IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 66
3093712

	BETWEEN	NEW ERA IT LIMITED Applicant
	AND	PHILIP GOURLEY First Respondent
	AND	LAURA KAYE Second Respondent
	AND	STEPHEN MCGIRR Third Respondent
	AND	CONTRAST NZ LIMITED Fourth Respondent

Member of Authority:	David G Beck
Representatives:	Amy Keir, counsel for the Applicant Jenni-Maree Trotman, counsel for the first, second and third Respondents Douglas Cowan, counsel for the fourth Respondent.
Investigation Meeting:	By Telephone on 16 February 2021
Submissions Received:	15 and 16 February 2021 from the Applicant 16 February 2021 from the Respondents
Date of Determination:	22 February 2021

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] On 19 January 2021, New Era IT Limited filed a Statement of Problem together with an application for an interlocutory interim series of restraining injunctions against the four

Respondents. The Applicant filed a supporting affidavit from Gregory Strachan, CEO of New Era.

[2] The four Respondents initially all represented by Ms Trotman, filed a Statement in Reply on 28 January 2021 and after a case management conference the first, second and third Respondents filed affidavits on 4 February 2021 and so did John Baigent, the sole director of the fourth Respondent, Contrast NZ Limited.

[3] New Era says each of the first, second and third Respondents:

(i) whilst still employed, failed to apprise their employer of client dissatisfaction and the actions or intentions of co-employees to breach fidelity and restraint obligations owed to New Era;

(ii) left its employment and now works or is engaged in some other direct capacity for the fourth Respondent in direct competition with New Era;

(iii) took unspecified confidential information which they have used or will use;

(iv) solicited and/or will solicit customers from it to bring their business to the fourth Respondent.

[4] New Era says the fourth Respondent knowingly aided, abetted, incited or procured the breaches committed by the first three Respondents.

[5] New Era says these actions amount to breaches of contractual duties and post-employment restraint provisions in the first to third Respondents' employment agreements being duties to:

(i) Diligently and faithfully serve the company use best endeavours to promote and protect the interests of the company (duty of fidelity).

(ii) Not compete against New Era by working for direct competitors for a period of six months post-employment.

(iii) Not solicit clients or persuade employees to leave New Era.

(iv) Not retain, use or disclose confidential information pertaining to New Era's business.

[6] New Era seeks interim injunctions against all the Respondents that they cease providing services to New Era clients until further order of the Authority and in regard to the first to third Respondents, orders that they:

(i) immediately return any confidential information in their possession;

(ii) cease soliciting New Era's clients' custom until further order of the Authority;

(iii) cease soliciting employees of New Era until further order of the Authority;

(iv) the first and third Respondents cease engagement with the fourth Respondent until respectively 24 and 28 March 2021 or such other time as the Authority orders.

[7] The first to third Respondents deny being in possession of confidential or proprietary information and suggest that the restraint provisions are too widely drawn to be enforceable and are beyond what is reasonably necessary to protect the Applicant's legitimate proprietary interests.

[8] The first to third Respondents assert that the Applicant does not have an arguable case and that the balance of convenience does not favour the making of the orders sought. They specifically deny breaching fidelity obligations and assert that any New Era client dissatisfaction was known to management, they occupied positions with no influence over client decisions and the loss of custom resulted from pre-existing issues as opposed to the first to third Respondents actions or omissions.

[9] The fourth Respondent asserts that the Authority lacks jurisdiction to grant injunctive relief.

Issues

[10] The issues I must determine are:

(i) What contractual obligations exist that the first to third Respondents' have allegedly breached?

(ii) Have the Applicants met the established test to allow restraining orders to be made?

(iii) Does the Authority have jurisdiction to issue any restraining orders against the fourth Respondent?

[11] The well-established legal framework that I must follow in respect of assessing an application for an interim injunction is in summary:

> **Step one** — the Applicant must establish that there is a serious question to be tried;
>
> **Step two** — consideration must then be given to the balance of convenience and the impact on the parties of the granting of, or refusal to grant, the interim orders sought. The impact on any third parties will also be relevant to this weighing exercise; and
>
> **Step three** — the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

The Authority Investigation

[12] In order to resolve these issues I held an investigation meeting on 16 February 2021 in which I received submissions and considered the filed affidavits (by this point Contrast NZ was represented by Mr Cowan) that due to Covid-19 restrictions had to be conducted by telephone.

[13] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions on matters to resolve the disputed issues and make orders but I do not record all evidence and submissions received.

