Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2020] NZERA 288
3106252

	BETWEEN	CHERRI GLOBAL LIMITED Applicant
	`AND	JONATHAN KARL GRANT MILMINE First Respondent
	AND	BERRY FARMS NZ LIMITED Second Respondent
Member of Authority:	Trish MacKinnon	
Representatives:	Peter Kiely and Hannah King, counsel for the Applicant Nick Logan and Michael Quigg, counsel for the First Respondent Sarah McFetridge, counsel for the Second Respondent (in attendance by telephone as observer)	
Investigation Meeting:	3 July 2020 at Wellington	
Submissions [and further Information] Received:	On the day, orally and in writing from both parties	
Date of Determination:	24 July 2020	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Cherri Global Limited ("CGL" or "the company") has applied to the Authority for an interim injunction against its former employee, Jonathan Milmine, the First Respondent. CGL's substantive claims against Mr Milmine are that he breached a number of explicit and

implicit terms of his individual employment agreement (IEA); and breached his duty of good faith. CGL claims compliance orders, penalties, damages, special damages and costs in respect of those claims. It also seeks the imposition of a penalty, and costs, on the Second Respondent, Berry Farms NZ Limited (Berry Farms) for inciting, instigating, aiding and/or abetting Mr Milmine's breach of his contractual non-competition restraint.

[2] The substantive claims, and Mr Milmine's counterclaim for unjustifiable disadvantage and constructive dismissal, will be investigated at a date in the future, as yet unscheduled. This determination deals only with CGL's application for interim relief until such time as the substantive matter can be heard and determined.

[3] The interim relief CGL seeks is an injunction preventing Mr Milmine from breaching the non-competition restraint of his IEA. Specifically, CGL seeks an order preventing Mr Milmine from being directly and/or indirectly concerned with Berry Farms and/or RD8 Fresh Produce Group Limited and/or RD8 Limited and/or The Fresh Berry Company of NZ Limited and/or Hoddys Fruit Co. Limited. I shall refer to those companies collectively, other than Berry Farms, as RD8. CGL asserts RD8 and Berry Farms are related businesses, having the same directors and shareholders, and that each is a business organisation in competition with CGL.

The Authority's investigation

[4] I accepted CGL's application for urgency in a telephone conference on 17 June 2020 and directed the parties to mediation on an urgent basis at that time. Mediation took place on 26 June but did not resolve the matter.

[5] The investigation into CGL's application for interim relief has been conducted by way of affidavit evidence and oral and written submissions from the Applicant and the First Respondent.

[6] CGL provided affidavits in support of its application for an interim injunction from its sole director and Chief Executive, Philip Alison, and its General Manager, Mark Carrington. It also provided an undertaking as to damages.

[7] Mr Milmine provided an affidavit to support his opposition to CGL's application. Further affidavits in support were provided by Dean Astill and Craig Hall, who are directors of Berry Farms, and of RD8.

[8] There has been no opportunity for testing of the evidence at this time. Any findings made in this determination are provisional and subject to a full and thorough investigation at the substantive hearing.

Non-publication orders

[9] CGL and Mr Milmine each made application for the non-publication of certain information. CGL sought non-publication orders around confidential information given in, or attached to, affidavits provided to the Authority by Mr Alison and Mr Carrington. The first respondent did not oppose the application.

[10] Mr Milmine sought non-publication orders relating to matters disclosed in his affidavit evidence to the Authority concerning his current employment with Berry Farms. He also sought non-publication in relation to allegations made by CGL against him in reply affidavits, and their attachments, of Mr Alison and Mr Carrington. CGL opposed that application on the grounds that Mr Milmine had not denied the allegations in his affidavit.

[11] The sequential filing of affidavits gave Mr Milmine no opportunity to respond to the allegations in question before the 3 July interim injunction hearing as Mr Milmine had no right of reply to Mr Alison and Mr Carrington's reply affidavits. In that circumstance I considered it appropriate for the allegations to be subject to interim non-publication orders.

[12] I have made interim non-publication orders in respect of the following information and material after considering the respective applications and submissions of the parties:

(a) The emails referred to in the Applicant's amended statement of problem dated 12 June 2020 at paragraph 3.5, as listed in paragraph 4 of that document;

(b) All other commercially sensitive confidential information put before the Authority in the course of the proceedings that is contained in, or attached to, the affidavits and submissions of the parties and/or the statements of problem and statements in reply;

(c) The document marked "O" attached to Mr Carrington's affidavit in reply dated 29 June 2020, and any references to that document or its contents;

(d) All information relating to the terms of Mr Milmine's current individual employment agreement with Berry Farms.

