

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 189
3099852

BETWEEN SANGUINE (NELSON) LIMITED
Applicant

AND BRITTANY FENWICK
First Respondent

AND ENHANCESKIN LIMITED
Second Respondent

Member of Authority: Helen Doyle

Representatives: Andrew Shaw, counsel for the Applicant
Luke Acland, counsel for the First and Second Respondents

Investigation Meeting: 5 May 2020 in Christchurch by telephone

Submissions Received: On the day

Date of Determination: 08 May 2020

DETERMINATION OF THE AUTHORITY

- A The application for an interim injunction is declined.**
- B The parties are directed to mediation and the matter will be given a date for substantive investigation as soon as possible.**
- C Costs are reserved until after the substantive investigation.**

Employment Relationship Problem

[1] Sanguine (Nelson) Limited is a duly incorporated company that carries on a business in beauty and skin care treatments in Nelson. It operates as a franchisor trading under the Caci Clinic franchise name. The Caci Clinic franchise is owned by Fab NZ Limited which, through its franchises, is a major provider of appearance medicine treatments in the Southern Hemisphere. I shall refer to the company from here on as Caci Clinic.

[2] Ms Fenwick was employed by Caci Clinic on a part-time basis as a Registered Nurse/Cosmetic Nurse Injector from 4 March 2019 working three days a week at its Nelson premises. She resigned from her employment with four weeks' notice from 4 February 2020. Her last day of employment with Caci Clinic was 28 February 2020 and she commenced employment with EnhanceSkin on 3 March 2020.

[3] Caci Clinic seek an interim injunction as follows:

- (a) Brittany Fenwick is to immediately cease her employment with EnhanceSkin, and shall not otherwise be connected with, engaged by or interested in the business of EnhanceSkin until after 28 February 2021, being twelve months from the date on which Ms Fenwick's employment was terminated with Sanguine trading as Caci Clinic Nelson;
 - (i) In complying with this order Ms Fenwick is to take all practicable steps to ensure that EnhanceSkin remove from their marketing material, including social media and websites, any reference to Ms Fenwick as an employee of EnhanceSkin.
- (b) Ms Fenwick shall not solicit or endeavour to entice away from Caci Clinic any of Caci Clinic's clients, or perform any work with any of Caci Clinic's clients, suppliers or customers until after 28 August 2020, being six months from the date on which Ms Fenwick's employment was terminated with Caci Clinic.
- (c) Alternatively, such other orders restraining Brittany Fenwick as the Authority may deem reasonable, having regard to the discretionary powers under s 83 of the Contract and Commercial Law Act 2017.

[4] No orders are sought at this time against EnhanceSkin Limited (EnhanceSkin) but there is a claim for a penalty in the substantive application on the basis that EnhanceSkin aided and abetted the alleged breaches of the employment agreement.

[5] Caci Clinic says that when Ms Fenwick commenced employment with EnhanceSkin she did so in breach of obligations under her employment agreement that survived termination.

[6] Ms Fenwick says that she has not breached the restrictive covenants in her employment agreement with Caci Clinic because it has no proprietary interest that it needs to

protect and the clauses are unenforceable. She says that there is no claim in the statement of problem for final injunctive relief for the alleged breach of the non-solicitation clause and that is fundamental to the ability to claim interim relief on that basis. Further that the restraint of trade does not specify the area of restraint. Alternatively if it is enforceable it is unreasonable and should not be modified under s 83 of the Contracts and Commercial Law Act 2007.

[7] The parties have not attended mediation at this stage. Communications have taken place between Caci Clinic's legal representatives and Ms Fenwick and latterly Mr Acland, however the matter remained unresolved and the application for an interim injunction was lodged.

