

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 209  
3219519

BETWEEN	MEDIAWORKS OUTDOOR LIMITED Applicant
AND	DAE CHUN First Respondent
AND	GO MEDIA LIMITED Second Respondent

Member of Authority: Rachel Larmer

Representatives: Aishleen Sluiters and Madeline Lister counsel for the  
Applicant  
Hugh Matthews counsel for the Respondents

Investigation Meeting: On the papers

Submissions and Further Information Received: 22 March 2023 from the Applicant  
4 April 2023 from the Respondents  
14 April 2023 from the Applicant  
19 April 2023 from the Respondents  
24 April 2023 from the Applicant

Date of Determination: 27 April 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

*Interim injunction sought*

[1] The Applicant, MediaWorks Outdoor Limited (MediaWorks Outdoor) seeks an interim injunction to prevent the First Respondent, Dae Chun, from acting in breach of post-employment restraint obligations that are set out in his Letter of Appointment dated 20 January

2021 (“*the Letter of Appointment*”) and in his MediaWorks Outdoor Terms of Employment v1.2 February 2018 (“*the MediaWorks Outdoor Terms of Employment*”). These two documents are collectively referred to in this determination as “*the Agreement*”.

### *Substantive claims*

[2] MediaWorks Outdoor sought an interim injunction pending the Authority’s determination of its substantive claims that Mr Chun breached the restraints in the Agreement and his statutory obligations of good faith, and that MediaWorks Outdoor should be awarded penalties and damages for those breaches. MediaWorks Outdoor has also applied for penalties to be imposed on Go Media for inciting, aiding and/or abetting the alleged breaches by Mr Chun of the Agreement.

### *MediaWorks Outdoor*

[3] MediaWorks Outdoor provides clients and agency partners with advertising solutions across its media network. MediaWorks Outdoor represents Outdoor, Radio and Digital brands.

[4] On 1 March 2021, MediaWorks Outdoor employed Mr Chun as the Group Account Director. Before that he had been employed by QMS NZ Media Limited (“*QMS*”) and prior to that, iSite Limited, which was acquired by QMS. On 1 March 2021, Mr Chun’s title was changed to Senior Account Director OOH (‘Out Of Home’).

### *Dae Chun*

[5] Mr Chun’s employment started as an Agency Manager at iSite Media on 29 April 2013. That entity was acquired by QMS in December 2021. QMS then entered into a merger with MediaWorks Outdoor in September 2019. Mr Chun in his affidavit said this merger was a takeover of the QMS business by MediaWorks Outdoor. The QMS employees essentially took a step back in terms of seniority.

[6] In March 2021, post-merger, QMS employees were asked to re-sign employment agreements provided by MediaWorks Outdoor, but which retained the name of QMS as the employer, in anticipation of a company name change from QMS to MediaWorks Outdoor Limited. The name change occurred on 25 May 2021.

[7] Mr Chun in his affidavit said that the approximately 30 QMS staff (reduced from around 60 after a COVID restructure) were assimilated by MediaWorks Outdoor into an

organisation that already had around 1,000 employees. Mr Chun said that as a QMS employee he felt intimidated and did not want to challenge the status quo, so he signed the Agreement when asked to do so, because he was fearful for his job security.

[8] Mr Chun said that the restraint provision in the Agreement was not highlighted to him. He believed the Agreement he signed was standard across all of MediaWorks Outdoor employees at all levels.

[9] In December 2022, Mr Chun applied for the role of Auckland Group Sales Manager with GO Media. He was interviewed on 19 December and was offered and accepted the job on 20 December 2022.

[10] That same day Mr Chun notified his direct manager, MediaWorks Outdoor's Group Head – Agency, Anna Magasiva, and Jaana Collins, who is MediaWorks Outdoor's General Manager – Agency, of his resignation. At that time MediaWorks Outdoor had been in its annual Christmas closedown for four days. When Mr Chun gave notice to MediaWorks Outdoor he was on annual leave.

[11] MediaWorks Outdoor required Mr Chun to work out his notice period, so his employment with it ended on 17 February 2023. Although MediaWorks Outdoor had the contractual right to place Mr Chun on garden leave, it elected not to do so.

[12] Mr Chun said that when he returned to work on 9 January 2023, after his Christmas annual leave, MediaWorks Outdoor removed him from a number of his usual activities and duties, including:

- Client work-in-progress meetings;
- Company outdoor sales meetings (covering strategies, revenue and sales incentives); and
- Company-wide meetings.

[13] Mr Chun's evidence was that from 9 January 2023 he was effectively working behind the scenes assembling media schedules in support of team members who were dealing directly with the clients.