Background to the employment relationship problem

[14] New Era IT Limited trading in New Zealand as New Era Technology provides comprehensive IT services to the school sector including the placement of IT support staff in schools. Mr Strachan indicated in his affidavit that New Era operates throughout New Zealand and services around 320 schools and has 160 employees with branches in Auckland, Hamilton, Napier, Palmerston North, Wellington and Christchurch. To place their business in

perspective, there are 2,536 primary, intermediate and secondary level, state, integrated and private schools in New Zealand. Commencing as a New Zealand company in 1996, New Era merged with an international provider in 2011 that operates in the UK, USA and Australia. Mr Strachan described the business as "strongly relationship based" and working in an environment where prompt service delivery and ongoing maintenance of services is crucial.

[15] New Era engages with client schools via a 'service agreement' for a set period to provide comprehensive IT support both onsite and remotely, including a 'helpdesk'. Typically, each school has a New Era team allocated to them and many schools have a dedicated fulltime, onsite technician but others may use remote services or a combination of the two. Each school would likely interact with at least four New Era employees – an onsite technician and off-site Technical Team Leader, Systems Engineer and an overseeing Client Manager.

[16] Contrast NZ is a company that directly competes with New Era for the provision of comprehensive IT services to schools. John Baigent is the sole director of Contrast NZ. Mr Baigent is also the sole director of Overseer Software Limited. The first to third Respondents claim they are now employed by Overseer Software.

[17] The genesis of this dispute stems from when New Era made their South Island Regional Manager (who I will refer to as Mr Z) redundant on 24 April 2020 and part of his departure involved an agreement that New Era would not enforce the non-compete provision of his contractual restraint of trade allowing him to be engaged by any directly competing company. Mr Z announced on LinkedIn that he had taken up a position with Overseer Software on 11 May 2020.

[18] I had no evidence before me on what role Mr Z plays with Overseer Software but Mr Baigent disclosed that he began in mid-June 2020 to gain access to the schools IT market through an Overseer Software product called "Oversight' which is a software package that allows schools to better manage and track various physical assets. This access allowed Mr Baigent to pitch for a more comprehensive technical support role in schools in direct competition with New Era to be delivered via his other company, Contrast NZ.

[19] In specific dispute in these proceedings are three Christchurch secondary schools that left New Era and switched to Contrast NZ as their provider of IT services. The schools are: Cashmere High School, Villa Maria College and Kaiapoi High School.

[20] Whilst I had documentary evidence that the three schools left due to dissatisfaction with New Era, it was apparent from documentation that this dissatisfaction was partly driven by their concern about Mr Z's departure. New Era however, alleges that the first three Respondents worked in concert with Mr Baigent and potentially Mr Z, to persuade the three schools to leave and that such actions were in breach of restraint obligations (including a fidelity duty whilst they were still employed).

First Respondent – Philip Gourley

[21] Mr Gourley worked for New Era for two periods from October 2009 – October 2015 and then December 2015 – September 2020. Latterly, Mr Gourley's role was New Era's South Island Engineering Manager working from a Christchurch office and he was responsible for managing the South Island technical team. The role at New Era was described by Mr Gourley as "break-fix" with him being involved in problems that remained unresolved by technicians and system engineers. Mr Gourley also described having to occasionally relieve technicians during busy periods, project work with schools infrastructure and being acting team leader for the senior South Island team.

[22] Overall, Mr Gourley said he was a "technical pre-sales resource for the South Island sales team and the Client Managers". Mr Gourley emphasised that he was not responsible for "managing New Era's relationship with any of its clients" as such tasks and ongoing contact was dealt with by a Client Manager. Mr Gourley described a "clear separation between the sales and technical team" and that his role did not involve access to or involvement in pricing or making sales to clients.

[23] Mr Gourley resigned on 28 July 2020, worked out his notice period and left New Era on 23 September 2020. He took up a position with Overseer Software in an IT role that whilst he provided extracts from an employment agreement, did not disclose what his duties were or actual start date (I estimate early October 2020).

[24] Mr Gourley claimed that he became stressed and dissatisfied with his work at New Era and met with the sole director of Overseer Software, John Baigent and was now employed by them assisting the company in the marketing, development and sale of a their Oversight product. He says that he attended a meeting of Otago schools in November 2020 with Mr Baigent. In addition, without detailing the extent of such, Mr Gourley conceded that he had (claiming on direction of Overseer Software) been undertaking some unspecified remote support work for one of New Era's ex clients that is the subject of current disputation - Kaiapoi High School.