Confirming the identity of deponents and affirming contents of unsworn affidavits

[8] At the commencement of the investigation meeting on 5 May 2020 the Authority asked the deponents of unsworn affidavits, provided in support of and opposition to the application for an interim injunction, to confirm their identity and to affirm the contents of their affidavits as true and correct. This process has been confirmed as appropriate by the Chief of the Employment Relations Authority in response to the Covid-19 pandemic.

[9] There were four unsworn affidavits. Two were from Paulette Potter who is a director of Caci Clinic with the second unsworn affidavit by way of reply. One unsworn affidavit was from Ms Fenwick and the other from Dr David Orsbourn who is a medical doctor and director of EnhanceSkin. Ms Potter also affirmed the undertaking as to damages set out as part of her original unsworn affidavit. A signed undertaking as to damages must be lodged with the Authority and served as soon as alert levels enable that to occur.

[10] I shall refer to the affirmed contents of the affidavits as statements in this determination.

[11] The Authority was assisted in its decision making process by the submissions of Mr Shaw and Mr Acland directed to the issues the Authority is required to consider with an interim injunction.

Issues

[12] The answer to an interim injunction is not in the rigid application of a formula, but there are broad inquiries the Authority should undertake in determining the application. An interim injunction involves the exercise of a discretion however the assessment of whether there is a serious issue to be tried is not discretionary and requires evaluation by the decision maker.¹

[13] The issues that require determination in this matter are as follows:

- (a) Is there a serious issue to be tried that is not vexatious or frivolous?
- (b) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that each party will incur as a result of the interim injunction being granted or not being granted; and
- (c) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

Material matters against which these issues are to be considered

[14] Ms Fenwick was party to an individual employment agreement with Caci Clinic dated 14 February 2019. The following clauses are material and survive the ending of the employment relationship.

[15] Clause 18 of the employment agreement contains a restraint of trade provision:

18. Restraint of Trade

You recognise that you will, during the course of your employment with the Employer have access to Confidential Information as described in the “Confidential Information” clause above and will have influence over employees, customers and suppliers of the Employer, and receive specialised and proprietary training in the area of Appearance Medicine services (including botulinum toxin treatments, dermal fillers and peels) (‘proprietary interest’). In recognition of the importance of these proprietary interests and in consideration of the Employer’s offer of employment, the remuneration payable under and beneficial terms of this Agreement, you agree to be bound by the restrictive covenants under this clause and the “Non Solicitation” clause below.

¹ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90, (2013) 13TCLR 531 at [12] – [13]

You shall not, during the term of your employment, and for a period of 12 months from the date of termination of employment with the Employer, for any reason whether directly or indirectly, alone or with any other person:

- (a) be involved as a principal, agent, shareholder, director, servant or employee in any other capacity in any other business within a radius of 10 kilometres of the place of work set out in Schedule Two of this Agreement that competes with, or make compete with, the business of the Employer, without the express written permission of the employer;
- (b) carry on or be connected with, employed or engaged by or interested in, any business within the 10km radius that competes with, or may compete with, the Appearance Medicine business of the Employer or of Caci Nelson without the express written permission of the Employer.

[16] Clause 19 of the employment agreement contains a non-solicitation provision:

Clause 19. Non Solicitation

You shall not, during the term of your employment and for a period of 6 months from the date of termination of employment with the Employer, for any reason whether directly or indirectly alone or with any other person;

- (a) attempt to encourage or persuade any of the Employer's clients, suppliers, or customers to terminate or restrict their trade relations with the Employer;
- (b) solicit or endeavour to entice away from the Employer, or have any dealings (excluding personal dealings) with any employees, customers, suppliers, clients of the Employer, or contractors to, the Employer.
- (c) perform any work, either directly or indirectly, with any of the Employer's clients, suppliers, or customers.

You acknowledge that the restraints contained in the "Restraint of Trade" clause above and this clause are:

- (a) intended to apply to the maximum extent;
- (b) significant to the Employer's decision to enter into this Agreement; and
- (c) fair and reasonable in all the circumstances with regard to subject matter, area and duration, and are reasonably necessary for the Employer to protect itself.