Background

[13] Mr Milmine had been working in the wine industry for approximately 20 years before accepting the role of National Horticulture Manager with CGL in 2018. He has also operated a long-standing private family business growing and selling limes, and growing grapes for sale to wineries. Mr Milmine deposed that he discussed these private business interests with Messrs Alison and Carrington during his recruitment process. He and Mr Carrington signed an IEA on 14 August 2018 and he commenced employment with CGL on 1 October 2018.

[14] CGL is described by its founder, Mr Alison, as a large-scale horticultural produce company which has its headquarters in Hawke's Bay. It currently grows, markets and exports cherries internationally and has cherry orchards in Hawke's Bay and central Otago. Mr Alison deposed that CGL is, and was during Mr Milmine's employment with it, in the planning stages of growing, marketing and exporting blueberries.

[15] Mr Milmine resigned from CGL on 20 March 2020 on two months' notice in accordance with the requirements of his IEA. In his letter of resignation Mr Milmine referred to a salary shortfall of several months' duration. He deposed this related to a salary increase he had agreed with Mr Alison when negotiating the terms of his remuneration package. Part of that negotiation included an agreement that Mr Milmine's total remuneration would rise to a specified level from the first anniversary of his employment, on 1 October 2019.

[16] The parties had different views over what the agreement meant and the matter had not been resolved by the time of Mr Milmine's resignation on 20 March 2020. Mr Milmine raised a personal grievance for unjustifiable disadvantage and constructive dismissal on 6 April 2020.

[17] CGL responded on 7 April, rejecting Mr Milmine's personal grievance. On 24 May it commenced proceedings in the Authority against Mr Milmine, alleging he had breached several provisions of his IEA, including those relating to confidentiality and restraint of trade, and that he had failed to comply with his duty of good faith.

[18] At that stage the company sought compliance orders, penalties, damages, special damages and costs against Mr Milmine. It requested urgency in respect of compliance orders and non-publication orders. Urgency was declined at that time and the parties were directed to mediation.

[19] On 12 June 2020 CGL lodged an amended statement of problem, seeking an interim injunction as set out in paragraph 3 of this determination, and adding Berry Farms as Second Respondent.

The IEA

[20] Relevant provisions of Mr Milmine's IEA with CGL are:

> *2.0* ***Background***
>
> *2.1 The Employer operates a horticultural management business and an investment group of companies based in Hawke's Bay and elsewhere as required.*
>
> *...*
>
> *4.0* ***Definitions***
>
> *"the Employer's Business"* — *Means "the Employer's horticultural management business.*
>
> ***10.0 Performance Appraisal***
>
> *10.3 That the parties agree that at the first annual review of 1/10/2019 being 12 months following his agreed starting date of 1/10/2018 that the employees total remuneration for the following 1 year period shall be no less than $xxx annually and any further reviews and increased remuneration beyond that level will be subject to annual reviews or whatever alternative outcomes are negotiated by the respective parties acting in good faith.*
>
> *That within 3 months of the employee commencing employment, dated 31/12/2018 the parties hereby agree to have negotiated the "at risk bonus" segmental allocation into a minimum of 3 and not more that (sic) 5 separate allocations. The parties agree that the negotiations are to be undertaken on a "good faith" basis. For the record this segmental allocation is in order to reflect performance in each allocation against specific outcomes.*
>
> *23.0* ***Other Work, Non Competition and Restraint After Termination***
>
> *23.2 For a period of six months following termination (hereinafter in this clause 23 referred to as "the Period"), the Employee will not be directly or indirectly concerned (whether as employee, contractor, shareholder, director, agent*

> *partner consultant (sic) or in any other capacity) in any business organisation or venture which is in competition with the business of the Employer.*

Interim orders

[21] The Authority has jurisdiction to make orders relating to contractual obligations between parties arising from their employment agreements.[1] The basis upon which applications for interim orders are determined is well established.[2] The first step is to ascertain whether there is a serious case to be tried. In this instance that will entail evaluating whether there is an arguable case for enforcement of the non-competition restraint in the substantive hearing of the matter.