[14] Mr Chun acknowledged that after giving notice he still had contact with Omnicom Media Group (“OMG”), which he said was primarily to ensure that MediaWorks Outdoor was able to continue servicing that client.

[15] Mr Chun denied that he had been involved with any “*special projects*” or “*confidential materials*”, contrary to what Ms Collins had said in her affidavit.

[16] Mr Chun has a wife and baby. He is currently the sole income earner in his family and is responsible for two mortgages, the first on the family’s primary property and a second mortgage on a rental property. In his affidavit Mr Chun noted that he needed to top up the rental property mortgage because the rental income did not fully cover it.

### *GO Media*

[17] GO Media is a New Zealand-based outdoor media company that provides various outdoor advertising solutions, such as classical and digital billboards. MediaWorks Outdoor considers GO Media to be a direct competitor. GO Media and MediaWorks Outdoor are both large players in the Out Of Home industry.

### *Advertising agencies*

[18] There are 30 to 40 advertising agencies operating throughout New Zealand, ranging from big global agencies to small independent agencies. Both MediaWorks Outdoor and GO Media trade (or attempt to trade) with all of those agencies. There are also a number of other key players in the industry who also compete with the agencies for the same business that MediaWorks Outdoor and GO Media are after.

[19] The key agencies are well aware of the products and the differences in the offerings that are available from MediaWorks Outdoor and GO Media. Mr Chun’s role with GO Media required him to work with all Auckland agencies and their direct clients.

[20] Mr Chun in his affidavit said that the personnel within the advertising agencies were often quite transient. The people who were doing the booking of advertising campaigns did so on a campaign by campaign (or site by site) basis. This was usually done by the more junior staff, so those people often changed every couple of years.

[21] Mr Chun also noted that business from advertising agencies also changed both between agencies (and sometimes within the agencies) depending on market conditions. For example,

a particular agency could gain or lose a major client to another agency, and then all of a sudden the media providers would need to be dealing with someone different for the next campaign for that advertiser.

*Differences between MediaWorks Outdoor and GO Media*

[22] Mr Chun started work with GO Media on 20 February 2023. He has been working with it for more than nine weeks. Mr Chun in his affidavit explained how GO Media priced its assets differently and had different variables for its sites than MediaWorks Outdoor did.

[23] Although MediaWorks Outdoor and GO Media both have a number of billboard sites around the country, each site had different characteristics both in terms of exposure, and the ability to present signage (which was often down to contractual resource consent restrictions). Mr Chun also noted there were differences in the way in which GO Media and MediaWorks Outdoor operated regarding the sequencing of electronic billboards.

[24] Mr Chun pointed out that these differences would affect the decisions that an advertising agency made and the pricings that related to particular campaigns. He also said that GO Media has a specific pricing model that used analytics from things such as views per billboard, car trackers and rotations in billboard locations.

[25] Competition between MediaWorks Outdoor and GO Media often focused around those items and the perceived benefits for clients between the respective companies and the way they operated, and their particular billboard sites. Agencies and advertisers obviously held their own views as to what attributes they valued more for any particular campaign, and that usually would drive their spending patterns, rather than the individual who was selling the outdoor billboards.

[26] GO Media used its analytics model to set its pricing completely independently of anything that MediaWorks Outdoor does. Mr Chun in his affidavit said that there was nothing that he could provide to GO Media from his time with MediaWorks Outdoor that would influence GO Media's pricing model or analytics.

## **The Agreement**

### *Term of Employment*

[27] The MediaWorks Outdoor Terms of Employment contained clauses that related to confidential information and post-employment obligations. These stated:

#### **Confidential information**

You will gain information or knowledge during the course of your employment, which is confidential and/or commercially sensitive. This is information that is not in the public domain and includes information such as confidential business/technical information, business methods and management systems and information relating to clients and customers. It is important that you recognise this information and understand that you are not permitted, either during the term of your employment or following its termination, to either directly or indirectly release or disclose such information, use any such information other than in the proper performance of your duties or copy any confidential information for personal use or use by any other unauthorised person, firm, company or entity.

Upon termination of your employment you must return any documents, letters, papers, business cards and other material of every description (including customer lists and/or price structures, computerised records and copies of or abstracts from the same) that you possess or control relating to the affairs and business of or belonging to MediaWorks.

#### **Post-employment obligations**

MediaWorks does not want to prevent you from obtaining alternative employment should you wish to leave. However, we naturally wish to protect our business relationships and our confidential information. For that reason certain restrictions on your activities following the termination of your employment with us may be set out in your appointment letter.