The restrictions in the "Restraint of Trade" clause above and this clause shall survive termination of this Agreement for any reason. Each restraint in the "Restraint of Trade" clause above and this clause is separate, independent and severable. If any restraint is deemed totally or partially unenforceable for any reason whatsoever, it will not affect the enforceability of the other restraints.

If any of the restrictions in the "Restraint of Trade" clause above and this clause shall be adjudged to be void or ineffective for whatever reason but would be adjudged to be valid and effective if part of the wording were deleted or the periods reduced or geographic area modified, they shall apply

with such modifications as may be necessary to make them valid and effective.

You acknowledge that the remedy of damages may be inadequate to protect the interests of the Employer in relation to the “Restraint of Trade” clause above and this clause and accept that the Employer is entitled to seek and obtain injunctive relief, or any other relief.

[17] Clause 15 of the Employment Agreement contains the confidentiality clause

Clause 15. Confidential Information

In this agreement “Confidential Information” means all confidential information which is not in the public domain and which is reasonably regarded by the Employer as confidential to it, and any related companies, which you become aware of in the course of carrying out this agreement including, but not limited to;

- a. The Employer’s financial affairs;
 - b. Trade secrets;
 - c. Confidential business information;
 - d. Business methods and management systems;
 - e. Pricing information;
 - f. Policy and procedural manuals;
 - g. Detailed information and records relating to clients, applicants, staff and parties with whom the employer deals commercially;
 - h. Strategic information relating to marketing, advertising or any other aspect of business;
 - i. Know-how not generally known to the public;
- relating to the Employer or any related party of the Employer.

The Employee agrees that the Employee will hold all Confidential Information in confidence and will not without the written consent of the Employer directly or indirectly at any time during the term of this agreement or following its termination for any reason (for so long as the information continues to be Confidential Information);

- a. Use any Confidential Information;
- b. Disclose any Confidential Information to any person, firm, company or organisation;
- c. Copy any material containing Confidential Information for personal use or for use by any other unauthorised person, firm, company or organisation;
other than to the extent necessary to carry out the Employee’s duties under this agreement or as required by law.

You acknowledge that the Employer will treat a breach of this clause as serious misconduct and may terminate your employment summarily. A breach of this clause may also result in the Employer applying for remedies including injunctive relief and/or damages.

[18] Ms Fenwick entered into a confidentiality agreement with Caci Clinic at the same time as she signed her employment agreement. As well as referring to confidential information it additionally referred to the non-solicitation restraint.

[19] As part of her employment with Caci Clinic Ms Fenwick undertook training as set out below:

- (a) Initial nurse training on 4, 5 and 6 March 2019;
- (b) Off label Botox training on 27 March 2019;
- (c) Micro needling on 8 April 2019;
- (d) Frax training on 9 April 2019;
- (e) Variable pulsed light training on 2 and 3 May 2019;
- (f) Juvéderm workshop two-day course on 26 and 27 August 2019;
- (g) Diode training on 17 September 2019;
- (h) Advanced facial sculpting on 23 September 2019.

[20] Caci Clinic has deducted part of these training costs from Ms Fenwick's final pay in reliance on clause 30 of the employment agreement read in conjunction with clause 22 and seeks the balance in its substantive claim. Ms Fenwick accepts that she must pay for some of the training however questions part of the training costs.

[21] On 2 March 2020 Caci Clinic was advised by a client that Ms Fenwick was being employed by Enhanceskin. Ms Potter saw a Facebook page with a photo of Ms Fenwick announcing her employment with that company.

[22] A significant issue for Ms Potter in her two affirmed statements was that after the receipt of the resignation letter she asked Ms Fenwick directly what she intended to do once she had left her employment with Caci Clinic. This included a question on 20 February 2020 about whether Ms Fenwick would be taking up employment with another appearance medicine clinic. Ms Fenwick denied that she was.

