

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 135  
3210619

BETWEEN	TRAFFIC SAFE NEW ZEALAND LIMITED Applicant
AND	BENJAMIN TEIKA First Respondent
AND	LEADING TARANAKI LIMITED Second Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Alastair Hall, counsel for the Applicant  
Benjamin Teika (self) for the First Respondent  
Chantelle Ngaia, representative for the Second Respondent

Investigation Meeting: On the papers

Submissions Received: 22 February 2023 from the Applicant  
None from the Respondents

Date of Determination: 16 March 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Traffic Safe New Zealand Limited (TSNZ) has applied to the Authority for an interim injunction against its former employee Benjamin Teika, the First Respondent. TSNZ’s substantive claims against Mr Teika are that he breached a number of explicit and implicit terms of his individual employment agreement (IEA) and breached his duty of good faith. In its substantive claim, TSNZ also seeks penalties against Leading Taranaki Limited (LTL), the

Second Respondent, for inciting, instigating, aiding and/or abetting Mr Teika's breach of his contractual non-competition restraint.

[2] The substantive claims will be investigated at a date in the future as yet unscheduled. This determination deals only with TSNZ's application for interim relief against Mr Teika until such time as the substantive matter can be heard and determined.

[3] The interim relief TSNZ seeks is:

- (a) an injunction preventing Mr Teika from breaching the non-competition restraint in his IEA;
- (b) an injunction preventing disclosure of confidential information;
- (c) an injunction preventing non-solicitation of TSNZ's employees and clients; and
- (d) an order causing Mr Teika to immediately comply with implied terms contained in the IEA by immediately returning all property belonging to TSNZ including confidential information and intellectual property.

### **The Authority's investigation**

[4] On 1 February 2023 I held an urgent telephone conference between Mr Alastair Hall, Ben Teika and Chantelle Ngaia as representative for the Second Respondent. The parties were directed to mediation on an urgent basis. The parties attended mediation but the matters remain unresolved.

[5] By prior agreement, following the unsuccessful mediation a further telephone conference was scheduled for 1 March 2023. Mr Teika had previously advised the Authority that he would not be attending the call. He indicated he had left his employment with LTL and in any event did not believe any restraint should be applied to his employment. LTL could not be reached on the telephone number they had provided and the second case management conference call proceeded in the absence of Mr Teika and LTL. During the conference call, I advised that the interim application would proceed on the submissions filed and an interim determination issued in due course. This course of action had been discussed at the previous telephone conference on 1 February 2023.

[6] Despite the opportunity to do so, neither Mr Teika nor Leading Taranaki Limited filed submissions and accordingly the only submissions before the Authority were those of TSNZ.

The Authority had before it however the IEA, an undertaking as to damages and an affidavit from Mr Karl Hitchcock, a director of TSNZ.

## **Background**

[7] Mr Teika commenced employment with TSNZ on 23 May 2022 until he tendered his resignation on 6 December 2022. The IEA provided for one months' notice and his final day of employment was therefore 7 January 2023.

[8] Mr Teika undertook a role as a Training and Development Officer and a Senior Sites Traffic Management Supervisor for TSNZ. The Second Respondent, Leading Taranaki Limited (LTL) is a recruitment company operating in the Taranaki area. It had recently expanded its operations to include traffic management but otherwise acted as a recruitment company. Mr Teika's employment with TSNZ was subject to terms and conditions which were set out in his written IEA. This included restricted covenants in favour of TSNZ. The ones which are relevant are as follows:

### **30. Confidentiality**

- 30.1 All information which may be supplied to you by us or which you may become aware of from your employment by us or from your dealings with us or which are in any way related to or connected with our business ("the confidential information") is our property. In this clause "confidential information" means any information relating to our business, the users of our services, operations or financial affairs or any other commercially sensitive information which has come to your knowledge or which has been disclosed or might reasonably be understood to have been disclosed to you in confidence, other than information which is already public knowledge or which is obvious or trivial.
- 30.2 You must, during the continuance of the agreement and after its termination, for whatever reason;
  - a. Use your best endeavours to prevent the use or disclosure of any confidential information to any person, firm, company or other body unless previously and expressly authorised by us; and
  - b. Other than in the proper discharge of your duties to us, not disclose or attempt to disclose any confidential information to any person, firm, company or other body; and
  - c. Not use or attempt to use any confidential information to your own benefit, rather than for our benefit; and
  - d. Not use or attempt to use any confidential information in any manner which may injure or cause loss, whether directly or indirectly, to us; and

- e. Not turn or attempt to turn your personal knowledge of any of our clients to your personal benefit, rather than our benefit.

### **31. Intellectual Property**

You acknowledge that any intellectual property produced by you in the course of your employment, and all intellectual property of ours which you are exposed to during this employment, is entirely our property, during and after the termination of this agreement, for whatever reason.