If in your appointment letter it is agreed that you hold a key position, unless you first obtain the written consent of MediaWorks to waive or reduce any restraint, you agree that during your notice period and for the term specified in your appointment letter following termination (however that occurs), you will not:

- be directly or indirectly involved in any capacity (whether as an employee, contractor, consultant, partner, trustee, principal, agent, shareholder, director, self-employed person or otherwise) in any business or activity in competition with MediaWorks in the geographical area specified in your appointment letter (**Non-Competition**), or
- directly or indirectly solicit, canvass, procure or attempt to entice any person or entity which, within the 12 month period prior to the termination of your employment, was a client, supplier to or employee of MediaWorks, to change the nature of their relationship with us or assist any person, firm or corporate to do the same (**Non-Solicitation**), or

- directly or indirectly deal with any person or entity which, within the 12 month period prior to the termination of your employment, was a client or supplier of MediaWorks or assist any person, firm or corporate to do the same (**Non-Dealing**).

Note that obligations concerning protection of confidential information continue after the end of the restraint period.

You acknowledge that the above restraints are fair and reasonable and necessary to protect the goodwill subsisting in the MediaWorks' business; and that the offer of employment and your level of remuneration provide adequate consideration for such restraints.

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***Our expectation is that following the termination you comply with your obligations to protect our confidential information and do not compete with MediaWorks or solicit our clients, suppliers and staff within the restricted timeframes.***

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### *Letter of Appointment*

[28] The Letter of Appointment was dated 20 January 2021. It said that the employment would commence on 1 March 2021, with the original service date of 29 April 2013 still applying for the purposes of service calculation. It recorded a two month notice period.

[29] Clause 9 of the Letter of Appointment contained a clause relating to post-employment obligations. This stated:

You agree that you occupy a key role. Therefore in the event your employment terminates you will be subject to restraints on the terms set out in the terms of employment. In your case the restraint period and geographical area are:

Non-competition: three (3) months.

Geographical area for non-competition: national level

Non-solicitation and non-dealing: six (6) months.

[30] The 20 January 2021 offer was stated to remain valid for seven working days. Clause 7 of the offer provided that the company vehicle would be removed and the salary increased by \$15,000 to compensate for the removal of that benefit. The increase in salary was to apply from 1 May 2021.

### *Consideration for the restraints*

[31] When Mr Chun signed the Agreement on 23 February 2021, the employer was still recorded as QMC Media Limited. That was the same legal entity that had employed Mr Chun

prior to him signing the Agreement. MediaWorks Outdoor's Terms of Engagement and the Letter of Appointment were silent about whether or not consideration had been paid for the restraints Mr Chun had been required to accept.

[32] Mr Chun claimed he had not received any consideration for agreeing to the restraint obligations, because he was already employed when he was required to sign them and at the time he signed his employer had not changed. Although MediaWorks Outdoor disputed that, it did not provide objectively verifiable evidence that there had been consideration for the restraints.

[33] The salary increase in the Agreement was specifically related to the removal of the benefit that related to access to a company vehicle, which was to be less than 12 months old and which would be replaced on a four yearly cycle. If that was all the Applicant was relying on, then it would be unlikely to be able to establish that consideration had been exchanged for the restraints it wanted to enforce.

#### *Evidential issues*

[34] MediaWorks Outdoor introduced new evidence for the first time in its submissions. It also made submissions on evidence that was not before the Authority. The specific matters of concern are set out at paragraphs 48 to 61 of the Respondents' submissions.

[35] This interim injunction application has been determined on the basis of the currently available evidence. That meant that evidence that was provided solely by way of the Applicant's submissions was not considered. Likewise, submissions the Applicant made that were based on evidence that has not been provided to the Authority have also not been considered.

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

[36] This interim injunction application has been determined 'on the papers'. Ms Collins filed an affidavit on behalf of MediaWorks Outdoor. Mr Chun filed an affidavit on behalf of himself and GO Media. Both parties also filed written submissions after the affidavit evidence had been exchanged.

**Issues**

[37] The following issues are to be determined at this interim stage of these proceedings;

- (a) Does the Applicant have an arguable case?
- (b) If so, where does the balance of convenience of convenience lie?
- (c) What does the overall justice of the case require?
- (d) What if any costs should the successful party be awarded?

**Does the Applicant have an arguable case?**

[38] Whether or not there is an arguable case is a very low bar to clear. The Applicant's claims cannot be said to be frivolous or vexatious, because Mr Chun signed written post-employment restraints, so to that extent there is an arguable case.

*Legitimate proprietary interest?*

[39] Whether it is arguable that the Applicant has a legitimate proprietary interest, that was capable of being protected by a post-employment restraint was questionable. Although the Applicant made many assertions to that effect, it failed to back that up with sufficiently detailed objective evidence.