[23] Ms Fenwick in her statement says that she did not set out to "lie" to Ms Potter but wanted to make the workplace bearable. Her view, as set out in the statement, was that aspects of what she told Ms Potter about what she was going to be doing with increased

working at the hospital and study were correct. Earlier in her statement she said she was very unhappy working with the owners of Caci Clinic. Dr Orsbourne's statement confirmed that Ms Fenwick signed an employment agreement with EnhanceSkin on 26 February 2020.

[24] Mr Shaw in his submission referred the Authority to document H attached to the original statement of Ms Potter, which is an emailed letter from Ms Fenwick to Caci Clinic lawyers dated 7 March. There is reference in that email to Ms Fenwick, prior to departing her employment, taking legal advice and he placed emphasis on that in his submissions.

[25] Dr Osbourne's practice at EnhanceSkin is a specialised medical, cosmetic and vein clinic and not a beauty therapy clinic. Facials, hair removal and waxing are not carried out as they are at Caci Clinic. It is accepted however that there is some overlap in the work that Ms Fenwick carries out and that the two businesses are competing in some areas. Ms Potter in her second statements refers to Botox, dermal filler treatments and laser treatments for skin being areas where there is direct competition between EnhanceSkin and Caci Clinic. Further that Botox and injecting dermal filler was work Ms Fenwick performed at Caci Clinic.

[26] In their respective statements both Ms Fenwick and Dr Orsbourne provide undertakings not to treat Caci Clinic's clients for the period of the non-solicitation restrictive covenant. Dr Orsbourne states that he has hired Ms Fenwick to work for EnhanceSkin clients only and describes a process to stop the chance of treating Caci Clinic's clients for a period of six months. Ms Fenwick says in her statement that she has no interest in taking clients from Caci Clinic and that would not be a fair thing to do.

[27] Dr Orsbourne confirmed that EnhanceSkin has not been operating since the Alert Level 4 lockdown and that it is likely they will not operate until all social distancing recommendations are discontinued.

[28] Ms Potter in her second statement expresses reservations with the undertakings and raises concerns about EnhanceSkin advertising Ms Fenwick online for virtual consultations on Facebook and Websites and that she would be recognisable to Caci Clinic clients even during the lockdown.

[29] She says that Ms Fenwick had already promised in her employment agreement to abide by the restraint of trade provisions but then breached the terms. Further that she "lied" about her intentions to practice in appearance medicine and that there is no ability to oversee

the undertaking and it would require further proceedings and costs. She says that EnhanceSkin only made the offer after Caci Clinic had gone to the cost and time of bringing its application to the Authority.

Is there a serious issue to be tried?

Covenants of restraint of trade

[30] Covenants of restraint of trade are *prima facie* unlawful and unenforceable unless they can be justified as reasonably necessary to protect the proprietary interest of the employer and in the public interest. The reasonableness of the restraint is to be assessed at the time the employment agreement was entered into.²

[31] A restraint provision should only be enforced to the extent required to protect a proprietary interest for the employer, and relevant to this is the nature of the employee's position within the business, the business of the employer and the geographical scope of the restraint, its nature and duration.

Proprietary interests

[32] The proprietary interests that Caci Clinic seeks to protect are those referred to in clause 18 which is the restraint of trade provision as confirmed in the statements of Ms Potter. These are:

- (a) Confidential information as set out in clause 15 of the employment agreement;
- (b) Influence over employees, customers and suppliers;
- (c) Specialised and proprietary training in the area of Appearance Medicine (including botulinum, toxin treatments, dermal fillers and peels).

[33] Ms Potter refers in her statements to the confidential information as set out in clause 15 of the employment agreement that Caci Clinic seeks to protect. Trade secrets were emphasised by Mr Shaw in his submissions.