[22] The next step involves considering where the balance of convenience lies between the parties in the period between the determination of the current application and the determination of the substantive matter. The final step of the process entails standing back and assessing where the overall justice lies between now and that final determination of the substantive matter.

Arguable case

[23] CGL submits the threshold is low for establishing whether a serious question arises as to the likely enforceability of the restraint of trade. It acknowledges that covenants not to compete are *prima facie* unlawful, but submits the Authority should have no hesitation in enforcing reasonable restraints of trade where an employer has legitimate proprietary interests to protect. It submits the restraint provision agreed by CGL and Mr Milmine fits into that category.

[24] CGL refers to both the Court of Appeal judgment in *Fuel Espresso Ltd v Hsieh*[3], which emphasised that *"(a)greements are made to be kept*", and to the Employment Court's judgment in *Green v Transpacific Industries Group (NZ) Limited*,[4] which has since endorsed that approach[5]. Former Chief Judge Colgan said in *Green*:

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[1] Section 162, Employment Relations Act 2000.
[2] *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 at 142 (HC and CA).
[3] [2007] NZCA at [58]
[4] [2011] NZEmpC 6
[5] [2011] NZEmpC 6

> "Gone are the days, if they ever existed, when an employee could confidently sign up to a restraint and then breach it in the bold expectation that "those things are not worth the paper they are written on"."

Competition

[25] CGL submits there is a serious question to be tried that Mr Milmine, as an employee of Berry Farms, is directly or indirectly concerned in a business venture or organisation that is in competition with its business. In its view the business venture or organisation goes beyond Berry Farms to the RD8 group of companies referred to above in paragraph 3. It bases this view, in part, on affidavit evidence given by Mr Astill that the RD8 Group is an integrated business.

[26] Other factors relied on by CGL include the control and ownership of the RD8 Group of companies and shared facilities and services amongst the group. In CGL's submission, Berry Farms and RD8 are in competition with it as CGL and RD8 both sell their fruit, including cherries, into the same export markets.

[27] Additionally, CGL submits that it and RD8 both grow fresh produce for export. CGL says its confidential information and intellectual property in relation to its horticultural practices is transferable to other crops grown for fresh sale. As an additional, or alternative, submission, CGL says that both Berry Farms and CGL are in the process of preparing to produce blueberries for sale, as deposed by Messrs Alison and Carrington.

Proprietary interests

[28] CGL submits there are three proprietary interests that the restraint of trade in Mr Milmine's IEA protects: confidential information; intellectual property and business relationships. It says Mr Milmine was exposed to commercially sensitive information during his employment with it and submits Berry Farms "and its related companies" will receive an undue advantage through employing Mr Milmine.

[29] CGL says the confidential information Milmine had access to included strategic information about the company's plans and commercialisation of new research, its innovative and disruptive horticultural practices and supply chain processes. In CGL's submission this information would be of immense value to a competitor. The company acknowledges Mr Milmine gave an undertaking on 15 June 2020 in relation to this but says he failed to give the undertaking when first asked, and it now does not trust him to adhere to it.

[30] CGL submits Mr Milmine had access to its intellectual property in many aspects of its business from production to distribution. It says it has invested heavily in this intellectual property which is portable and would be highly valuable to others in the fresh produce export industry. CGL also says Mr Milmine had access to, and developed, crucial relationships with service providers and with research and development contacts including Plant and Food Research during his employment with CGL. It says Mr Milmine transferred a spreadsheet containing a list of over 50 of its contacts to his personal storage device and admitted he used that list to advise the contacts of his departure from CGL.

[31] CGL submits the inadvertent disclosure of confidential information is also a risk factor for the company if Mr Milmine is allowed to continue working for his current employer until the substantive matter can be heard. It cites Employment Court cases over the last 13 years which, in its submission, demonstrate the courts have acknowledged the appropriateness of restrictive covenants to deal with the issue of inadvertent disclosure of confidential information.[6]

[32] One of those cases is *Pottinger v Kelly Services (New Zealand) Limited* which CGL cites as authority for a restraint of trade being enforceable where its scope is necessary to protect the party in whose favour it is given.[7] In CGL's submission, the restraint provision in Mr Milmine's IEA is reasonable as to its scope and duration and he entered into it willingly and in the knowledge that his employer required him to be bound by it after their employment relationship ended.