[40] The Applicant claimed it had a genuine proprietary interest;

- (a) In confidential information Mr Chun had retained in his mind; and
- (b) Over relationships Mr Chun had with its clients.

[41] Both of these are matters that could potentially (subject to appropriate evidence) give rise to a legitimate proprietary interest, so on that basis it can be said to be arguable. The Authority was also mindful that for the purposes of this interim injunction application, it had to assume that the Applicant could prove the evidence in its affidavit.

[42] From that point of view, it is therefore arguable that the Applicant has a legitimate proprietary interest that is capable of being protected. However, the actual evidence the Applicant has provided to date in support of such claims was weak and, on the face of it, appeared inadequate.

*Reasonableness of the restraints?*

[43] It was arguable that the restraints were reasonable, based on the mere fact that the parties had entered into them. However, the evidence the Applicant provided in support of its claim that the restraints were reasonable, and were no more than was required to protect its legitimate proprietary interest appeared, on the face of it, to be inadequate.

[44] The Authority's objective view of the currently available evidence was that it fell short of establishing that an unmodified version of the restraints would be likely to be viewed as reasonable.

[45] However, given the low bar that had to be met in terms of this test, the Applicant has established it has an arguable case, although the Authority had noted that the Applicant's claims appeared to be weak.

**Where does the balance of convenience lie?**

*Restraints are prima facie against public policy and unenforceable*

[46] The starting point is that restrictive covenants that attempt to limit an employee's ability to earn a living are contrary to public policy and therefore prima facie unenforceable.

[47] However, the law recognises that some restraints may be enforceable, if an employer can establish it has a legitimate proprietary interest to protect and that the restraint is reasonable, and therefore no wider than was necessary in order to protect that legitimate proprietary interest.

[48] The evidence provided by the Applicant falls short of objectively establishing that permitting it to enforce the restraints would be in the overall public interest.

*Mr Chun returned the Applicant's property when his employment ended*

[49] There was no suggestion that Mr Chun had not complied with his obligation to return all of the Applicant's documents, letters, papers, business cards and any other material of every description (including customer lists and/or price structures, computerised records and copies of or extracts from the same) that he possessed or controlled relating to the affairs and business or belonging to it.

[50] Therefore, the only confidential information that Mr Chun retained was what was already in his head.

*Mr Chun is already subject to a confidentiality clause*

[51] Mr Chun was already subject to a confidential information clause in the Agreement. The Applicant failed to adequately explain why it also needed to protect its confidential information by a post-employment restraint, in addition to the confidential information clause in the Terms of Employment.

*Applicant's onus*

[52] The Applicant bears the onus of establishing on the balance of probabilities that when it entered into the restraint with Mr Chun on 23 February 2021 (being the date he signed the Letter of Appointment dated 20 January 2021) it had a legitimate proprietary interest which required protection in relation to his employment at that time.

[53] It appears that the Applicant may struggle to discharge that onus, because the evidence it has provided so far appeared inadequate, both in terms of establishing a genuine proprietary interest and in terms of the restraints being reasonable.

*Undertakings provided by Mr Chun*

[54] Mr Chun provided detailed and specific undertakings that protected the confidential information the Applicant claimed was the subject of its proprietary interest.

[55] These undertakings should be taken at face value and viewed as legitimate. There did not appear to be any need for a post-employment restraint in light of the undertakings Mr Chun had provided.

[56] The undertakings Mr Chun provided appeared to be reasonable and appropriate, in terms of addressing the allegedly confidential information the Applicant had identified. This suggested that the information to be protected was understood by Mr Chun and therefore could be easily separated by him from other information he carried in his head, which he was free to use in his new job.

[57] The undertaking stated that Mr Chun had complied with his confidentiality obligations to MediaWorks Outdoor since his employment ended on 17 February 2023. It also recorded that he would not use MediaWorks Outdoor's confidential information for his own or any third

party's benefit or gain, and he would not divulge any of MediaWorks Outdoor's confidential information to a third party, including to his new employer, GO Media Limited, unless MediaWorks Outdoor provided him with its express authority in writing in advance.

[58] Clause 3 of Mr Chun's undertaking stated:

MediaWorks' 'confidential information' is information that is not in the public domain and is not information that is already known to GO Media in its capacity as a business that competes with MediaWorks and is information that is genuinely confidential and in which MediaWorks has a proprietary interest. MediaWorks says that includes (but is not limited to):

- (a) total OOH revenue, tracking and target and forecast
- (b) MediaWorks' discounting and trading levels
- (c) client spend, discounts and contractual agreements
- (d) specific brief responses, proposes and pricing for Q1 and Q2 activity, and
- (e) commercial growth decisions and strategy.