[25] Mr Gourley did not outline his specific understanding and knowledge of his post–employment restraint obligations contained in his employment agreement in force upon his resignation from New Era. Mr Gourley suggested that he had not discussed anything about restraints when he signed the employment agreement in December 2015 (his second with New Era, the first also containing identical restraint provisions). Whilst being involved as a senior manager in negotiating and signing other employment agreements on New Era's behalf, Mr Gourley disavowed knowledge of specific content - claiming an HR manager prepared such and his involvement was limited to providing details of the salary, position and start date.

[26] Mr Gourley says that he first became aware of New Era's concerns that he had allegedly breached restraint obligations when he received a letter of 18 November 2020 from New Era's lawyer setting out allegations. These included a belief that he was now working for Contrast NZ and sought undertakings by 20 November that he would desist in approaching New Era clients or employees and that he would not attend an Otago schools' gathering on 19 November.

[27] Mr Gourley attended the Otago meeting and did not respond to the letter until 24 November. In his emailed reply to New Era's lawyer he disclosed that he had attended the conference "on behalf of" Overseer Software who he indicated were not a direct competitor of New Era. Mr Gourley said that he was not employed by Contrast NZ and denied approaching New Era employees to entice them to leave. He concluded his email:

> I am happy to assure you that I will not be involved in any conversation with New Era clients or employees that are in contravention of clauses 13 and 13.5 of my employment agreement with New Era.

[28] Mr Gourley indicated no further contact with New Era until he received a further letter of 16 December 2020. This alluded to correspondence from Kaiapoi High School (not disclosing it was dated 20 July 2020) allegedly evidencing that Contrast NZ where pitching for business with them conditional on Mr Gourley's services being secured. The 16 December letter cited what level of damages New Era would be claiming against Mr Gourley for the loss of the Kaiapoi High School contract and that unspecified penalties for breach of contract were also being contemplated. The letter concluded with an offer to attend mediation that had a seven day timeline to respond to or failing a response, the matter would be referred to the Employment Relations Authority.

[29] Mr Gourley did not respond and he attended an unsuccessful mediation after New Era had filed the matter with the Authority.

Second Respondent – Laura Kaye

[30] Laura Kaye worked for New Era from August 2016 – September 2020 in their Christchurch office and she was latterly appointed as South Island Technician Team Leader in November 2018 reporting to Mr Gourley.

[31] Ms Kaye described her role as managing onsite support technicians including undertaking occasional onsite cover in schools. Ms Kaye says that she had no responsibility to deal with schools on any 'contractual' matters and if asked about products or services she would defer to the school's client manager. Ms Kaye indicated that she had no knowledge or involvement in pricing jobs or negotiating contracts. Ms Kaye says she worked directly with schools on technical issues supporting technicians and at times she was physically present at schools. This work included liaising with ICT managers or designated staff in schools including schools identified as being subject of this disputation.

[32] Ms Kaye resigned on 27 August 2020 after what she says was a period of dissatisfaction and that her decision was hastened by Mr Gourley's resignation. Ms Kaye says she viewed and responded to a SEEK job advert of 16 August 2020 detailing that Overseer Software were seeking technicians. Ms Kaye disclosed that she was already aware (from viewing a LinkedIn profile), that a previous regional manager of New Era, Mr Z who had

been made redundant was already working for Overseer Software. Ms Kaye's last working day with New Era was 25 September 2020 and she commenced work with Overseer on 12 October 2020. Ms Kaye provided extracts from her employment agreement with Overseer Software but no details of her role. The Seek advertisement describes the role as "Support Technician to work with growing company in education sector" and that it involved information and communication, technology and helpdesk & IT support.

[33] Ms Kaye's two employment agreements with New Era (one covering an earlier basic technician position) contained restraint provisions that she claimed she had not read when signing such and was generally unaware of.

[34] Ms Kaye indicated very limited involvement in discussions with clients who left New Era during her employment.

[35] Ms Kaye said the first time she became aware of New Era's concerns that she was allegedly in breach of restraint obligations was a letter from New Era's lawyer of 16 December 2020. This letter accused her whilst being employed at New Era of being aware and not disclosing that her former regional manager had been approaching clients and employees of New Era including her and that she had taken up a position with Contrast NZ being a direct competitor. The letter also suggested that Ms Kaye was working at Villa Maria College. The letter ended in identical terms to the one Mr Gourley received. Ms Kaye did not respond before proceedings were filed and attended the unsuccessful mediation utilising the same counsel as Mr Gourley and Mr McGirr.