[33] Mr Milmine deposed he could not recall discussing the restrain provision and the time spent negotiating was over remuneration. He acknowledged it was a part of the IEA but submits CGL does not have an arguable case for enforcement of the restraint for several reasons. The first is that CGL repudiated its contractual agreement that he would receive an increase to his remuneration from 1 October 2019. He had negotiated this term and had not been willing to sign the IEA until it was included without its and submits it was the price or consideration for his agreeing to the terms of the IEA.

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[6] *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ; *Warmington and O'Neill v AFFCO New Zealand Limited* [2012] NZEmpC 19; and *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97, citing (then) Judge Inglis in *Warmington.*
[7] [2012] NZEmpC 101 at [17].

[34] As noted earlier Mr Milmine referred in his letter of resignation to his salary shortfall of several months' duration at that time. He says further discussions following his resignation did not resolve the matter and, when CGL failed to provide him an assurance over payments, he resigned effective immediately, cancelling the IEA.

[35] In Mr Milmine's submission he was entitled to cancel the IEA under s 37 of the Contract and Commercial Law Act 2017, following CGL's breach of a term of the IEA by failing to increase his remuneration as agreed. Mr Milmine cites the Employment Court's judgment in *Premier Events Group Ltd v Beattie* as being directly applicable to his situation.[8]

[36] Mr Milmine also submits the restraint provision of his IEA is so wide and unreasonable as to be unenforceable. He bases this on his construction of clause 23.2 of the IEA and the definition of "the Employer's Business" at clause 4 (set out at paragraph 20 above). He has also used a dictionary definition of "horticulture" as "the art or practice of garden cultivation and management".

[37] The result, in Mr Milmine's submission, is that the non-competition and post-termination restraint would prohibit him from being directly or indirectly concerned, even as a passive shareholder, in any business organisation or venture which is in competition with CGL's business of horticultural management. This would mean he could not work anywhere in the world for any organisation that cultivated or managed a garden.

[38] As far as legitimate proprietary interests are concerned, Mr Milmine submits CGL is unable to show it has such an interest requiring protection from his employment with Berry Farms. He says his job with CGL was solely related to the growing and harvesting of cherries, in which capacity he was not exposed to any proprietary interest. He was not involved in the export aspect of CGL and had no interaction with its export customers as his involvement ended at the packhouse door.

[39] Mr Milmine submits CGL does not have a unique or confidential method of growing cherries. In his view there are no trade secrets involved in its methods and CGL's claims lack any specificity. He says his former employer's methods are both standard practice and common knowledge in the industry, as deposed by Mr Astill and Mr Hall. Furthermore, Berry Farms, as also deposed by Messrs Milmine, Astill, and Hall, does not grow cherries: it grows

[8] [2014] NZEmpC 231.

strawberries, raspberries, blackberries and, to a much lesser extent, blueberries which it does not currently sell. Nor does any RD8 company grow cherries.

[40] In Mr Milmine's submission, even if the non-competition restraint was enforceable it would not be triggered by his employment with Berry Farms because it is not in competition with CGL. He emphasises that he is not employed by RD8 but by Berry Farms, which has no involvement in the growing or sale of cherries.

[41] With regard to CGL's statements about its plans for growing blueberries, Mr Milmine deposed that, during his employment with CGL, his research or involvement was limited to googling "how to grow blueberries" and visiting a third party's blueberry orchard on 9 April 2019 with Mr Alison. His evidence is that he had no further involvement, and had no knowledge of CGL having any further involvement, with blueberry growing during his employment.

[42] Mr Milmine acknowledged he emailed information from his work email address to his personal email address but denied any impropriety or wrong-doing. Many of the documents were to enable him to undertake work from home on his personal computer and to enable printing from his home printer, which he could not do from his work laptop. Many of the documents were sent during the COVID-19 lockdown when he was working from home; others were sent to as a way of reminding himself to action them; and some were to provide himself with evidence of unfair treatment by his employer.

[43] Mr Milmine deposed he sent the list of clients to his home email during his notice period while he was working on the handover document CGL required of him. This occurred while he was working at home due to COVID. The list allowed him to "tick off a list of people" for the handover document.