**I note that I have little or no knowledge of confidential information in these specific categories.** (Emphasis added).

[59] Mr Chun also represented that he had returned all of MediaWorks Outdoor property as per the provisions of the confidentiality clause in his Terms of Employment. He further stated at clause 5 of the undertaking:

I have taken and will take going forward, all reasonable steps to prevent confidential information of MediaWorks being used or divulged to any third party, including GO Media.

*Undertakings have been provided by GO Media*

[60] GO Media provided written undertakings dated 13 March 2023. GO Media stated that it would not incite, aide and/or abet Mr Chun to breach his confidentiality obligations to MediaWorks Outdoor, which included not inciting, aiding or abetting him to use MediaWorks Outdoor's confidential information for his own, or any third party's benefit or gain or divulge any of MediaWorks Outdoor confidential information to a third party, including GO Media, unless MediaWorks Outdoor provided Mr Chun with its express authority in writing in advance.

[61] GO Media's undertaking further stated that:

MediaWorks' 'confidential information' is information that is not in the public domain and is not information that is already known to GO Media in its

capacity as a business that competes with MediaWorks and is information that is genuinely confidential and in which MediaWorks has a proprietary interest.

[62] Clause 2 of GO Media's undertaking stated:

GO Media has taken and will take going forward, all reasonable steps to prevent confidential information of MediaWorks being used to divulge any third party, including GO Media, by Mr Chun.

*Applicant's evidence in support of the injunction application is inadequate*

[63] The Applicant has had ample opportunity to provide Mr Chun, GO Media and the Authority with specific and detailed evidence to support its claim that it has a legitimate proprietary interest, which is capable of protection by a post-employment restraint.

[64] Despite multiple requests for that information, and the Authority's expectation that it would be provided in an affidavit in support of the interim injunction application, what has been provided falls short of the evidence that would be required to establish that.

*Inadequacy of evidence provided*

[65] The Applicant made broad assertions that it had a legitimate proprietary interest in protecting its "*client relationships and confidential information*" but it failed to back that up with detailed evidence. It also failed to respond to Mr Chun's evidence that contradicted the assertions Ms Colin had made in her affidavit. Examples of this included:

- (a) Ms Collins in her affidavit claimed that "*Mr Chun was privy to client activity and strategy on the same agency business across our three channels extending into Q1 and Q3*". Mr Chun disputed that he had any information extending past Q1, which had now elapsed.
- (b) Ms Collins did not explain what "*client activity and strategy*" she was referring to or what information Mr Chun was privy to that extended into Q2 and Q3, in the face of him denying that he had any such information.
- (c) Ms Collins claimed that Mr Chun's knowledge of the Applicant's "*commercial information will aid him in competing for current and future business, particularly whilst we have resourcing issues*". She did not explain what that commercial information was, or why it was sufficient to have given rise to a legitimate proprietary interest.

- (d) Ms Collins claimed that Mr Chun was privy to commercially sensitive information around pricing, briefs and strategy for the outdoor, radio and digital channels. However, GO Media only offered outdoor advertising. Ms Collin's did not explain exactly what the alleged commercially sensitive information was or why it was still current, in response to Mr Chun's evidence any information he had was stale, and did not extend past Q1, which had already passed.
- (e) Mr Chun pointed out in his affidavit that he had not had access to any client work-in-progress meetings, or company outdoor sales meetings, which covered strategies, revenue and sales incentives, or companywide meetings since 20 December 2022. The Applicant did not provide evidence to contradict that.
- (f) Ms Collins claimed that Mr Chun's "*knowledge of our current strategies will also give him an unfair competitive advantage in favour of our competitor (and to our detriment)*". However, she does not explain what specific information Mr Chun had or why that would amount to a proprietary interest that could be protected.
- (g) The Applicant did not address Mr Chun's evidence that GO Media used a specific pricing model that used analytics, which meant there was nothing he could have offered GO Media about the Applicant's pricing that would have influenced GO Media's pricing model/analytics.
- (h) Although Ms Collins claimed Mr Chun had been "*working on a number of critical projects*", he denied that. The Applicant did not explain what these projects were or why they would have given rise to a legitimate proprietary interest.
- (i) Ms Collins claimed that Mr Chun was "*privy to highly confidential and commercially sensitive information relating to PHD*" (one of the Applicant's clients). However, she did not explain what that information was or why it was highly confidential or commercially sensitive. Nor did she explain to what extent Mr Chun was privy to it or why it was not stale information.