The third Respondent - Stephen McGirr

[36] Stephen McGirr worked for New Era from March 2015 – September 2020 in their Christchurch Office as a Systems Engineer working primarily with two other systems engineers responding to school initiated issues via desk-top technicians.

[37] Mr McGirr resigned on 24 August 2020 saying it was due to work stress and concern after his regional manager (Mr Z) was made redundant and also Mr Gourley leaving. Mr McGirr's last day of employment was 23 September 2020. Mr McGirr says he applied for a job at Overseer Software as a support technician that was advertised by SEEK on 12 August 2020 and he was interviewed by Mr Baigent. He commenced work with Overseer Software

on or around 5 October 2020. Mr McGirr did not disclose his employment agreement with Overseer Software but such was partially disclosed by Mr Baigent without detailing Mr McGirr's role.

[38] In his affidavit, Mr McGirr was less than forthcoming on his role with Overseer Software but he did disclose "part of my role with Overseer involves me providing desktop technician duties at Kaiapoi High school". It would appear that this latter work had no connection with the provision and support for the distinct Oversight software product and is more likely to have been the provision of wider IT support work secured by Mr Baigent utilising his associated company Contrast NZ. This view is reinforced by Mr McGirr currently using an email address using the Contrast NZ domain.

[39] Mr McGirr says he became aware of his contractual restraint provisions whilst still employed by New Era when at an unspecified time he noticed others leaving to work for competitors and "someone mentioning we all had restraints in our agreements". Mr McGirr claimed there were no consequences for the staff leaving and he says he failed to check his employment agreement specific terms as a result.

[40] Mr McGirr said his first knowledge of the breach allegations came with a 16 December 2020 letter that contained allegations that he had been aware of Mr Z's activities, had not disclosed such and that he was working for Contrast NZ and involved with technician support activities on their behalf at Kaiapoi High School. The letter ended in the same manner as the ones to Mr Gourley and Ms Kaye. Mr McGirr likewise did not respond, engaged the same counsel as Mr Gourley and Ms Kaye after service of Authority proceedings and attended the unsuccessful mediation.

The employment agreements' detailed restraint obligations

[41] The identically worded restraint provisions applying to Mr Gourley and Mr McGirr are:

> The employee agrees that he will not, whilst employed, and for a period of 6 months following the termination of the Employee's employment (for whatever reason), within New Zealand, without the prior written consent of the Company, do any of the following:
>
> **Induce or attempt to induce** any director, manager or employee of the Company, or any company in the Group, to terminate his or her employment with his or her

employer, whether or not that person would commit a breach of that person's contract of employment; and

Approach, induce, solicit or persuade any person or entity who or which was or is a client or customer of the Company within the last 12 months of the Employee's employment with the Company, or any related company, to cease doing business with the Company or reduce the amount of business which the person or entity would normally do with the Company, or accept any contract of service with or contract for the provision of services to such person or entity where the nature of the service provided or to be provided by the Employee are substantially similar to the services provided by the Company to that person or entity.

Work for a company that is a direct competitor of New Era in the education market.

[42] Ms Kaye's restraint wording was similar in all but one respect (the restraint period):

The Employee agrees that he or she will not, whilst employed, and for the periods specified below following the termination of the Employee's employment (for whatever reason), within New Zealand, without the prior written consent of the Company:

a. For a periods of six months after the Employee's employment with the Company ceases**, induce or attempt to induce** any director, manager or employee of the Company, or any company in the Group, to terminate his or her employment with his or her employer, whether or not that person would commit a breach of that person's contract of employment; and

b. For a period of six months after the Employee's employment with the Company ceases, **approach, induce, solicit or persuade** any person or entity who or which was or is a client or customer of the Company within the last 12 months of the Employee's employment with the Company, or any related company, to cease doing business with the Company or reduce the amount of business which the person or entity would normally do with the Company, or accept any contract of service with or contract for the provision of services to such person or entity where the nature of the service provided or to be provided by the Employee are substantially similar to the services provided by the Company to that person or entity.

c. Within the geographical region (e.g. Auckland, Northland, Waikato, Hawkes Bay, Lower North Island or South Island) that the Employee worked within and **for a period of two months** after the Employee's employment with the Company ceases, work for a company that is a direct competitor of New Era in the education market.

(My emphasis added in bold).