[34] The extent of confidential information that Ms Fenwick had knowledge of, or access to, is disputed. It is not the role of the Authority at this stage to resolve any disputes and that

² *Gallagher Group Limited v Walley* [1999] 1 ERNZ 490 (CA)

will need to wait until a substantive investigation can be held. I will briefly set out the different views below as they appear in the statements.

[35] Ms Fenwick in her statement said that she had not taken or made copies of any information after she left her employment. She said that she was unaware of confidential business information, business methods or management systems, trade secrets and the financial affairs of Caci Clinic. Ms Fenwick accepted some knowledge of pricing but said it was commonly known by clients. She did not accept that she was aware of wholesale prices and said she has not discussed anything about pricing while at EnhanceSkin and has no interest or knowledge in that side of things.

[36] Ms Fenwick stated that she could recall some client information and could probably recognise about 20% of clients by name but more by appearance. She said that she could recall there were some client records but was unaware of any commercial information about clients and had not removed any information. The only knowledge Ms Fenwick said she had about the marketing and advertising was about her role and the marketing that she saw was public.

[37] Ms Fenwick did agree that she obtained specialist knowledge in appearance medicine at Caci Clinic but did not accept it was different to the knowledge any nurse would obtain after doing appearance medicine education. She did not accept that the specific skills she obtained were different to general industry skills in appearance medicine.

[38] Ms Potter refers in her statements to the National Training Academy established in Auckland by Caci Clinic and says that the Academy itself and the techniques and procedures taught are proprietary interests. She states that the training provided by Fab NZ Limited at the Academy is essential to the service provided by Caci Clinic to its clients and constitutes trade secrets together with programmes relating to treatments, laser hair removal and Botox and filler. She states that these techniques are “know how” not generally known to the public as it relates to Caci Clinic.

[39] Ms Potter states Ms Fenwick did have access to the financial affairs of Caci Clinic. She refers to access Ms Fenwick had to weekly targets and sales results of programmes and product. She refers to knowledge Ms Fenwick had about trade secrets and, confidential business information. Ms Potter says that Ms Fenwick was privy to business methods and management systems in that she knew about roles in Caci Clinic, key performance indicators

for the role and how Caci Clinic saw points of difference between Caci Clinic and other providers. Further that she had access to the operations manual which details the management system. Ms Potter stated that Ms Fenwick was privy to supplier prices for products because from time to time these products were offered to employees and others at cost plus GST. She expressed surprise that Ms Fenwick only had a vague memory of the policy and procedures manuals as they are available online and staff are required to read them. Ms Potter stated that Ms Fenwick had access to all client records at Caci Clinic including their treatment history, health and contact details.

[40] Ms Potter accepted that Ms Fenwick did not have access to strategic information about marketing, advertising or other aspects of the business however did have access to marketing information at the beginning of every campaign. She did not accept that the information and training Ms Fenwick has received is generally known to the public and describes specialised knowledge in appearance medicine and significant parts of the training as unique to Caci Clinic.

[41] Mr Shaw submits the training and resulting knowledge is fundamental to the good will of Caci Clinic and is in the nature of a trade secret. He refers to Ms Potter's statement about the skincare programmes which incorporate the techniques and procedures taught in the Academy.

[42] Mr Acland submits there is insufficient evidence presented to the Authority to establish trade secrets based on training and appearance medicine techniques. He places reliance on the statements of Ms Fenwick and Dr Orsbourne that the training from the Academy was industry standard practice. Mr Acland submits that there can be no legitimate proprietary interest in an employee's acquired skills and knowledge with reference to *Transpacific Industries Group (NZ) Ltd v Harris*.³

[43] Ms Fenwick's role was a part-time cosmetic nurse. I accept it is arguable that she would have knowledge of Caci Clinic's methods and processes as she undertook her role and access to clients' records. It is less strongly arguable on the untested evidence that Ms Fenwick would have extensive or intimate knowledge about the commercial activities of Caci Clinic and its financial affairs, beyond aspects as they pertained to her performance, compared to others such as sales figures or knowledge of roles. It is accepted that she did not

³ *Transpacific Industries Group (NZ) Ltd v Harris* (2013) 10 NZELR 640 [2013] NZEmpC 97 at [42]

have strategic information except some limited knowledge of marketing that arguably was already in the public domain.