[44] As I have already noted, I am reliant on untested affidavit evidence and the submissions of the parties. Judge Inglis (as she then was) succinctly stated the law in *Pottinger*:[9]

> [16] Contractual provisions restricting the activities of employees after termination of their employment are, as a matter of legal policy, regarded as unenforceable unless they can be justified as reasonably necessary to protect proprietary interests of the employer in the public interest… [references omitted].

[9] N5 at [16] to [18].

> [17] The onus of establishing that a restrictive provision is reasonable is on the employer. Such a provision should be no wider than is required to protect the party in whose favour it is given. [references omitted].
>
> [18] Restraints are enforced only to the extent required to protect a proprietary interest of the employer. The nature of the employee's role and the employer's business, the geographical scope of the restraint, and its nature and duration are relevant factors in assessing whether a restraint is reasonably necessary.

[45] On the basis of the untested evidence and submissions I find it likely CGL has proprietary interests in its business relationships, client information and intellectual property. At this time I am not persuaded those propriety interests extend to its aspirations for growing blueberries, plans for which appear to be at an embryonic stage.

[46] I have considered the submissions on behalf of CGL regarding competition but do not find them compelling. Mr Milmine's employer is Berry Farms, which is in the business of growing berries, not cherries. Berry Farms, as deposed by Mr Hall, has aligned itself with the Australian and New Zealand arm of Driscolls, which gives it access to that company's global research and development, and intellectual property. I am more persuaded by Mr Milmine and Mr Hall's evidence, albeit untested, that CGL's confidential information and intellectual property would be of no use to Berry Farms, than I am by CGL's claims of its high value.

[47] As acknowledged by CGL, Mr Milmine had provided undertakings with regard to confidentiality. There is no evidence that Mr Milmine divulged any confidential information in the weeks he has been employed by Berry Farms. Mr Astill deposed that, as far as he was aware, Mr Milmine had neither divulged any of CGL's confidential information or intellectual property to Berry Farms or any RD8 Group company, officer or official, nor used any such confidential information or intellectual property in his employment with Berry Farms. Mr Hall and Mr Astill provided undertakings on behalf of the RD8 Group on 17 June 2020 that:

> 1. RD8 will instruct Mr Milmine to not disclose to it or provide it with any confidential information or intellectual property that he may hold in respect of Cherri Global.
>
> 2. RD8 will encourage Mr Milmine to abide by his ongoing intellectual property and confidential information obligations to Cherri Global that survive the termination of his employment pursuant to his individual employment agreement with Cherri Global.
>
> 3. To the extent that RD8 receives or becomes aware of any confidential information or intellectual property belonging to Cherri Global that was or may have been taken from Cherri Global by Mr Milmine, RD8 will return

that information to Cherri Global and destroy any copies from RD8 systems.

4. RD8 has not authorised and will not authorise the creation or disclosure of any copies of any confidential information and/or intellectual property belonging to Cherri Global and/or Cherri Global's business, suppliers or clients (in whatever form) that was or may have been retained by Mr Milmine in breach of his obligations to Cherri Global.

5. Mr Milmine will be on leave from 5pm on Wednesday 16 June 2020 to 5pm on Friday 26 June 2020.

[48] The affidavit evidence shows there is some commonality between Berry Farms and RD8, including, as Mr Astill deposed, some shared services, such as the finance function, which would require Mr Milmine to interact with RD8. However, his role as General Manager of Berry Farms is specific to that company and, as deposed by Mr Hall and Mr Astill, to the labour and production management aspects of that company. It is unlikely Mr Milmine's role overlaps with RD8 other than in such a shared service capacity.

[49] Regarding the interpretation of the restraint provision at clause 23.2 of Mr Milmine's IEA, CGL rejects Mr Milmine's view that the definition of "the Employer's business" at clause 4 applies. In CGL's submission, the use of the phrase "the business of the Employer" in clause 23.2 is, ostensibly, deliberate and intended to convey a different meaning from the clause 4 definition, which was "the Employer's horticultural management business".

[50] I am not convinced by that submission and regard "the employer's business" and "the business of the employer" as being essentially the same. That being so, the restraint can be seen as intended to prevent Mr Milmine from being directly or indirectly concerned in any business organisation or venture which is in competition with CGL's horticultural management business.

