work for a competitor.

Ms Brown

[49] On my analysis the restraint term in Ms Brown's employment agreement has two parts:

- a) It applies for a period of three months and a radius of 15 kilometres from Newmarket which is the location at which Ms Brown was employed; and
- b) It prohibits Ms Brown from carrying on business in competition with TCC either personally, as an employee, consultant or agent for any other entity for that period.

Proprietary interest

[50] Mr Timothy Hornibrook, the Chief Executive Officer for TCC New Zealand Limited deposed that the proprietary interests to be protected by the restraining provisions include:

- a) TCC's extensive investment in training provided to its technicians;
- b) TCC's confidential information; and
- c) TCC's client/customer relationships.

[51] Mr Hornibrook deposed that the three month period allows a reasonable and realistic time for TCC to recruit replacement technicians and for the new technicians to establish and develop relationships with TCC's clients. Further, the three months provides time for the confidential information acquired by its technicians to become less relevant and allow TCC to take steps where possible to limit the commercial sensitivity of such information.

Extensive investment in training

[52] Mr Hornibrook does not expand on his assertion that TCC has invested extensively in training for Ms Sanft and Ms Brown. TCC Sylvia Park retained Ms Sanft's holiday pay at the end of her employment as reimbursement for all external training costs incurred by TCC.

[53] There is no specific clause dealing with training costs in Ms Sanft's employment agreement, except clause 18.1 which allows deductions from money owed which includes a reference to training costs.

[54] Ms Brown completed mandatory training in advanced laser treatment while working for TCC Manukau. She had done this type of training before and while it showed her TCC's way of doing things the procedures were already familiar to her as a result of previous training within the industry.

[55] Ms Brown's employment agreement at clause 31 makes provision for the costs of her training to be met by TCC. However, the clause also provides for Ms Brown to reimburse TCC for training costs incurred within 12 months of her employment ending where she resigns from her employment. The amount due for reimbursement would be the costs incurred but reduced by 1/12th part for each complete calendar month after the end of the training during which time Ms Brown remained employed by TCC.

[56] While TCC may have expended costs in training for Ms Sanft and Ms Brown, clearly the intention was that those costs could be and were recuperated.

Confidential information and client/customer information

[57] Mr Hornibrook deposed that most of TCC's clients are repeat clients with some clients travelling as far afield as the Waikato region and Wellington. Some technicians like Ms Brown have loyal customer followings. Some of the treatments are very personal and intimate in nature so clients prefer to consult the same technician for their treatments.

[58] Ms Michelle Taylor, Country Manager for LCNZ Franchising deposed that laser treatments typically involve 5-10 minute treatments. These treatments are performed by employed laser technicians. Other more specialised treatments are performed by specialist employees. Ms Taylor accepted that LCNZ and TCC are

competing for the same customers. Ms Taylor does not accept that the movement of laser technicians between businesses has a big impact on where customers go.

[59] Ms Taylor deposed that the majority of LCNZ's business is laser treatment services. The vast majority of clients are walk-ins who are chasing low prices and convenience. While clients may sometimes ask for a specific technician, it is rare for a client to follow a technician from one clinic to another. LCNZ'S model works on the basis that customers do not have the same treating therapist for any treatment except in the rare situations where a customer is adamant they want a specific individual.

[60] It is arguable that the restraint is necessary to protect the proprietary interest TCC holds in its confidential information and client/customer relationship. Both of the employment agreements contain provisions addressing the non-solicitation of clients of TCC and for the protection of confidential information. TCC has not alleged that either Ms Sanft or Ms Brown have breached these specific obligations.

[61] In their statements in reply both Ms Sanft and Ms Brown state that they have not given LCNZ any information confidential to TCC. They state that they have not approached or undertaken any work for customers or clients of TCC.

[62] TCC has an arguable case that the restraint is necessary to protect its client base although it is not a strong argument given other provisions available to it which both Ms Sanft and Ms Brown state they have not breached. I have taken into account that Ms Sanft and Ms Brown would have acquired knowledge including TCC's clients, practices and protocols which they may directly or inadvertently disclose during their employment with LCNZ.