[44] To support an arguable case for a proprietary interest reliance was placed mainly on confidential trade secrets and influence over client relationships. For the other matters listed as confidential information, it is arguable that the extensive confidentiality clause and separate confidentiality agreement together with the non-solicitation clause 19 provided sufficient protection.

[45] I accept that at the time when the employment agreement was entered into it was arguably necessary to protect influence that Ms Fenwick, in her role, may have in client relationships but less strongly arguable to protect for influence over employees or suppliers.

[46] It is arguable that training and the acquisition of skills per se does not support the need for protection. Ms Fenwick, because she left her employment when she did, is required to reimburse at least part of those training costs.

[47] Caci Clinic says its Academy training is not simply about the acquisition of skills, but is to acquire knowledge about and apply the Caci Clinic way and method of appearance medicine. Mr Acland makes a broad submission that that knowledge does not support the need for protection. The statement in *Transpacific Industries*⁴ is not as broad as that, and is that not all knowledge acquired can be capable of upholding a restrictive covenant, particularly general knowledge. Conversely some knowledge can be capable of upholding a restrictive covenant,

[48] There are clear disputes in the untested evidence before the Authority as to whether the training the Academy provides, and the skincare programmes it has, are in the nature of trade secrets constituting legitimate proprietary interests that require the protection of restrictive covenants. This will need to be the subject of evidence at a substantive investigation meeting possibly with the assistance of expert evidence.

[49] Proprietary interests in trade secrets and client relationships, at the time the employment agreement was entered into, arguably required protection in the nature of restrictive covenants. Having considered all the information I conclude that there is an arguable case, in the sense of one that is neither frivolous nor vexatious.

⁴ Above n 3 at [42]

Reasonableness of the restraints

Duration and geographical area

[49] In his submission Mr Shaw placed some reliance on what Ms Fenwick had signed in her employment agreement, including that the restraints were fair and reasonable and necessary and that they are intended to apply to the maximum extent.

[50] That is not the end of the matter. Having found an arguable case for proprietary interests the restraints must be no wider than is necessary to protect those interests. The issues of fairness, reasonableness and such restraints being necessary have to be assessed by the Authority regardless of what was written and agreed to.

[51] Clause 18 prevents Ms Fenwick from being employed, engaged, or carrying on a business that competes within a radius of 10 kilometres for 12 months. Mr Acland places some reliance on the fact that there is no location identified in the clause to set the radius of 10 km. It is not in dispute that EnhanceSkin is some 650 metres from the Caci Clinic Nelson.

[52] The clause restrains Ms Fenwick from working in appearance medicine in Nelson for a year. The reason advanced for this length of restraint by Ms Potter in her original statement is because of client treatment cycles Caci Clinic has. Ms Potter states that Caci Clinic may not know if they have lost a client for a considerable period. Dermal filling was given as an example of a yearly visit although Botox treatments are every three to four months. The restraint of trade clause is double the duration of the non-solicitation clause.

[53] In *Pottinger & Ors v Kelly Services (NZ) Limited* a distinction was drawn between a restraint of trade provision preventing an employee from working in competition with the former employer at all, and a provision that prevents soliciting and working with customers of the ex-employee.⁵ It was noted that the scope of the former is wider and more onerous and public policy considerations are identified more acutely.