*Evidence regarding confidential information claim was minimal*

[66] The Applicant's evidence about what confidential information it claimed amounted to a legitimate proprietary interest was minimal. Ms Collins in her affidavit said that Mr Chun had "*a high degree of contact/access to*":

- (a) Total OOH revenue, tracking to target and forecast
- (b) Discounting and trading levels
- (c) Detailed client spend, discounts and contractual agreements
- (d) Specific brief responses, proposals and pricing for Q1 – Q4 activity,
- (e) Commercial growth decisions and strategy.

[67] This information did not appear to be in the nature of trade secrets or be so obviously highly confidential that it required protection akin to that given to trade secrets. There was no explanation of why Mr Chun could simply not isolate this specific information from other information he carried in his head, which was not capable of being the subject of a post-employment restraint.

[68] Ms Collins did not explain why the identified information was confidential, what if anything had been communicated to Mr Chun about the confidential nature of that information, the circumstances in which it had been imparted to him, why at least some of that information could not be obtained directly from clients/customers or why any such information had not become stale.

*Applicant failed to respond to Mr Chun's evidence regarding the confidential information it had identified*

[69] Mr Chun has provided detailed explanations in response to the alleged confidential information Ms Collins identified in her affidavit, which the Applicant failed to respond to. In particular:

- (a) In terms of the “*total OOH revenue, tracking to target and forecast*”, Mr Chun said that the daily or weekly tracking information he had previously had access to was out of date. More than four months had elapsed since his resignation and more than two months had elapsed since his employment ended, but there was no evidence from the Applicant about why that information it believed he had was not outdated by now.
- (b) Mr Chun also pointed out that he was not aware of the total OOH revenue (entire tracking) as that figure included other items that he was not privy to. There was no evidence provided by the Applicant to contradict that.
- (c) In terms of “*discounting and trading levels*”, Mr Chun said all OOH staff, including entry level employees in the OOH team had access to that information,

and it could also presumably be obtained directly from clients/customers, so it was unclear why it was truly confidential.

- (d) In terms of “*detailed client spend, discounts and contractual agreements*”, Mr Chun in his affidavit said he had never seen the contractual arrangements the Applicant had with major agencies, so he did not know what they contained in terms of minimum spend, pricing guides, rebates and the like. He also said that no-one had ever discussed those terms with him and there was no evidence to contradict that.
  - (e) Mr Chun was aware of pricing of the billboards that he had sold to an agency, but the contracts associated with that were relatively transitory and occurred on a campaign by campaign basis. Mr Chun had set discount amounts he (and other entry level staff ) could offer clients. The campaigns he had sold while employed were likely at the end of the campaign cycle. There was no evidence provided by the Applicant that Mr Chun retained information about any campaigns that had not expired.
  - (f) In terms of the “*specific brief responses, proposals, and pricing for Q1-Q4 activity*” Mr Chun therefore said he had no way of knowing (and he had no predictive information available to him) on what the Applicant was planning, selling or pricing in terms of their billboards after the campaign cycles he had worked on had ended. There was no evidence of any active campaigns that Mr Chun had been involved in, that he had retained confidential information for, that had not become stale by the end of Q1 (which had passed).
  - (g) Mr Chun noted that Q1 is now over. He said he had no information on brief responses, proposals or pricing beyond Q1. He was not aware of any strategy or pricing for OOH beyond that which he had sold last year or in Q1 of this year. He said that he had no clue what the Applicant’s proposals and pricings would be for the balance of this year. The Applicant did not provide any evidence to contradict him about that. Nor did the Applicant identify or explain what specific confidential information it claimed Mr Chun had retained that was relevant in Q2-Q4 of this year.
- [70] In terms of the “*commercial growth decisions and strategy*”, Mr Chun repeated what he had said when responding to the allegation that he had confidential

information relating to the specific brief responses, proposals and pricing for the Q1 – Q4 activity. Mr Chun said he had no information about the Applicant's commercial growth decisions and strategy going forward. The Applicant failed to provide evidence contradicting that.

[71] The limited and somewhat generic information provided by Ms Collins in her affidavit was insufficient without further appropriate particularisation to establish a legitimate proprietary interest likely existed, that was capable of being protected by a post-employment restraint.

*Evidence was inadequate to establish a likely proprietary interest over client relationships*

[72] Ms Collins' affidavit evidence about why there were client relationships that should be subject to a post-employment restraint was also minimal and lacked the necessary detail. She said that Mr Chun was privy to "*client activity and strategy*" and listed the clients/agencies he had worked with.

[73] Ms Collins said that Mr Chun was "*a top performer, working on a number of critical projects [ ... ] and he had built up strong client relationships during his tenure.*" Ms Collins noted that Mr Chun in his role had "*significant direct contact with MediaWorks Outdoor's clients*". She did not provide evidence of any particular influence or unique relationship that Mr Chun had with any of the clients he had worked with.