Reasonableness of the restraint

[63] Once an employer has established a legitimate proprietary interest, it then needs to demonstrate that the restraint is reasonable and does not go beyond protecting that interest any more than is necessary. This assessment requires consideration of the duration of the restraint, its scope and geographical limits.⁵

[64] Ms Sanft's restraint seeks to prohibit her from undertaking any paid work for a competitor for a period of three months and within a radius of 15 kilometres from

⁵ *Air New Zealand v Kerr* [2013] NZEmpC 153 at [23].

Sylvia Park. Ms Brown's restraint seeks to prohibit her from carrying on business in competition with TCC for a period of three months and within a radius of 15 kilometres from Newmarket.

[65] In assessing this question I have taken some guidance from cases dealing with restraints in the hairdressing industry.⁶ This is because, like those undertaking beauty treatments of a sensitive nature, it is usual for clients in the hairdressing industry to become loyal to their hairdresser. With hairdressers that loyalty is founded on the individual hairdresser's skill and on their pleasant and sympathetic personality and forms part of the employers' good will.⁷

[66] In *Rodwil Enterprises Ltd v Dominguez* a geographical boundary of three kilometres was considered reasonable. In *Servilles Ltd v Whiting* the employment court reduced the period of the restraint from six months to three months and held a five kilometre radius was reasonable. In *Pure Hairdressing Ltd v Kosmidakis* the Authority held that a radius of five kilometres was reasonable but that the duration would in all likelihood be reduced from 12 months to three or four months following the investigation into the substantive claims.

[67] A final determination of the reasonableness of the restraint will need to be addressed when the matter can be properly tested. For the purposes of this determination I am not satisfied the geographic radius is reasonable. Depending on the outcome of the substantive claims it is likely the geographic radius may be modified to a shorter geographical radius of five kilometres rather than 15.

Has there been a breach

[68] Both Ms Sanft and Ms Brown are working for LCNZ which are companies competing with TCC. Both employees started working for LCNZ within the three month period. They both work for LCNZ businesses which are located within the 15 kilometre radius of the location of their previous employment.

[69] In the event that the radius is reduced to 5 kilometres, as indicated earlier in this determination, Ms Sanft's work for LCNZ at St Lukes will fall outside the restraint area and she will not be in breach.

⁶ *Rodwil Enterprises Ltd v Dominguez*, Auckland Employment Relations Authority, AA 272/07; *Servilles Ltd v Whiting*, unreported, Employment Court, 2 June 2000, AC 47/00, Colgan, J; *Pure Hairdressing Ltd v Kosmidakis* [2012] NZERA Wellington 7.

⁷ *Dawnay Day & Co Ltd v de Braconier d'Alphen* [1997] IRLR 285 (HC) at 290.

[70] Ms Brown largely works from home. She does not undertake any clinical work. Her role for LCNZ is to provide operational support across a number of individual clinics including providing training to employees around administrative tasks such as opening and closing stores, the online booking system and familiarising employees with how staff present and conduct themselves. Ms Taylor deposed that Ms Brown does not provide any training related to technical laser skills.

[71] Given the different locations of the clinics to which Ms Brown provides administrative support I am unable to definitively say to what extent she is breaching of the 15 kilometre radius. It appears clear, though, that there may be some breaches even if the radius is reduced to 5 kilometres.

Conclusion

[72] I find TCC has established it has an arguable case although it is not strongly arguable given the possibility that the geographical radius of the restraint may be significantly reduced.

Balance of convenience

[73] The question of balance of convenience requires an assessment of the impact on the parties of granting or not granting the interim order, having regard to, amongst other things, the relative merits of the case. The same consideration applies in respect of third parties. Relevant to this assessment is the question of whether the impact on a party is harm that can be adequately compensated by damages.

[74] Neither Ms Sanft nor Ms Brown have disclosed their ability or otherwise to meet any prospective award of damages that might result from losses of business to TCC if they are found in a substantive investigation to have breached a valid restraint and to have caused such losses.