- 31.2 You agree to provide all reasonable assistance required by us, at our expense, to enable us to maintain and enforce our intellectual property whether during or after the term of this agreement.
- 31.3 You must fully disclose to us details of all inventions, discoveries, know-how, designs, patents, copyright works and all other intellectual property produced or conceived during the course of employment with us.

### **32. Restraint of trade**

- 32.1 You agree not to undertake employment, establish, publish, or obtain an interest in, any business operating within the road safety industry, either on your own behalf, or with or for a third party, who in our reasonable opinion is a competitor, within a region that we operate in, and for a period of six (6) months, following the cessation of employment for any reason.
- 32.2 You agree that you will not, either during the period of employment or for six (6) months following the termination of the employment for any reason, solicit, canvass or approach for your own personal benefit or on behalf of any company or organisation which you may be directly or indirectly involved in, our clients/customers for whom we perform services that you have a working knowledge of during the period of employment with us, or have any other dealings in the course of business that you have a knowledge of during the period of employment with us.
- 32.3 You agree that you will not, either during the period of employment or for six (6) months following the termination of the employment for any reason attempt to persuade any employee of ours to cease his or her employment with us.
- 32.4 You expressly acknowledge and accept that the restraint of trade provisions in the above clause are reasonable and necessary in order to protect and maintain our proprietary interests and other legitimate interests.
- 32.5 You agree that the remuneration and consideration provided in this agreement represents reasonable and sufficient consideration for the constraints contained within this clause.

[9] TSNZ says that immediately upon receiving Mr Teika's resignation on 6 December 2022, it wrote to him acknowledging receipt of the resignation, noting that his last day of

employment would be 7 January 2023 and reminding him of his contractual obligations expressly, those which survived the termination of employment.

[10] On 14 December 2022 Mr Hitchcock met with Mr Teika who advised Mr Hitchcock that he had been offered a position with LTL but would not be involved in their traffic business. He explained he would be working only in the recruitment space. However, Mr Hitchcock says that shortly thereafter information came to light that Mr Teika had been seen attending at a customer's site and that another employee of TSNZ had been offered a position with LTL. TSNZ was advised that Mr Teika had organised the employment agreements for this person and that it was likely TSNZ would be losing a contract which LTL would be taking over.

[11] Prompted by the above, TSNZ reviewed its IT systems which indicated that Mr Teika had assessed the systems remotely after his employment had ended. TSNZ tried to prevent Mr Teika gaining further information by changing passwords. However, Mr Teika gained further access through resetting the password externally.

[12] On or about 19 January 2023, TSNZ were contacted on behalf of a major client which advised it that Mr Teika had made a direct approach to them to solicit work for LTL.

[13] On 19 January 2023 TSNZ wrote to Mr Teika seeking undertakings that he would comply with his employment obligations. No undertakings have been received.

[14] During the original conference call on 1 February 2023, Mr Teika's position can be stated as simply he considered any restraint prima facie void and did not believe he had breached any terms of his employment agreement.

[15] A similar view seems to be held by LTL.

### **Mr Hitchcock's affidavit**

[16] Mr Hitchcock has filed an affidavit dated 2 February 2023. He deposes that the purpose of the restrictive covenants in Mr Teika's employment were to protect the relationships that TSNZ has with its staff, customers and suppliers. He was most concerned with Mr Teika's purported breaches especially with the information he had received, namely that at least a member of his staff had been offered work with LTL and that Mr Teika had accessed TSNZ's computer systems and was taking confidential information which he believed was to share with LTL. Mr Teika had attempted to access the system more than once and Mr Hitchcock pointed

out that Mr Teika had gone to the extent of resetting the password externally when it had been changed to protect the company's information. He said that they had sought undertakings for Mr Teika that he would comply with his obligations but these had gone unheeded. He felt that orders from the Authority were necessary and without them, Mr Teika would continue to misuse confidential information for the benefit of LTL and to the detriment of TSNZ.

[17] It was clear at this interim stage that Mr Hitchcock is uncertain as to what the effect of the use of the information would be other than it be to the detriment of TSNZ. As the information could include confidential client information and/or forms, once LTL has the advantage of having that information, it may be difficult to ascertain damages if an injunction is not given.

[18] Unfortunately the Authority does not have the benefit of submissions and/or affidavits from Mr Teika, or from LTL. LTL's position in an interim application such as this, however, does not cause a difficulty as a sanction against LTL would be by way of penalty if indeed it was later found to have induced a breach of contract. At this interim stage, the Authority is not considering a penalty.

### **Interim orders**

[19] The Authority has jurisdiction to make orders relating to contractual obligations between parties arising from their employment agreements.<sup>1</sup> The basis upon which applications for interim orders are determined is well established.<sup>2</sup> The legal framework which I must follow in respect of applications such as this can be summarised as follows:

- (a) Step One – the applicant must establish that there is a serious question to be tried;
- (b) 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 a weighting exercise; and
- (c) Step Three – the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

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<sup>1</sup> In s 162 Employment Relations Act 2000.