[43] I observe the drafting above was not clear or arranged under suitable headings, but none of the Respondents appeared to have apprised themselves of their own agreement provisions which is not exculpatory. In Ms Kaye's case, her provision is somewhat confusing as to the length and scope of her restraint covering her ability to work for a competitor. I however, accept it reads (and so did the Applicant) that for a period of two months (not six) Ms Kaye is restrained within the South Island, from working for a company in direct competition to New Era in the education sector. Whereas, Mr Gourley and Mr McGirr's restraint on working for direct competitors are for six months and both wider in scope (New Zealand wide). However, the non-solicitation of staff from New Era and non-solicitation of their clients' restraints remain extant (six months) for all the first three Respondents and are of the same scope throughout New Zealand.

The confidentiality provisions

[44] All Respondents' agreements contained detailed provisions preventing the disclosure and/or use of confidential information both during and post-employment and a provision protecting intellectual property.

What is New Era seeking?

[45] In summary, New Era is seeking interim orders that:

- All four Respondents cease supplying services to any of New Era's clients including three identified schools.
- That the first, second and third Respondents abide by confidentiality and restraint provisions that survive the employment relationship and that they all provide unspecified confidential information in their possession and that they all cease soliciting the employment of New Era's employees and the custom of New Era's clients.
- That the first and third Respondents cease engagement with the fourth Respondent until the expiry of their extant contractual restraints of trade.

[46] In submissions Ms Keir described the "purpose" of the orders sought as:

> …. to prevent the parties from benefitting of breaches of obligations committed by the First, Second and Third Respondents during the term of their employment with the Applicant and to uphold contractual restraints of trade. The order sought against the Fourth Respondent is to prevent the use of information belonging to the Applicant in the conduct of the Fourth Respondent's business.

The evidence in support of New Era's application for interim orders

[47] Ms Keir provided a timeline of events and limited correspondence for which she invited the Authority to draw an inference that the first three Respondents acted 'in concert' with New Era's previous regional manager (Mr Z) to lure clients away from New Era and then to resign at the same time to work for a direct competitor.

[48] The material provided centred on three cited Christchurch High schools' decisions to end their service contracts with New Era and switch to Contrast NZ in a timeframe coinciding with Mr Z's departure and close to the dates that the first to third Respondents signalled their intentions to resign.

[49] One piece of correspondence stood out, being a 20 July 2020 email from Kaiapoi High School to Mr Z that was inadvertently sent to his old New Era email address. The email evidenced that Mr Z had been in discussion with the school to secure their IT business away from New Era. Ms Keir argued that it was suggestive of this new arrangement being dependent upon Contrast NZ securing the services of Mr Gourley "as the Senior Engineer by 31 August 2020". The email could also be read to found an implication that Mr Z was aware of the contractual restraint provisions being at issue as the school sought to insert an exit clause in the contract with Contrast NZ to the effect that if they were "legally prevented" from providing an onsite technician then the school had the option to terminate the agreement with Contrast NZ.

[50] Further, to support the assumption that all the Respondents' acted in concert, Mr McGirr has conceded that he is currently working as a technician at Kaiapoi High School and Mr Gourley and Ms Kaye appear to respectively be working with Kaiapoi High School and Villa Maria College.

[51] Ms Keir suggested that I should consider that the Respondents' employment agreements with Overseer Software were identical to New Era employment agreements and

were likely disclosed in breach of an express statement at the foot of each to not disclose or reproduce and that this evidenced a contractual breach of confidentiality obligations. Whilst I may have conceptually accepted that this was at issue, I was persuaded otherwise by the fact that each Overseer Software employment agreement had a footnote suggesting that they were created before the Respondents' signed them. I consider it is more likely than not, that another unidentified departing employee utilised the agreements for Overseer Software purposes. I also observe no specific prohibition in the Respondents' employment agreements to the effect that such disclosure was prohibited and no copyright exists on the documents concerned that otherwise contain what appear to be reasonably standard contractual terms.

[52] In addition Ms Keir more persuasively highlighted that all first three Respondents have "contrast.nz" personalised email addresses whilst professing to be engaged by Overseer Software.

The first to third Respondents' case

[53] Ms Trotman suggested overall, that the Applicant's case was based on "pure speculation". She suggested that: the claims lacked enough threshold evidence to support the breach of confidence as no proprietary information or products have been identified, that the breach of fidelity and solicitation claims specifically lack evidence and that there is no clear evidence proffered to suggest that the first to third Respondents caused the Applicant to suffer any material loss.