[74] While Mr Chun was responsible for "*establishing and maintaining strong or effective relationships*" with agencies and clients, including OMG, this fact in itself cannot create a legitimate proprietary interest.

[75] There was no evidence to explain why Mr Chun held any particular "*sway*" or influence over any client relationships. Mr Chun's affidavit evidence contradicted that, by explaining in detail what relationships he had and why he did not believe there was a legitimate proprietary interest in them. The Applicant did not respond to his evidence about that.

[76] There was no evidence that Mr Chun had a particular hold over any agency or employee that would likely influence them beyond making normal commercial decisions. There was nothing to suggest that these relationships were not simply transactional, in terms of the agencies and clients accepting the offer that they believed best met their needs at the relevant time.

[77] The fact that Mr Chun had contact and familiarity with customers/clients (and decision makers) was insufficient by itself to create a legitimate proprietary interest. What is needed is some real sway or influence with the client/customers, and there was no evidence of that.

[78] The evidence suggested that clients/customers were drawn to the offer that they believed best met their needs, not that decisions were made based on who the MediaWorks Outdoor employee was who had offered the services.

*Advertisers likely to change their advertising strategies going forward*

[79] Any previous information Mr Chun had was likely to have become stale fast.

[80] Mr Chun said in his affidavit that advertisers and agencies altered their strategies and spend in changing times, which meant that many clients' previous pricing and strategies would likely have changed from last year and Q1. He considered that further changes would be likely for the balance of 2023, given the economic uncertainty that the country was facing.

*Lack of consideration for the restraints*

[81] There is an issue as to whether there was "*consideration*" for the restraints that MediaWorks Outdoor is seeking to enforce. At the time that Mr Chun signed the Letter of Appointment he had already been working for QMS under the same terms and conditions.

[82] There is nothing in the Terms of Employment or the Letter of Employment that suggests that he received consideration for entering into the restraints. Although MediaWorks Outdoor said that he did receive consideration because his salary was increased, the Letter of Appointment expressly linked the salary increase to the fact that he would have to forego the motor vehicle benefit, which it assessed at \$15,000.

[83] The Letter of Appointment was silent about any consideration for the restraints and Ms Collins' affidavit did not set out in detail what, if any, consideration Mr Chun had received. She appeared to believe that his job was the consideration, but given Mr Chun was already employed, such a stance was questionable.

[84] Mr Chun's evidence was that he had not received any consideration for entering into the restraints. However, the Applicant did not provide evidence of actual consideration to contradict Mr Chun's evidence about that. Instead, the Applicant merely asserted there had been consideration, but without adequately explaining what the consideration actually was.

*Inequality of bargaining power*

[85] Mr Chun gave evidence that he felt pressured into signing the restraints, and effectively felt he had no other option. His role had been assimilated into MediaWorks Outdoor and he was told that everyone had to sign the Terms of Employment, which were standard for all MediaWorks Outdoor employees at all levels.

[86] There appears to have been a fundamental inequality of bargaining power in terms of the signing of the Letter of Appointment, because Mr Chun said he feared for his job security if he refused to do so.

*Time elapsed since Mr Chun resigned*

[87] Because Mr Chun resigned on 20 December 2022, the Applicant has had more than four months to secure any legitimate proprietary interests that it believed it may have had. That is a factor that would be assessed when the reasonableness of the current restraints were being determined by the Authority. It was also likely to weigh against the current restraints being seen as reasonable.

*Restraints unlikely to be reasonable*

[88] On the face of it, the six month restraints for non-solicitation and non-dealing appeared to be greater than would be necessary to protect any legitimate proprietary interest that may have existed, given that the non-competition period was stated to be for three months only. This need for a difference in duration of the restraints was not adequately explained by the Applicant.

[89] Even if the Applicant established it had a legitimate proprietary interest, based on the currently available evidence, it was unlikely that it would be able to establish that all of the restraints it wanted to enforce against Mr Chun were reasonable and were no more than was reasonably required to protect its legitimate proprietary interest (assuming that had been established).

[90] The Authority previously examined the same restraints in *O'Brien v Discovery NZ Limited*.<sup>1</sup> The employee in that matter was more senior and held a more responsible position than Mr Chun. In *O'Brien* the non-competition restraint was modified from three months to

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<sup>1</sup> [2022] NZERA 15.

seven weeks and the non-disclosure and non-dealing restraints were reduced from six months to three months. The Applicant did not explain why the Authority in this matter should not also conclude that such restraints were unreasonable, particularly for a lower level employee who had less responsibility.