[75] If called upon through its undertaking as to damages, TCC is likely better placed to pay Ms Sanft and Ms Brown for lost wages and other expenses they might incur if they are prevented from working for LCNZ from now until the expiry of the non-compete restraint period. That conclusion has assumed their employment with LCNZ would continue after the restraint period if they were forced to stand down for that period.

[76] For Ms Sanft this would be a stand down of about six days, while for Ms Brown it would be a stand down of approximately six weeks.

[77] Ms Sanft and Ms Brown earn no more than a modest income and both confirmed at the investigation meeting that they have no assets. This tends toward a finding in TCC's favour that without an interim injunction TCC may not be adequately compensated for any losses by an award of damages.

[78] Ms Sanft and Ms Brown have little or no ability to meet an award of damages if TCC are able to prove substantial commercial losses. On the other hand there is no evidence about just how substantial such amounts might be.

[79] If Ms Sanft and Ms Brown are prevented from earning an income in their area of work, they will be unlikely to have the funds to pay damages in any event. It seems to me to be preferable for Ms Sanft and Ms Brown to continue earning an income for the interim.

[80] Mr Hornibrook has deposed that TCC has been unable to find replacement technicians. He says this has caused it to close one of its treatment rooms and has reduced its capacity to treat clients which has resulted in lost revenue. These losses cannot be attributed to Ms Sanft's or Ms Brown's breaches of the restraining provisions. These losses are directly attributable to the lack of qualified technicians available for work in the Auckland area and TCC's inability to recruit replacement staff for Ms Sanft and Ms Brown. I am satisfied it would be facing these same issues even if Ms Sanft and Ms Brown had not taken up work with LCNZ.

[81] The delay in waiting for the substantive investigation meeting (likely to be in May or June) and then up to three months for a determination is a factor to be weighed in the balance. This is a factor of relative inconvenience to both parties equally.

[82] Ms Taylor deposed that Ms Sanft is employed at one of its busiest and most profitable clinics. She says that if an order requiring Ms Sanft to stop work is made it would have an adverse impact on the clinic. The pressure on other staff would increase and rosters would have to be altered and customer appointments rescheduled. This will frustrate customers and may result in appointments being cancelled.

[83] If Ms Brown is prevented from working for a period of six weeks, some of her work will have to be postponed and Ms Taylor herself will have to pick up the vast majority of her responsibilities. This work would have to be performed in addition to

Ms Taylor's current workload which already has her working approximately 60 hours each week.

[84] Although the balance of convenience is finely balanced standing back, the relative inconvenience favours Ms Sanft and Ms Brown. The impact on both will be significantly reduced if the geographical radius is reduced. Ms Sanft will have been stood down for no reason and Ms Brown may have been able to arrange working only for LCNZ clinics outside the reasonable radius. This would also reduce the impact on third parties such as LCNZ, its other employees and its clients.

Overall justice

[85] TCC's case, while arguable, is weak. The public policy considerations favour Ms Sanft and Ms Brown. Ms Sanft's and Ms Brown's freedom to work and use their skills and experience do not support the injunction being granted.

[86] Ms Sanft has paid for the training she received from TCC and Ms Brown was already qualified in the techniques required from her when undertaking her work for TCC. Training Ms Brown in TCC's preferred methods or protocols does not establish a proprietary interest. In any event, she is not using these skills in her current role.

[87] The geographical radius of the restraint is likely to be reduced to 5 kilometres. An interim order now would give TCC competitive protection in a geographical radius extending beyond what might be determined as a reasonable and necessary restraint.

[88] Standing back and having regard to all aspects of the matter, including the particular factors I have discussed, I find that the overall interests of justice follow the balance of convenience and favours declining TCC's application for an interim injunction.

Next steps

The Authority will shortly convene a case management conference to set a timetable for the investigation of TCC's substantive claims.

Costs

[89] Costs on this application are reserved and will be dealt with when dealing with the costs associated with the substantive matter.

Vicki Campbell
Member of the Employment Relations Authority