⁵ *Pottinger & Ors v Kelly Services (NZ) Limited* [2012] NZEmpC 101 at [48]

[54] A recent Authority determination about post-employment restraints in the beauty treatment industry considered some cases in the hairdressing industry as comparable.⁶ I accept that is an appropriate comparison. There is loyalty towards hairdressers by clients focussed on skills and personality which in turn form part of the employer's good will. One case indicated that the restraint should be reduced from six to three months and another from twelve months to three or four months.⁷

[55] Even weighing the client cycles I consider it strongly arguable that the duration of the restraint of trade in clause 18 will ultimately be found to be unreasonable because it is wider than required to protect any proprietary interests found to be established.

[56] It is arguable that a restraint period of more than three months may not be considered as reasonable. I accept that the clause may be capable of modification under s 83 of the Contract and Commercial Law Act 2007 taking in to account the requirements of s164 of the Employment Relations Act 2000 (the Act).

[57] Clause 19 is a broad provision because it comprises both non-solicitation and non-dealing restraints for a period of six months from the date of termination. It needs to be seen as a further protection against solicitation and dealing with clients. In turn, when the restrictive covenants are regarded as a whole, it supports an arguable case in respect of the unreasonableness of the duration of the restraint of trade.

Was there a breach by Ms Fenwick

[58] Ms Fenwick commenced working with a competitor EnhanceSkin within days after her employment terminated with Caci Clinic on 3 March 2020. EnhanceSkin is less than a kilometre from Caci Clinic. On its face that is a breach of clause 18 even if the duration of restraint is reduced to a reasonable period as set out above. There is an arguable case of a breach of clause 18.

[59] Ms Fenwick denies removing any confidential material. I cannot be satisfied an arguable case has been made out for a breach of the confidentiality provisions.

⁶ *TCC Sylvia Park Limited and TCC New Market Limited v Harlia Sanft and oths* [2020] NZERA 101

⁷ *Servilles Ltd v Whiting*, unrep, Employment Court, 2 June 2000, Colgan J and *Pure Hairdressing Ltd v Kosmidakis* [2012] NZERA Wellington 7

[60] Ms Fenwick denies breaching the non-solicitation provision and says that she has not treated any client from Caci Clinic and is not interested in “stealing” clients. Ms Potter in her statement says that when Ms Fenwick left a client of Caci Clinic ceased business with the clinic. She says that the client was a client of EnhanceSkin until a nurse working there resigned and she transferred her business to Caci Clinic but then returned after Ms Fenwick’s resignation to EnhanceSkin. Ms Fenwick denies any knowledge about who the client is and doing anything to encourage the client to leave. I cannot be satisfied that there is an arguable case of any strength of a breach of the non-solicitation clause.

Serious Issue to be tried

[61] In conclusion I find that there is a serious issue to be tried. It is arguable there are proprietary interests in trade secrets and client relationships that could be protected by a reasonable restraint. There has arguably been a breach of clause 18. Modification of the duration of the restraint of trade provision will arguably be required for it to be reasonable.

Balance of convenience

[62] The Authority is required in considering the balance of convenience to assess the relevant detriment or injury the parties will incur as a result of the interim injunction being granted or not.

[63] Caci Clinic says that loss will be difficult to ascertain if an interim injunction is not granted. In that regard it relies on the client cycles, meaning that it is not immediately apparent which clients has been lost.

[64] Mr Shaw submits that Ms Fenwick acknowledged when she signed her employment agreement that the remedy of damages may be inadequate to protect the interests of Caci Clinic, and that means the balance of convenience sits with Caci Clinic. Mr Shaw also refers to the Court of Appeal in *Fuel Espresso v Hsieh* that bargains should not be lightly swept aside.⁸

[65] He submits that Ms Fenwick also works at the hospital part-time and her loss will be reduced by that income.

⁸ *Fuel Espresso v Hsieh* [2000] ERNZ 50 (CA) at [21]

[66] Mr Shaw submits that there will be no prejudice to Ms Fenwick in granting the injunction at the current time as she is unable to perform appearance medicine because of the Covid-19 restrictions but her employment continues to be promoted on EnhanceSkin's website and social media pages.