*Modification of restraints unlikely*

[91] The Applicant should not assume that the Authority would automatically modify an unreasonable, illegal and unenforceable restraint. Based on the currently available evidence, the Authority would be unlikely to modify the restraints in this particular matter, if they were held to be unreasonable.

*Delay*

[92] Mr Chun put the Applicant on notice in his letter of 19 January 2023 that he considered the restraints were unreasonable, illegal and unenforceable. Despite that, MediaWorks Outdoor did not lodge its Statement of Problem or application for an interim injunction until 22 March 2023, more than eight weeks later. That delay counts against it.

*Garden leave*

[93] The Applicant decided not to put Mr Chun on garden leave. If it had done so, then he would have been out of the workplace for two months before his employment with the Applicant had ended.

*Mr Chun's personal circumstances*

[94] Mr Chun is in his ninth week of work for GO Media. He is the sole income earner in his family. Mr Chun is financially responsible for a wife and young baby and for paying two mortgages. He needs his income.

[95] The potential harm to Mr Chun and his family of issuing the injunction against him appeared to be greater than the potential harm to the Applicant of not issuing the injunction.

*Time remaining on the restraints*

[96] The Non-Compete restraint, if enforceable, would expire on 17 May 2023. The other restraints, if enforceable, would expire on 17 August 2012. The Applicant suggested Mr Chun could and should find an alternative employment until 17 August 2023. The Authority

considered that was unrealistic as it would also be very disruptive to Mr Chun, his family, GO Media and its clients.

*Status quo*

[97] The Authority considered there was considerable merit in retaining the status quo, pending its determination of the Applicant's substantive claims.

[98] The Applicant can pursue claims for damages and penalties, if it was able to establish that one or both respondents had engaged in any of the breaches that have been alleged against them. To the extent that the Applicant can prove that the respondents' breaches caused it to suffer loss, then it can claim damages from them.

*Finding – balance of convenience*

[99] The balance of convenience strongly favours the Respondents.

**Where does the overall justice lie?**

[100] At this point the Authority stood back to assess where the overall justice lay, pending its determination of the Applicant's substantive claims. That involved an objective balancing of the rights, obligations and inconveniences involved for all of the parties.

[101] In terms of assessing the merits of this matter, based on the current evidence, the Applicant's claims that it had a legitimate proprietary interest and that the restraints it was seeking to enforce were reasonable, appeared weak. That contrasted with the respondents' claims that the restraints were unreasonable, illegal and unenforceable, which on the face of it appeared strong.

[102] The Authority considered that the Applicant's assertions in relation to the confidential information claims were vague, stated in overly broad terms, and lacked the detail that was required to objectively satisfy the Authority that the Applicant was concerned to protect truly confidential information.

[103] Although the Applicant had referred to commercially sensitive information, it failed to explain what that was, how it knew that Mr Chun had access to it in the face of his denials or why (if he had it) that it was not stale.

[104] The Applicant also failed to point to any client relationships that were of such a special nature or type that would be capable of amounting to a legitimate proprietary interest, that could potentially be protected by a restraint.

[105] The evidence did not establish that Mr Chun had any unique or particular influence over any specific client. The evidence suggested that the client relationships were normal transactional ones. The Applicant has also already had more than four months to have secured these relationships, given Mr Chun resigned on 20 December 2022.

[106] The Applicant elected not to put Mr Chun on garden leave. It also waited for two months after Mr Chun informed it he considered his restraints were illegal and unenforceable to lodge these proceedings.

[107] Mr Chun is subject to an ongoing confidentiality clause. The Applicant also has the benefit of detailed and specific confidentiality undertakings provided by both Respondents. The Applicant could also claim penalties and damages if it proved breaches had occurred.

#### *Finding – overall justice*

[108] The overall justice weighs heavily in favour of maintaining the status quo.

#### **Outcome**

[109] The Authority was not satisfied that the evidential grounds to support a claim for injunctive relief had been made out. Even if they had, the balance of convenience and overall justice weighed strongly in favour of maintaining the status quo, until the substantive claims can be determined.

[110] Accordingly, the Applicant's request for an interim injunction is declined.

#### **What if any costs should be awarded?**

[111] Mr Chun and GO Media as the successful parties are entitled to a contribution towards their actual legal costs.

[112] This matter should be treated as involving a half-day investigation meeting, so the notional starting point for assessing costs is \$2,250. The Authority was not aware of any factors that should result in an adjustment being made to the notional starting tariff.

[113] MediaWorks Outdoor is ordered to pay Mr Chun \$1,125 towards his actual legal costs and GO Media \$1,125 towards its actual legal costs, meaning that the total costs awarded have been shared equally between the two respondents.

**Rachel Larmer**  
**Member of the Employment Relations Authority**