[54] Ms Trotman asserted that the limited material before the Authority shows that the three schools cited made independent decisions to swap providers based on New Era failing to meet their needs, rather than any actions of the first to third Respondents. Ms Trotman highlighted an email that Mr Strachan did not disclose but was provided by the fourth Respondent that demonstrated as early as 28 April 2020 that Mr Strachan had been placed on notice of specific and systemic issues the school had. Although Mr Z's redundancy is referenced, this email from the school principal, relates issues that suggest deep-seated concerns already existed. Whilst Mr Strachan in his affidavit countered the email with a suggestion that he had subsequently had an amicable discussion with the principal concerned, it would appear from the tone of the email that the school had firmly resolved to seek IT services elsewhere.

[55] In addressing the evident breaches of the restraint to not engage with competitors, which appears to be uncontested, Ms Trotman suggests that the restraints are unreasonably too lengthy and wide in scope and that the three Respondents had no tangible influence or 'sway' over New Eras clients. Ms Trotman suggested that the restraints sought were merely to restrict market competition and that shorter restraints would have allowed New Era to adjust and respond to any client issues arising from staff departures.

[56] Ms Trotman also highlighted that the Applicant seeks to rely on events that took place in the period July – October 2020 and that the applications for restraining orders was not timely.

The fourth Respondent – Contrast NZ

[57] Mr Cowan for Contrast NZ, advanced a compelling threshold issue as to the lack of jurisdiction of the Authority has to grant any interim injunction against a party not privy to the employment relationship between the first to third Respondents and the Applicant party. Mr Cowan conceded that Contrast NZ may, as suggested in the Applicant's Statement of Problem, be the subject of a penalty claim for allegedly aiding and abetting the breaches under s 134 (2) of the Act if such are established but that was a matter for later substantive proceedings.

[58] Apart from an acknowledgment by the Applicant's counsel that they may have failed to include Overseer Software as an additional party to these proceedings as the first to third Respondents current employer, I agree with Mr Cowan's submission. Although s 162 of the Act gives the Authority the power to make certain interlocutory orders including injunctive relief [1] this must, as case law has determined, exclude injunctive relief against a third party not privy to the employment agreement[2] or it has to stem from a matter "arising from or related to the employment relationship". The latter concept has been restrictively confined by the Court of Appeal to a matter that "must relate to or arise out of an employment relationship" and the Court considered this meant something that "directly and essentially concerns the employment relationship". [3]

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[1] *Credit Consultants Debt Services NZ Ltd v Wilson* (2007) 4 NZELR 372 at [46] – [47].
[2] At [60] – [64].
[3] *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255 at [94] – [100]

[59] I find that no interim orders can be made against the fourth Respondent for lack of jurisdiction as they had an insufficient connection to the employment relationship between New Era and the first to third Respondents.

Discussion applying the legal test – is there a serious question to be tried?

[60] As a threshold, I need to determine if the claim is frivolous or vexatious but assessing this is not an exercise of bare discretion – I must make a judicial and principled assessment of the evidence before the Authority (despite it being untested) and legal submissions advanced.[4] I record on the latter, that all counsel provided helpful and well considered submissions.

[61] Ms Keir has asserted an alternative slightly higher threshold as a useful formulation of the question in her suggestion that New Era has to establish that there is a "tenable combination of law and fact in which the Applicant's claim can succeed".

[62] Further, after traversing established case law and reciting the specific duties owed by the first to third Respondents, Ms Keir rightly asserts that in relation to a restraint of trade, for an arguable case to prevail, the Applicant has to establish that: first the restraint is reasonably valid bearing in mind that *prima facie* restraints of trade are contrary to public policy and not enforceable; and second "by working for [the new employer], [the Respondent] is in breach of that restraint of trade". Ms Keir then proceeded to argue that the background factors identified and timeframe in which they occurred "involved conversation and planning between the parties" including Mr Z – the departed former regional manager.

[63] Ms Trotman by contrast, suggested that the various breaches had not been established to an arguable degree and I now summarise her submissions under each alleged breach heading:

Fidelity/Confidentiality

[64] For Ms Kaye and Mr McGirr, Ms Trotman pointed to a lack of evidence to support any breaches of fidelity in that their involvement and potential influence over the three schools' contracts lost to New Era whilst they were still employed was minimal. Ms Trotman suggested it was apparent that Mr Strachan already knew of dissatisfaction and also he had access to a client manager who presumably was also aware of the issues. Ms Trotman did not

[4] *Western Bay of Plenty District Council and NZ Tax Refunds v Brook Homes Limited* [2013] NZCA 90.

address Mr Gourley's situation in regard to the claim of alleged fidelity breaches but I observe that his affidavit evidences his very peripheral role in client relationships/sales and that it was largely confined to technical support.

[65] I however, am attuned to the possibility that as Mr Gourley reported directly to Mr Z whilst engaged by New Era, inferentially has a working relationship with him at Overseer Software and he is specifically mentioned in email correspondence from Kaiapoi High School, it could be assumed that it is more likely than not, that he was in ongoing discussion with Mr Z but this may have been confined to him just seeking employment.

[66] On stronger ground, Ms Trotman pointed to the lack of specificity in the Applicant's claims for breach of confidentiality in that no documentation (other than the employment agreement being a potential breach that I have rejected) is cited as potentially confidential or propriety information or products identified or 'trade secrets' alluded to.

[67] All three Respondents said that they did not involve themselves in contractual negotiations with schools and potential clients are accessible as public information and easily pitched to at school conferences and cold-calling. All three claimed their skills were generic to IT specialists and that client needs were also easily understood without specialist knowledge acquired at New Era.

[68] I find that under the above two cited duties and potential breaches that New Era has struggled to make out an arguable case apart from an implication that Mr Gourley must have known of Mr Zs role in pitching to Kaiapoi High School and he failed to disclose this fully whilst he was still employed – likewise however, New Era having inadvertently received the email from Kaiapoi High School on 20 July 2020, failed to put any concerns to Mr Gourley or press him on their belief that he had allegedly breached his duty of fidelity at that point in time whilst he was still employed by them. It was not until 16 December 2020 that the email was alluded to and its full content was not disclosed.

Non-solicitation of clients and employees

[69] Ms Trotman pointed to a lack of evidence proffered to support a breach of the above duty. This included Mr Baigent's evidence that he was the only person involved in seeking business in the three cited schools and that it was more likely than not, that Mr Z was

involved due to his previous position and profile with New Era. Ms Trotman suggested that the schools involved have indicated none of the first to third Respondents were involved in their decisions to terminate relations with New Era.

[70] Ms Trotman noted that Ms Keir could only draw an inference that Mr Gourley had been part of the 'pitch' to Kaiapoi High School based on the 20 July 2020 email and that Ms Kaye had a long-standing relationship at Villa Maria College and that Mr McGirr was now working as a technician at Kaiapoi High School.

[71] Mr Trotman asserted that no evidence suggested any of the first three Respondents had approached each other to leave New Era or other departing employees. All cited Mr Z's involvement with Overseer Software and it is more likely than not that he was the 'magnet' rather than any active soliciting being undertaken by the three Respondents.

Was there a breach of non-compete provisions?

[72] Without traversing all evidence and submissions it is clear that the first to third Respondents have breached the non-compete provisions in their employment agreements and the only flimsy and rather undeveloped defence is that they are not engaged by a direct competitor as they work for Overseer Software and not Contrast NZ. This would require some evidence that there is a clear separation of business and that the three Respondents are solely engaged in the promotion and customer support for the school asset management product (Oversight) – I record I was not provided with such.

[73] The evidence of Mr Baigent openly acknowledged that he uses Oversight as a 'doorway' to develop his other growing IT service business (Contrast NZ) to compete in the same space as New Era. Also the fact that the first to third Respondents have email addresses identifying them with Contrast NZ and the lack of explanation on what duties they undertake, strongly suggests that they all at least breached the specific restraint provision that they should not "work for a company that is a direct competitor of New Era in the education market".

[74] Mr Gourley and Mr McGirr are ostensibly in ongoing breach of the aforementioned provision. And I observe that of all the potential breaches, this one is the most easily and commonly understood and it has evidently been flouted by the first to third Respondents.

[75] In answer to the first consideration, an arguable case has been amply made out against the first and third Respondents for consideration of an interim injunction restraining them further from breaching a non-compete provision. However, the only potential remedy against Ms Kaye is in substantive proceedings as her non-compete restraint has expired.

[76] In regard to the fourth Respondent, Contrast NZ, an action for potential penalties is only feasible if New Era can establish that Contrast NZ aided and abetted the breaches committed including whether they can establish by leading additional evidence, that the breaches were more extensive.

Balance of convenience

[77] Assessing the balance of convenience between the parties claims requires an imperative analysis of the impact on each party and any third parties if interim orders sought are either granted or not. I must also assess what happens if the interim position is reversed in any substantive determination. For the Applicant, I accept this means assessing the consequences of allowing the first and third Respondents continuing in breach of the non-compete component of their restraints as if the provisions of their employment agreements do not apply.

[78] Ms Keir pointed to the benefits gained and continuing to the first to third Respondents flowing from their alleged concerted actions and claims New Era has forgone significant income from lost custom. Ms Keir noted that although the first to third Respondents' may be held jointly liable the lost custom is unlikely to be recovered by New Era. Ms Keir posits that due to the first to third Respondents being 'embedded' in relationships with the identified three schools, there is little practical hope of New Era re-establishing those relationships. Interim orders are sought to "re-level" the playing field and ensure fair competition.

[79] By contrast, Ms Trotman pointed to what she considered is strong evidence that the relationship with two of the identified schools (Kaiapoi and Villa Maria) was already irretrievably lost and that the first to third Respondents played no role in influencing their decisions to swap providers and that New Era has not advanced this matter in a timely fashion. The suggestion is that that Cashmere High School who later terminated their services on 20 December 2020, did so after an earlier approach from Mr Baigent and Mr Z in mid-October 2020.

Assessment of where the balance of convenience falls?

[80] Whilst I can accept that New Era lost the first two schools' custom due to previous dissatisfaction and the first three Respondents do not appear to have been directly involved in causing this perception, the schools were nevertheless New Era clients who engaged with Contrast NZ. This may reasonably have been due to a perception that a former and trusted former New Era employee (Mr Z) was involved. The three Respondents were likely aware of this and knowingly went to work for a direct competitor within their restraint periods.

[81] Mr Baigent by October 2020, was pitching for work with Cashmere High and it is inconceivable that he would not have mentioned he was engaging former New Era employees known to all three schools. It is more likely than not that when Mr Baigent engaged the first three Respondents that he apprised them of the work that they would be engaged on and the location of such. However, on a practical basis, were I to grant the injunctions sought, all it may lead to would be significant financial hardship for the first three Respondents and their families and New Era would not re-gain the business of the schools lost.

[82] In fact, I perceive a real risk exists of New Era being perceived as 'crushing' competition in a market where ongoing reputation is important as schools frequently share perceptions of IT providers at regular gatherings. I also have to consider the length of the restraints of the first and third Respondents expiring relatively soon in mid-March 2021 and whilst New Era have attempted to resolve matters and attended mediation, the interim injunction was not sought in a timely fashion or emerging issues of fidelity dealt with promptly.

[83] A further factor I have to weigh is the public interest of the disruption to schools involved if any order prevented Contrast NZ from continuing IT services. Whilst other IT providers are available outside the parties to this litigation, a seamless transition would be unlikely and schools would have to go through tender processes to find new providers.

[84] Weighing all factors, including the clear merit in New Era's case for an injunction restraining further competition, I find whilst not condoning the first to third Respondents breaches and the very real potential that the fourth Respondent has played a part in them, that the balance of convenience marginally does not favour the granting of the interim restraining orders sought.

The weighing of overall justice

[85] An overall justice assessment is a ‘reality’ check on the position which has been reached after the analysis of the serious question to be tried and the balance of convenience has been weighed. As I have said, there is a serious question to be tried in regard to evident breaches of non-compete restraints and the Applicant's case in this context, is strongly arguable. Despite the first to third Respondents' suggestion that the employment agreements’ restraints were unreasonable in length and scope I do not (without conducting a detailed analysis) perceive such to be the case, as the first to third Respondents occupied middle management positions of strategic importance to New Era’s ongoing business.

[86] I have observed that the restraints were not well-documented but I also remark that the first to third Respondents failure to comprehend such as they all claimed ignorance of their employment agreement content was self-serving and not convincing in of itself. Employment relationships need to be taken seriously and advice sought when entering agreements containing complex post-employment obligations. Likewise, employers need to spend time on explaining such during bargaining and highlighting clearly in agreements using plainly understood language and concise layout.

[87] I also consider that the first to third Respondents have offered reasonable undertakings to abide by the confidentiality provisions of their employment agreements, to not solicit New Era clients or employees and to not accept any contract of service or for services with any New Era clients. I also practically have to consider that the non-compete and other restraints will expire in mid-March 2021.

[88] Standing back and looking at all factors I find that the balance of convenience does not favour granting the interim orders sought.

[89] A substantive hearing is a better forum to hear a more detailed exposition of what the Applicant considers their loss to be and how such was caused.

Outcome

[90] **The interim injunctions sought by the Applicant against the first to third Respondents are not granted and I have found that the Authority lacks jurisdiction to grant any interim order against the fourth Respondent. A case management conference will be convened as soon as practicable to timetable this matter for a substantive hearing.**

Costs

[91] Costs are reserved.

David G Beck
Member of the Employment Relations Authority