[67] Ms Fenwick says that if the interim injunction is granted she will suffer loss of half her income and also have to pay for the training that she received.

[68] Dr Orsbourne in his statement says that Ms Fenwick is currently being paid 80% of her wage but will not receive that if she is not to be employed with EnhanceSkin. He states if there is an order for an extended period that she is not to work for EnhanceSkin then she will be unlikely to be re-employed, not because they do not enjoy working with her but because of the likely downturn in work after the lockdown and the fact it is unlikely new staff would be taken on. That factor needs to be weighed with the view of Caci Clinic that there will be no prejudice to Ms Fenwick if an interim injunction is granted at the present time because she is not working as usual at the present time.

[69] I have considered, alongside the applicant's concerns about client loss, the undertakings provided by Ms Fenwick and Dr Orsbourne that EnhanceSkin will decline Caci Clinic's clients for six months. This includes a statement from Dr Orsbourne that since Ms Fenwick has joined EnhanceSkin it has not taken up any client of Caci Clinic.

[70] Ms Potter does not accept the genuineness of those undertakings because she states Ms Fenwick had lied to her earlier. I am not persuaded that the undertakings are not genuine. There is an undertaking from Ms Fenwick not to treat clients from Caci Clinic and also one from Dr Orsbourne. His refers to the period of six months for the duration of the undertaking and that is consistent with clause 19 of the employment agreement.

[71] I consider it appropriate to weigh the undertakings provided in balancing the relevant detriment or injury. That they were made too late and caused costs to be increased are matters more appropriately raised when costs are considered by the Authority. Concerns about enforceability of the undertakings are reduced because there is to be a substantive investigation and the matter remains open and ongoing. The Authority is in a position to offer provisional dates available in late June or July.

[72] The other matter that I have considered under the balance of convenience is a possibility that the duration of twelve months is ultimately found to be unreasonable, and a restraint of trade of more than three months may be unlikely, after modification.

[73] If that is the case then a three month period from the date of termination would end on 2 June 2020. An investigation meeting is unlikely to be available until some period after that date and then a later time for a determination. That would mean Ms Fenwick would be restrained from employment in the appearance medicine area in Nelson for a period longer than the restraint of trade may ultimately be found to be reasonable. I do acknowledge and weigh that there is an undertaking as to damages from Caci Clinic.

[74] Although the factors favouring each party are reasonably balanced I consider the undertakings offered tilt the balance of convenience in favour of Ms Fenwick. They lessen concerns, including those that arise whilst she is no longer able to perform appearance medicine but is advertising availability for visual consultations.

Overall Justice

[75] I now stand back and consider where the overall justice lies. I have found that there is an arguable case but the balance of convenience favours Ms Fenwick.

[76] Whilst there was an arguable case the Authority is not able to conclude it is strongly arguable. If Caci Clinic is ultimately successful after substantive investigation then orders for damages and penalties, including any concerns about good faith conduct, can adequately address any breaches established.

[77] The duration of the restraint of trade arguably requires modification. Any interim injunction granted with delay in investigation and substantive determination could result in a restraint period beyond that which is reasonable and enforced to the extent necessary to protect legitimate proprietary interests.

[78] The concerns about clients of Caci Clinic being taken up by EnhanceSkin until a substantive investigation can be conducted are reduced because of the undertakings provided.

[79] I conclude at the interim stage that overall justice favours declining the application for an interim injunction.

Further steps

[80] The parties are directed to mediation and should attempt in good faith to resolve issue of the duration of the restraint of trade provision under s 164 of the Act.

[81] A telephone conference will be arranged as soon as possible with Mr Shaw and Mr Acland to organise dates for a substantive investigation, timetabling required and any other matters.

Costs

[82] I reserve the issue of costs to be dealt with after the substantive investigation.

Helen Doyle
Member of the Employment Relations Authority