<sup>2</sup> Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd [1985] 2 NZLR 129 at 142 (HC and CA).

**Arguable case – a serious question to be tried**

[20] TSNZ submits the threshold for establishing whether a serious question arises as to the likely enforceability of the restraint of trade is low. It acknowledges that the covenant not to compete is prima facie unlawful but submits the Authority should have no hesitation in enforcing reasonable restraints of trade where there are legitimate proprietary interests to protect. It notes the agreement itself required agreement between the parties as to the reasonableness of the restraint provisions. In the Court's judgment *Green v Transpacific Industries Group (NZ) Ltd*<sup>3</sup> former Chief Judge Colgan said:

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".

[21] On the face of it, there appears to be proprietary interests that the restraint of trade properly protects. These include confidential information, intellectual property and business relationships. As I have indicated above, the threshold for an arguable case is not high. I have no submissions from the respondents, but it seems to me at this interim stage there is an arguable case. If Mr Teika has done what he is accused of having done, then there would be a clear breach of the specific covenants contained in his employment agreement. On the balance of the untested evidence and submissions, I find it likely that TSNZ has proprietary interests in its business relationships, client information and intellectual property.

**Balance of convenience**

[22] Assessing the balance of convenience requires an imperative analysis of the impact on each party and third parties if interim orders sought are either granted or not. I must then also assess what happens if the interim position is reversed in any substantive determination. For TSNZ, this means assessing the consequences of allowing Mr Teika to continue as if the provisions of his employment agreement do not apply. TSNZ say it would be difficult to quantify the damage sustained if ultimately the Authority finds for it. On the other hand, if the Authority found the restraint to be unenforceable at a substantive hearing, monetary remedies in accordance with the undertaking provided by TSNZ would more likely be adequate to compensate Mr Teika for any loss he suffered. Other factors that favour the imposition of an interim injunction are Mr Teika's apparent conduct in not engaging with the Authority's

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<sup>3</sup> [2011] NZMC 6.

investigation, the relative strength of each party's case and the strong indication that confidential information and intellectual property is being used in breach of the agreement.

[23] Mr Teika is not here to give evidence on the impact an interim injunction may have on him. I am also mindful of the fact however, that Mr Teika is not working for LTL now and accordingly the effect of any injunction could not now be to force the termination of his employment or at least a standing down. Likewise, there is no real need in this present case to consider the effect of any injunction on LTL.

[24] It has had the opportunity to give evidence and has not done so. But in any event, the effect of any injunction on it is at this stage negligible. If Mr Teika was still working for LTL, then that may have had an impact as an effect of the injunction could be to deprive LTL of a valued employee. If Mr Teika is not working for them, the effect of any injunction on them is limited.

[25] In any event, if at a substantive hearing I was to find that for some reason none of the restraint provisions or non-solicitation provisions were enforceable, any loss suffered by Mr Teika should be able to be assessed easily. On the other hand, if I were to find at a substantive investigation that the provisions were enforceable and had been breached, there is a risk that TSNZ's business could have been damaged in the interim and may not have been able to be put back into the position it was before, when it thought it had the advantage and security of clear contractual restraints on Mr Teika.

[26] At this early stage, and without the benefit of any evidence from Mr Teika, the merits of TSNZ's case are also relevant to the balance of convenience. Their position is certainly arguable.

### **Overall justice**

[27] The overall justice assessment is essentially a check on the position that has been reached after the analysis of the serious question to be tried and the balance of convenience. As I have said, there is a serious question to be tried, and TSNZ's case is at least on paper arguable. Overall justice favours granting the interim orders sought. As indicated earlier, I am cognisant of the fact that Mr Teika is no longer employed by LTL. If he had remained employed, that would have been a factor taken into account when assessing balance of convenience. Essentially, however, what is being sought by TSNZ, at least on the interim

basis, is that Mr Teika be ordered to comply with the provisions of his employment agreement which survived termination of employment with TSNZ.

### **Conclusion**

[28] An interim injunction is granted and shall continue in force until such time as the substantive investigation meeting finally disposes of the matter or is otherwise varied by the Authority. The following orders are made:

- (1) Benjamin Teika is restrained from destroying, using, copying, transmitting, transferring, altering, deleting or defacing any of Traffic Safe New Zealand Limited's confidential information and intellectual property;
- (2) Benjamin Teika shall immediately comply with the clauses of his individual employment agreement in relation to:
  - (i) Restraint of trade; and
  - (ii) Disclosure of confidential information; and
  - (iii) Non-solicitation of employees and clients.
- (3) Benjamin Teika is ordered to immediately return all property he holds or controls belonging to Traffic Safe New Zealand Limited, including confidential information and intellectual property;

### **Costs**

[29] Costs are reserved and in the normal course of events will be dealt with at the conclusion of the substantive investigation meeting.

**Geoff O'Sullivan**  
**Member of the Employment Relations Authority**