[51] There is no explicit geographical restriction on the constraint and I do not accept CGL's submission that it the restraint is clearly intended to be confined to New Zealand. CGL exports its products to a number of countries which introduces the possibility of an intention that the restraint is applicable to those countries and, potentially, worldwide.

[52] Even if the restraint were confined to New Zealand, it would prohibit Mr Milmine from undertaking work in the discipline in which he is skilled and in which he has more than 20 years' experience. That leads me to conclude the restraint is too wide to be enforceable. It is

not feasible to modify the restraint at this stage although that may be a matter for pursuing when the substantive matter is heard.

[53] I accept CGL's submissions that the threshold is low when considering whether there is an arguable case and that there are some legitimate proprietary interests CGL is entitled to protect. However, I am not persuaded by CGL's arguments regarding competition. I make no final finding on this matter, but overall find that, while there is an arguable case for enforcement of the restraint provisions, it is not a strong one.

[54] I have considered the argument regarding the repudiation of contract put forward by Mr Milmine and, while there may be some merit in exploring that further in the substantive hearing of the matter, I am unwilling to consider it further at this stage when the evidence is untested.

Balance of convenience

[55] Each party claims the balance of convenience lies with it. CGL says if the Authority finds at the substantive hearing that the restraint provision is enforceable, and also finds Mr Milmine breached the restraint, it would be extremely difficult to quantify the damage CGL sustained. In contrast, it submits, if the Authority found the restraint to be unenforceable at the substantive hearing, monetary remedies, in accordance with the undertaking provided by CGL, would be adequate to compensate Mr Milmine for any losses he suffered.

[56] Other factors that, in CGL's submission, favour the imposition of an interim injunction are Mr Milmine's conduct; the relative strength of each party's case; the conduct of Berry Farms; and the relative positions of the parties in the interim period. CGL views the risk of its confidential information and intellectual property being used as serious whereas the impact of an interim injunction on Mr Milmine would be negligible and rectifiable.

[57] Mr Milmine disagrees with CGL's assessment of the effect the imposition of an interim injunction would have on him. He has been employed by Berry Farms since 25 May 2020, apart from a two week period of leave, which he says signalled a good faith attempt to resolve this matter. In his submission his employment with Berry Farms is the status quo and the balance of convenience always favours the status quo. Mr Milmine deposed that he is the main income earner for the family and, if the restraint were to be enforced, would not have the means to support his family, pay mortgages and other expenses including school fees.

[58] Mr Milmine has provided an undertaking not to divulge any of CGL's confidential information and has deposed he has not divulged any such information to his current employer or to anyone else. It is his view any such information would be of no use or interest to his employer in any event. Mr Milmine has expressed the view in his affidavit that he cannot see how CGL could think Berry Farms was in competition with it.

[59] He recorded in his affidavit that he had deleted all CGL information apart from a folder of documents necessary to pursue his personal grievances. According to his legal representative, at the time of the Authority's hearing of the interim application, Mr Milmine was shortly to provide his personal laptop and email account to a forensic computer consultant engaged by CGL.

[60] I have considered and agree with CGL's view that Mr Milmine has proved himself easily able to obtain employment in the past. I disagree that indicates he could just as easily obtain alternative employment in the event Berry Farms is unwilling to hold his role open for him until the expiry of the restraint period. It is currently uncertain what effect, if any, the global pandemic will have on Mr Milmine's employment opportunities but I am loathe to dismiss his concerns on that front.

[61] After weighing up the effects on the parties in this interim period I consider the balance of convenience favours Mr Milmine.

Overall justice

[62] Standing back and considering where the overall justice lies until such time as the determination of the substantive matter takes place includes reflecting on the strengths of the parties' respective cases, bearing in mind there has not yet been an opportunity for testing the evidence.

[63] I have concluded there is an arguable case for enforcement of the non-competition restraint in the substantive hearing of the matter but that it is not a strong case for the reasons given above. I have found the balance of convenience is in Mr Milmine's favour.

[64] I am not convinced by CGL's reasons for being unwilling to accept the undertakings given by Mr Milmine and his current employer. Nor do I view the potential for any adverse effects on CGL's business if the injunction is not imposed on Mr Milmine to be irremediable. In short, overall justice favours Mr Milmine. CGL's application for interim relief is dismissed.

[65] The Authority will contact the parties shortly to arrange a case management conference for the progression of the substantive matter.

Costs

[66] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority