

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 745
3250799

BETWEEN COOKRIGHT FILTERING
 SERVICES LIMITED
 Applicant

AND KEITH HILL
 First Respondent

AND KAYE THOMAS
 Second Respondent

Member of Authority: Antoinette Baker

Representatives: Libby Brown and Megan Inwood counsel for Applicant
 First Respondent, no appearance
 Second Respondent, no appearance

Investigation Meeting: 22 November 2023 by AVL

Submissions received: 20 November 2023 and on the day from Applicant
 20 and 21 November 2023 from First Respondent

Determination: 13 December 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant (Cookright) seeks interim orders restraining the first respondent, its former employee, Mr Keith Hill from:

- a. Working in competition with Cookright;

- b. Carrying out services of the type provided by Cookright for any customers who Cookright has done work for in the past 12 months;
- c. Soliciting or approaching any customer who Cookright has done work for in the past 12 months.

[2] To seek these interim orders, Cookright relies on clauses in Mr Hill's individual employment agreement (IEA) which broadly state that he is not to operate or work for a business carrying out similar services to Cookright for 2 years after his employment ends 'within a radius of 100 km of any Cookright Franchise operation'; and for two years is not to provide or offer similar services to Cookright customers.

[3] Mr Hill denies he has acted in competition, offered or provided similar services to Cookright for his own business but acknowledges actions during his paid out notice period and after his employment ended when he did so as an employee of 'A1 Vat Services' (A1). A1 offers services similar to Cookright in the same area Mr Hill was working in for Cookright being the Nelson, Marlborough, Tasman region. A1 is owned by the second respondent who says in her Statement in Reply that she is Mr Hill's girlfriend, that they started living together in 2022 and that she started her sole trader business, A1, in February 2023 after working for many years as a secretary.

[4] Mr Hill also says the restraining clauses in his IEA are unenforceable, that many Cookright customers have no ongoing contractual obligation with Cookright and can choose to contract with whoever they please; that he was just a low paid commercial cleaner for Cookright; that he was not told about the effect of the restraints before he signed his IEA; and that he did not exchange value for agreeing to comply with the restraints (consideration). Mr Hill says it is unfair that Cookright are trying to prevent him from working in his last few years until retirement in an area that he is comfortable working in.

[5] Cookright also brings a substantive claim against Mr Hill seeking permanent restraining orders, orders for the return of property or compensation for loss, and damages associated with

alleged breaches of duties including breaches of restraining clauses; and against the second respondent for a penalty for aiding Mr Hill's breaches of restrictive clauses in his IEA.

[6] This Determination only deals with the interim orders sought against Mr Hill.

The Authority's Investigation

[7] Cookright lodged a Statement of Problem, an affidavit from Mr McMullen and an undertaking as to damages for the interim application. Mr Hill lodged through his then counsel a Statement in Reply and an affidavit. A phone conference call was held with counsel for Cookright and the then counsel for Mr Hill. I set the interim matter down for a priority hearing by AVL on 22 November 2023 and directed a timetable for any further affidavit evidence and submissions. In the interim I directed the parties to urgent mediation which occurred and was unsuccessful.

[8] After the phone conference, Mr Hill instructed new counsel and Cookright amended its Statement of Problem adding a second respondent, Ms Kaye Thomas on the basis it alleged that she aided Mr Hill's noncompliance with his restraint obligations. Ms Thomas provided a written email reply which I have treated at this stage as her Statement in Reply. Cookright did not seek to involve her in the interim proceedings. She remains a party to the substantive matter.

[9] Cookright lodged further affidavit evidence and submissions according to the timetable set at the phone conference. Mr Hill did not file further affidavit evidence.

[10] On 10 November 2023 Mr Hill's second counsel sought an extension of time to provide an Amended Statement in Reply based on Mr Hill instructing an unidentified 'senior counsel' the following week. Nothing further was communicated for or by Mr Hill to the Authority during the following week.

[11] Mr Hill emailed the Authority on the evening of Sunday 19 November 2023. This was received by the Authority on the morning of Monday 20 November 2023. Mr Hill confirmed

he was no longer represented, that he would not be filing any further affidavit evidence, that he could not afford representation and that he was under 'stress' from the 'accusations' made by Cookright. He said he could not attend the scheduled interim investigation meeting on 22 November 2023 because he did not have a computer and because he did not want to face Mr McMullen due to the way he felt he was accusing him, and this was causing him stress.

[12] I directed a response be sent to Mr Hill to say that the interim investigation meeting would proceed because Mr Hill could appear by phone and that facing the other party would not occur at the interim stage. I strongly urged Mr Hill to provide a phone number so that he could participate in the interim investigation meeting to enable me to assist him to understand the process and explain what was required of him. I explained that the process did not involve the testing of evidence.

[13] Mr Hill emailed a response to the Authority saying that he did not intend to attend the interim investigation meeting on 22 November 2023. He repeated the same reasons. He specifically did not seek an adjournment.

[14] I decided, as communicated to the parties on the morning of the scheduled investigation meeting, that the meeting would continue. This was because it had been given priority and because I considered that for this interim stage I had statements and affidavits from both parties from when Mr Hill was represented by counsel.

[15] On the above basis I continued with the interim investigation meeting, heard submissions from Cookright's counsel based on the written submissions already provided to Mr Hill and the Authority, and asked clarifying questions and reserved my determination.

[16] In determining this matter I have received and consider where relevant the affidavit evidence of Mr McMullen, Mr Curtis Floyd and Mr Grant Hill of Cookright, and Mr Hill. I consider the parties initiating and responding documents and the parties' submissions. For the latter I have treated Mr Hill's two emails to the Authority prior to the interim investigation meeting as his submissions where relevant. I have also referred to Ms Thomas's email content

to clarify her relationship to Mr Hill, her stated ownership of A1, and the two potential surnames she may be known by.

[17] Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested. In applying the relevant tests for interim orders, the Authority is not required to resolve any disputes.

What are the relevant facts that gave rise to the problem?

[18] Cookright operates a franchisee business providing services to customers in various hospitality outlets and catering facilities. The services can be summarised as cooking oil filtering, collection of waste oil, cleaning of frying vats and the overheads, and general kitchen cleaning. It also sells recycled and new cooking oil, fats and kitchen consumable products.

[19] Mr Stephen McMullen is a co-director and minority shareholder of Cookright¹ and is based in Napier.

Terms and conditions of Mr Hill's employment

[20] Mr Hill signed an individual employment agreement (IEA) on 18 May 2017 to work for Cookright as 'Nelson Area Manager/Operator'. Mr McMullen's affidavit attaches his email to Mr Hill on 20 April 2017 attaching the draft IEA and including the words, 'please review and question if necessary.' Mr Hill signed the IEA and above his signature over three weeks later on the 18 May 2017. The following declaration was above his signature:

I, Keith Hill, declare that I have read and understand the conditions of employment detailed above and accept them fully. I have been advised of the right to seek independent advice in relation to this agreement, and have been allowed reasonable time to do so.

¹ <https://app.companiesoffice.govt.nz/companies/app/ui/pages/companies/868427>

[21] Mr Hill's IEA included he would be provided with a work phone. Mr McMullen's affidavit evidence includes that he agreed that Mr Hill would continue to use his own phone but be reimbursed for this. Mr McMullen attaches statements showing payments to Mr Hill for 'ph reimbursement.'

[22] Mr Hill's job description in the IEA included that his role was in the 'Nelson area' and the location of work the Cookright's Richmond base in Nelson and 'within the Nelson Franchise Area location to which [the employee] may be directed from time to time by [Cookright].' Mr Hill also worked in the Marlborough area and Tasman area consistent with the list of 'hoods and flues' he had booked for June 2023² [during his notice period] which included customers in Motueka, Blenheim, Renwick (referred to as 'a new business'), Havelock, Rai Valley and Richmond. However, Mr Hill's affidavit evidence includes that 'initially Cookright was only operating in Nelson and Motueka'. Over the years Cookright's business expanded into Marlborough and Takaka.³ It is unclear until the evidence is tested whether Mr Hill means that he initially worked in the smaller area when he worked prior to 2017 as an on call commercial cleaner for Cookright.

[23] Mr Hill's job description included day to day servicing of Cookright customers following a servicing schedule or based on individual customer requirements. The servicing included but was 'not limited' to 'vat cleaning, oil filtering, delivery of cooking oils, collection of waste oil, deposit of waste oil to storage, collection of overhead filters.'⁴ Filters were sometimes removed and taken away to be cleaning leaving the customer with a temporary swap out set until the return of their cleaned filters.

[24] The IEA does not include anything about managing employees, but Mr Hill refers to himself in his written resignation as 'Area manager for Cookright Tasman/Nelson/Marlborough.' In an email close to the time Mr Hill resigned he refers to being 'effectively responsible' for interviewing and appointing new staff and that his role included

² Email Keith Hill to Craig McMullen dated 2 June 2023 attached at annexure 4 of Affidavit of Stephen Craig McMullen, 13 September 2023.

³ Statement in reply at paragraph 2.4.

⁴ IEA, 'Schedule 2 - Job Description'

being part of ‘important decision making.’⁵ Based on what is before me there was at least one other person was working in the Nelson area for Cookright with Mr Hill. This was Mr Hill’s nephew, Mr Grant Hill, who then replaced Mr Hill when he left his employment. A replacement was then employed to replace Mr Grant Hill. These replacement roles started before Mr Hill had his last day working on 30 June 2023.

[25] Mr Hill was employed on a base salary of \$40,000.00 per year reporting directly to Mr McMullen and this had increased to \$50,000.00 by the end of the employment. His IEA⁶ also included two further ways he could be paid by Cookright for his work:

- a. 50% of gross profit (less the cost of cleaning oil) for ‘any new business gained’
- b. 25% of ‘gross job profit’ (calculated less various job costs) on a ‘specialised kitchen cleaning’ ‘project’. This is also referenced as a ‘bonus’.

[26] Cookright’s year-end information for 2023 recorded just under \$10,000.00 in bonuses paid to Mr Hill for the above new customers or up selling.

Restrictive covenants in the IEA

[27] The following are the relevant clauses in the IEA that relate to post employment obligations (bold references are as they appear in the IEA copy provided):

11.3 Ongoing Confidentiality

The Employee shall during the continuance of employment and after termination (Howsoever occasioned):

- 11.3.1 Not disclose any confidential information to any person other than a person authorised by the Employer to receive it;
- 11.3.2 Use his/her best endeavours to prevent the disclosure or publication of any confidential information;
- 11.3.3 Not use any confidential information to his/her own benefit as distinct from the benefit of the Employer;

⁵ Email Keith Hill to Craig McMullen dated 2 June 2023 attached at annexure 4 of Affidavit of Stephen Craig McMullen, 13 September 2023.

⁶ Above at ‘Schedule 3 - Commission’

11.3.4 Not use or attempt to use any confidential information in any manner which may injure or cause loss whether directly or indirectly to the Employer;

...

11.3.6 The provisions of this clause shall cease to apply to information that enters the public domain other than that directly or indirectly entered through the failure of the Employee to observe its terms.

15 Restraint of trade

15.1 Introduction

The Employee acknowledges that the terms of this agreement and the Employer's remuneration provide consideration for entering into the restraints referred to below. The parties confirm that they consider the restraints to be reasonable in all the circumstances and necessary to protect the Employer's proprietary interests.

15.2 Non-Competition

The Employee agrees that for a period of **two years** following the termination of their employment for whatever reason, they shall not in any capacity whatsoever, whether personally, or as an employee, consultant or agent for any other entity or employer, directly or indirectly carry on, be connected, engaged or interested in any business which completes or may compete directly with the Employer within a radius of **100km of any Cookright Franchise operation**.

15.3 Non-Solicitation

To protect the Employer's interests, the Employee agrees that during employment and for a period of **two years** following the termination of employment (for whatever reason), the Employee shall not, in any capacity whatsoever, whether personally, or as an employee, consultant or agent for any other entity or employer, directly or indirectly:

15.3.1 canvass, solicit or accept work for or carry out any work of the same nature for any person or entity who is an existing or identifiable client or customer or supplier of the Employer; or

15.3.2 solicit, approach or endeavour to entice away or discourage from being employed, contracted or otherwise by the Employer any person or entity who is an employee, contractor or agent or advisor of the Employer; ...

Mr Hill's Resignation

[29] Mr Hill resigned in writing on 24 April 2023 and gave notice until 29 July 2023, more than the required 60 days in his IEA. The extended notice period was agreed to by Cookright.

The notice period

[30] After Ms Hill resigned Mr McMullan says Cookright was told by an existing customer (Business H) that Mr Hill had approached the business offering his services doing the same thing he did for Cookright. Mr McMullan addressed Cookright's concerns with Mr Hill in

emails and later in an AVL meeting that Ms Thomas also attended. Cookright reiterated and provided Mr Hill with copies of the restrictive clauses from his IEA. Mr Hill by this time said he had advice. He denied he had visited the customer during his notice period. He accepts he probably came across as defiant about the clauses being unenforceable.

[31] On [Friday] 23 June 2023 Mr McMullen emailed Mr Hill a letter referring to ‘our conversations’ [about the restrictive clauses] and said that while Cookright had accepted the extended resignation period it would from that time pay Mr Hill in lieu of notice relying on the IEA notice provisions to do this⁷. Mr Hill did not work again from 30 June 2023 but was paid up until 29 July 2023 (the original end date of the extended notice period Mr Hill gave).

[32] On 27 June 2023 Cookright emailed customers introducing Mr Grant Hill as the new manager for Cookright effective from 1 July 2023 giving all his contact details.

[33] Mr McMullen became concerned about missing Cookright equipment (overhead filters, wheelie bins, a pump and waste oil) just before or after Mr Hill left his employment, Mr Hill refutes these claims based on various reasons and the testing of this evidence must wait until the substantive matter is heard.

Mr Hill and A1

[34] Mr Hill’s affidavit evidence includes an individual employment agreement signed by him and dated 1 August 2023 to work in the position of ‘Casual/on call commercial cleaner’ with an employer stated as ‘A1 Vat Services’ (A1 IEA). The duties stated are ‘clean vats and collect waste oil from them, hood and flue extraction systems.’ No employer party has signed the A1 IEA. Payslips for A1 for Mr Hill show four consecutive weeks paid between 31 July 2023 to 24 September 2023 for hours of 40, 20, 20 and 15 per week respectively. The pay rate shows \$25.00 gross per hour with a top up for holiday pay included.

⁷ IEA, clause 17.2 and Schedule 1 ‘Terms’

[35] Mr Hill's affidavit includes that he commenced working for A1 after 'Kaye Deer' approached him. It has since been clarified that Kaye Deer is the name that Kaye Thomas intends to change to and, as already referred to, that she is Ms Hill's girlfriend.

Customers of Cookright

[36] Mr McMullen's affidavit evidence is that 'within a month of Mr Hill's departure,' on 30 June 2023, seven of Cookright's customers notified that they no longer required Cookright's services. These are now set out briefly in the same order they appear in Mr McMullen's affidavit dated 13 September at paragraph 26(b).

Business A

[37] Business A emailed Cookright on 18 July 2023 that it no longer required its services because they decided to do their vat cleaning themselves.

[38] Mr Hill says he is a regular customer of Business A (a café), that he was not involved in its decision to stop using Cookright, that he told the business in 'general terms' that he was leaving Cookright, that he understood they were trying to cut down on costs and that the business was 'dissatisfied with the way Cookright had handled an issue that had arisen with their fryers.'

Business B

[39] On 19 July 2023 Business B told Cookright it had sold its business and the new owner would clean the vats themselves. It thanked Cookright for their services 'over the past 2 years'. Mr McMullen's affidavit evidence is that he photographed Mr Hill appearing to service the fryers at this business on 9 August 2023.

[40] Mr Hill's affidavit evidence is that he worked at Business B on 9 August 2023 to 'clean and replace the oil in the vat' but 'was not involved in any way with [Business B] changing

from Cookright to A1 Vat services’ and that they ‘stopped using Cookright because the business was being sold and the new owner was going to do the cleaning itself’ but when ‘the sale did not go through ... this business needed someone to clean the vats.’

Business C

[41] Mr McMullen’s affidavit is that Business C (in response to Cookright’s emailed reminder of two overdue invoices) gave notice by email on 20 July 2023 that they wanted to close their ‘account with Cookright’ later clarifying they were doing renovations and not using the fryers. Mr McMullen’s affidavit includes that he visited Business C on 8 August 2023 and the fryers were in use.

[42] Mr Hill’s affidavit evidence is that he ‘played no role in this business’s decision to stop using Cookright and that when he worked for Cookright, Business C’s custom was limited.

Businesses D

[43] This business comprises of two outlets on the same institutional site. On 10 August 2023 Mr McMullen inquired after they cancelled their services. The business said Mr Hill had approached them offering his services, one outlet saying they he offered the same work for ‘\$5 lower’ and that this was a primary reason to change.

[44] Mr Hills’ affidavit evidence is that ‘at the end of July’ he gave the A1 business card to both outlets at Business D but did not discuss anything about price.

Business E

[45] Mr McMullen’s affidavit evidence is that on 10 August 2023 he was told by the chef at this business that Mr Hill approached them and had started servicing their kitchens under the business A1, that Mr McMullen observed two dockets for two vat cleans by A1 for this business while visiting Business E, and that the chef there gave him the A1 business card.

[46] Mr Hill's affidavit evidence is that he was contacted by the chef at Business E in late July 2023, that he explained Mr Grant Hill was taking over and that the chef asked him what he was doing now and in response Mr Hill explained he worked casually for A1. He says that he dropped A1's business card soon after this and then cleaned the vats for this business at their request on 4 August 2023. Mr Hill says he was sent to do the job by A1.

Business F

[47] Mr McMullen's affidavit evidence is that on 9 August 2023 he observed Mr Hill going to this business with cleaning equipment and concluded he was cleaning their fryers.

[48] Mr Hill's affidavit evidence is that he was asked to clean the vats at Business F by A1 and had nothing to do with Business F deciding to change from Cookright. Mr Hill says he understood this business changed to A1 because it was unhappy with the service it got from Cookright.

Business G

[49] On the 4 August 2023 Mr McMullen says he and Mr Grant Hill visited Business G because Mr Grant Hill had not received any response from the new owner after they had asked Cookright to arrange to provide services to them. Mr McMullen says he recognised Cookright filters installed at the business. This is untested evidence and refuted by Mr Hill. However, Mr Hill says he understands that the new owner chose to engage A1 services from when they took over the business on 1 August 2023 and he had nothing to do with this decision.

[50] Mr McMullen's affidavit evidence also includes that in August 2023 the following two businesses confirmed to him that Mr Hill had approached them about changing from Cookright but they did not make that change.

Business H

[51] Business H is referred to above at [30]. It is the business that Mr McMullen says initially alerted him in June 2023 about Mr Hill offering it his services. As already noted, Mr Hill denies he visited Business H during his notice period and this evidence remains to be tested.

[52] Mr McMullen says that on 8 August 2023 the manager of Business H told him that Mr Hill approached Business H in early August 2023 offering to do the services that Cookright did but for \$5 cheaper saying that he was now running his ‘own company’. Mr Hill denies being involved in any such discussion with Business H but acknowledges he dropped of the A1 card when he visited in August 2023 and accepts (as is Mr McMullen’s affidavit evidence) that the manager asked him if he was ‘poaching’ Cookright’s customers.

Business I

[53] Mr McMullen’s affidavit evidence is that on 8 August 2023 Business I confirmed to him that Mr Hill approached them offering services in place of Cookright. Mr Hill’s affidavit evidence is that he visited this business ‘for a beer on Friday 4 August 2023’, that the owner approached him and in ‘general conversation’ asked about whether he had changed jobs. Mr Hill says he confirmed he worked for A1, and the owner could give A1 a call.

Interim relief

[54] When dealing with an application for interim relief the Authority applies legal tests. This has been summarised by the Court of Appeal⁸ as follows:

The applicant must first establish that there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous. Next the balance of convenience must be considered. This requires consideration of the impact on the

⁸ *NZ Tax Refunds Ltd v Brook Homes Ltd* [2013] NZCA 90 at [12] - [13].

parties of the granting of, and the refusal to grant, an order finally an assessment of the overall justice if the position is required as a check.

[55] More recently the Employment Court⁹ has explained the difference as ‘fundamental’ between the approach to interim as opposed to permanent orders restricting someone from doing something:

[An interim injunction] has described an interim measure as a ‘holding remedy’ to address a present position until the merits of the case can be fully adjudicated; or as a process to ‘hold the ring’ pending final determination of the merits or other disposal of the dispute.

[56] Accordingly, the following issues are necessary for me to determine for the interim orders sought:

- a. Is there an arguable case for enforcement of the restraint and non-solicitation clauses?
- b. If so, where does the balance of convenience lie?
- c. Is there an adequate remedy other than the interim relief sought, such as damages?
- d. Overall, where does the justice of the case lie?

Is there an arguable case for enforcement of the restraint and non-solicitation clauses?

[57] Before considering each of these restrictions I will deal with two matters raised by Mr Hill in his affidavit evidence and Statement in Reply.

[58] Firstly, Mr Hill claims not to have paid an exchange of value for the restrictions when he signed his IEA in 2017 suggesting as I understand it that the clauses then cannot be enforceable for this reason. The Court of Appeal has held that an additional payment is not required as distinct from a later variation seeking to obtain agreement for restraints.¹⁰ It is arguable subject to any substantive arguments raised by Mr Hill that Cookright can rely on this here.

⁹ *Savage v Wai Shing Ltd* [2019] NZEmpC 141 at [32].

¹⁰ *Fuel Espresso Ltd v Hsieh* [2007]ERNZ 60 at [16] to [20].

[59] Mr Hill also claims not to have been alerted to the clauses in his IEA in 2017 before he signed the document. I take it he is saying that the clauses would be unenforceable for this reason. Cookright submits that Mr Hill had sufficient time (about one month) before he signed the IEA as a manager/operator and that when he did sign he did so below a declaration that he had been given the opportunity to seek advice. I find it is at least arguable that Cookright has a case to defend this position.

Restraint of trade

[60] Restraint of trade clauses are only enforceable if the party wanting to enforce them can show they are necessary to protect a legitimate proprietary interest that is no wider than is necessary for that purpose. This usually includes length of time and area. They also need to show that the restraint clause in the IEA was reasonable at the time it was agreed to, and that it was not against the public interest. The latter is usually interpreted as ‘anticompetitive’ or not preventing people from legitimately working for a living.¹¹ Cases have also considered whether there should be consideration (value in exchange) for agreeing to be restrained from competing post-employment.

Proprietary interest

[61] While Mr Hill says he was only a low paid commercial cleaner for Cookright, Cookright says that he was the person in the area that customers were familiar with and knew. His IEA entered in 2017 carries a manager title. Mr Hill’s own emails to Mr McMullen just before he

¹¹ *Air New Zealand v Kerr* [2013] NZEmpC 153 at [23]; *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97 at [41].

resigned reflect that he considered the job was more than just a cleaning job. Mr Hill has further stated the following in his letter to the Authority dated 21 November 2023:

[He has] 35 plus years in the hospitality industry as manager of hotels, pubs, restaurants and even owned a café ...’.

Mr Hill further states that:

Due to my knowledge, personality and marketing skills and knowing what the hospitality industry needs I gained a big majority of the customers for Cookright.

[62] The bonus incentives in the IEA reflect more than just the role of a cleaner and I note that Mr Hill earned an extra (approximately) \$10,000.00 gross in bonuses in his final year.

[63] Cookright submits that it is the personal approach and familiarity with the customer base in Mr Hill’s managerial position that is the proprietary interest it seeks to protect with the restraint of trade. It is submitted that it is the customer lists or contacts that Mr Hill inherently knows even if he has deleted them from his personal phone that he used for his work. It is submitted for Cookright that he had the familiarity and knowledge of those customers and could still call on them and have discussions based on that previous familiarity and knowledge.

[64] I accept that Cookright has shown that based on this it has an arguable case that there was a proprietary interest to protect in the form of Mr Hill’s established face to face relationships with Cookright’s customers in the Nelson, Marlborough and Tasman area being the information about those customers’ needs and servicing requirement cycles. Based on the above I find that Cookright has an arguable case that it has a proprietary interest to protect.

Does Cookright have an arguable case that two years is reasonable to protect its proprietary interest?

[65] Counsel for Cookright draw my attention to an Employment Court decision¹² where an employee of a large catering company was a manager of several work site cafeterias for his employer's client. He was found to have breached his obligations including a restraint of trade for 12 months post his employment although the Court did not find the employer had proven contractual loss (exemplary damages were awarded). I find some assistance in that the Court considered that restraint of 12 months in the circumstances of that case to be 'very close to being of excessive duration.'¹³ The employee was a manager who had almost full autonomy with both the client and with suppliers in delivering catering services across several work sites. It is weakly arguable that there is some similarity here with Mr Hill's situation. I say weakly because I have nothing to show me Mr Hill was dealing with suppliers or that he had access to the sort of managerial business information that appeared to be at the heart of that case.

[66] Cookright also submit that I should consider that Mr Hill does not come to this matter with 'clean hands' based on him allegedly deliberately continuing to contact Cookright customers either during his paid notice period or after this. Again, the Employment Court considered this to be an aspect that should be considered if a restraint clause is to be modified.¹⁴ There is no such application before me from Mr Hill and I do not find at this stage this is something I should consider particularly given that the evidence has yet to be tested. For now, I need to consider whether there is an arguable case that the two years as stated in the IEA is reasonable to enforce. Base on what is before me I do not find there is an arguable case for two years. It is arguable that 12 months is sufficiently long enough for Cookright to redress its ability to establish its new area manager with clients who may be due for services within the (at most) yearly cycle of vat servicing and cleaning. I find this weakly arguable as to reasonableness of time frame because the clients also include takeaways and cafes. It is not a stretch to conclude that those customers would be looking for services at much shorter intervals.

¹² *Spotless Services (NZ) Ltd v Walters* [2001] ERNZ 236.

¹³ Above at [59].

¹⁴ Above at note 12.

Reasonableness of restraint on Mr Hill as an employee of a competing business

[67] I understand Mr Hill to be saying that while he acknowledges completing work for ‘new’ clients of A1 (who were previous clients of Cookright), the restraint of trade does not apply to him as an employee. A strict reading of the restraint of trade clause shows that it is broad enough to cover an employee of a competing business. However, it is strongly arguable that Mr Hill has more than an employment relationship with the second respondent which leans towards a time frame that could be reasonably longer than say if it related to an employee with little control or influence over the business he or she subsequently worked for and who were simply doing as they were told. That sort of time frame may arguably be something like six months which by now has almost expired.

[68] What is also before me is Mr Hill’s open acknowledgement that he personally continued to approach and or offer services and or, for some, perform services for Cookright customers beyond the last working day of his employment. Cookright submits that this shows a deliberateness by Mr Hill given Cookright had put Mr Hill on notice that it intended to seek to enforce the restraints in his IEA and that Cookright took them seriously. Mr Hill indicated that had advice by this time. I find some merit in the submission that there was arguably deliberateness in Mr Hill’s approach rather than inadvertence and that this arguably lends towards a question about his interest in A1 and the control he has over that business utilising the knowledge and experience of the Customer base from his role with Cookright in the region.

[69] Based on the above I find this further supports that an arguable case that 12 months may be a reasonable time post-employment for Cookright to re-establish its proprietary interest.

Does Cookright have an arguable case that the area is reasonable to protect its proprietary interest?

[70] The restraint of trade states that the restraint area is ‘100km radius of any Cookright franchise’. It was submitted for Cookright that this is the ‘Nelson, Marlborough and Tasman’

area. Mr Hill does not appear to dispute this was the area he worked in for Cookright in his role as area manager/ operator. However, when evidence is tested it may be necessary to identify what falls within the '100km radius' of the Richmond, Nelson based franchise that Cookright operates as well as the issue referred to above about whether this was the area Mr Hill originally started working in when the restraint of trade was entered into.

[71] It is difficult to see how it could be argued that the proprietary interest being protected, relating as it does to Mr Hill localised knowledge of the customer base in the Nelson, Marlborough and Tasman region could apply to any other Cookright franchise in New Zealand, as drafted in the IEA.

[72] Based on considering the above I find it arguable that the restraint of trade is reasonable to be enforced in the area that is within a radius of 100 km of the Richmond, Nelson Cookright franchise base to be read as the address included in the IEA.

Does Cookright have an arguable case to enforce the two years for non-solicitation?

[73] I find for the same reasons as above that Cookright has an arguable case that the non-solicitation clauses in the IEA would be reasonable to enforce to protect the proprietary interest but only to a period of 12 months post-employment. This is based on the at most cyclic nature of the cleaning services provided to returning and what is submitted are loyal customers.

[74] Cookright further submits that interim orders could include a definition of existing customers as being those Mr Hill worked with in the 12 months preceding the end of his employment. Given the cyclic nature that some returning customers may well return within at most 12 months after the employment ended this seems difficult to argue as a definition. However, at this interim stage and given Cookright cannot prevent Mr Hill indefinitely working in the same area I find it arguable that such an order should be made but only for those customers existing six months before Mr Hill finished his employment. This is in part because Mr Hill has now left his employment almost six months ago and the time for Cookright to re establish customer contacts with Mr Hill's replacement could only reasonably be within the 12 months

cycle of services being offered. If Cookright had ongoing contracts with customers that have been broken rather than returning 'loyal' customers (as is Mr Hill's submission) I do not have that information in front of me.

[75] Based on the above I find it arguable that Cookright could show that it is reasonable that Mr Hill be restrained according to the non-solicitation clauses in his IEA for 12 months after the end of his employment and that existing customers be interpreted as those who were customers up to six months prior to termination.

Where does the balance of convenience lie?

[76] It is submitted for Cookright that an assessment of potential injustice if interim orders are not made favours Cookright. It says that there is considerable evidence before the Authority to show that if interim orders are not made there is a risk that Mr Hill will continue to breach the restraints that it says it will show are reasonable in the substantive matter. I have found these are arguable subject to time frame (one year) and existing customers (six months prior to the end of employment).

[77] Cookright puts forward figures in support of the losses it continues to incur from the lost customers referred to above. Added to this, Cookright submits that the evolution of understanding about the second respondent's role including the discovery that she was the self-stated owner of A1 and Mr Hill's girlfriend (apparently different from Mr Hill's Statement in Reply referring to her simply as 'Kaye Deer') means that Cookright should be favoured for the interim orders. In short it says it cannot trust Mr Hill not to continue to take away its customers from it either by breaching the non-solicitation or the restraint of trade.

[78] Mr Hill on the other hand appears to have formed the view that he is potentially being prevented from ever working again in the hospitality industry or anywhere.

[79] Mr Hill's position in his email on 20 November 2023 is:

[Mr McMullen] in every way has taken away my human rights to earn a living in whatever field I wish to enter into by his and grant Hills behaviour and actions. I only have three years of working life left before I can retire fully and they have taken away my rights to even earn a part time wage to survive in a field I am comfortable in. No person or organization has the right to dictate and take away the human right of any individual living in New Zealand. The restraint of trade is a humiliating thing to enforce in any contract.

[80] Mr Hill includes in his email dated 21 November 2023 that he believes Cookright's claims are:

...taking away my right to work for the next 3 years before I can retire as I'm 62 years old.

[81] I accept that there is something to consider here about Mr Hill saying he is close to retirement, that this may be a job he is familiar with, and that he should not be stopped from earning a living. However, he has not assisted me with what the impact may be on him as the causal on call employee (possibly former) that he says he now is for A1 or why he has formed the view that he is being prevented from working overall in hospitality or anywhere and for '3 years' when this is not the extent of the restrictions being argued. This may well have quite an impact if Mr Hill had set up his own business in competition and made an outlay to do this to give himself a form of part time pre-retirement income, but he is clear that he has not done this and is only working on a casual on call basis for A1. This arguably supports the submission from Cookright that the restriction only applies to a discreet area of work in the hostility industry, not limiting the options for casual part time work for Mr Hill as much as he puts forward.

[82] I find therefore that the balance of convenience weighs towards Cookright given it has shown potential financial losses and an arguably understandable concern that Mr Hill will arguably continue to use his knowledge of the Cookright customer base to establish a customer base.

[83] Cookright also says that in the light of Mr Hill appearing not to accept there is a problem with him taking its customers based on his at hand knowledge and familiarity with them, damages only may not be sufficient to satisfy its losses should the matter arguably fall to be decided in its favour in the substantive investigation. I accept there is some merit in this submission.

[84] Based on the above I find the balance of convenience favours Cookright.

Where does the overall justice lie?

[85] Standing back from the above, I consider that the overall justice favours Cookright in making the interim orders that it has mostly sought. While I note that Mr Hill feels strongly about a restriction on his ability to work his statements appear inconsistent with the reality of the situation that the restrictions relate to just the role he played for Cookright and not the wider hospitality industry that he states he has many years of experience in. I also measure the overall justice by reducing the interim orders sought in relation to the length of time and additional breadth of customer base based on a reasonable time frame for Cookright to re-establish its customer base with a replacement manager. Overall, this focuses the justice on what is a time limited proprietary interest to protect and legitimate commercial competition.

Orders

[86] Based on the signed undertaking as to damages and pending further orders of the Authority including any outcome in the substantive matter, I order that:

- a. Until 30 June 2024, Keith Hill is not to directly or indirectly carry on or be interested in any capacity, including employment, in any business that is similar to Cookright's business in the area that is within 100 kilometres from the Richmond, Nelson Cookright base.

- b. Until 30 June 2024, Keith Hill is not to carry out services in any capacity, including employment, that are of the type provided by Cookright for any customers in the Nelson, Marlborough, and Tasman region who Mr Hill has engaged with for Cookright in the 6 months before the end of his employment.

- c. Until 30 June 2024, Keith Hill is not to offer services in any capacity, including employment, that are of the type provided by Cookright for any customers in the Nelson, Marlborough, and Tasman region who he has engaged with for Cookright in the 6 months before the end of his employment.

Next steps

[87] The Authority will now convene a phone conference call with the parties (including the second respondent, Ms Thomas) or their named representatives to confirm issues and schedule dates for the provision of evidence and a face-to-face investigation meeting in Nelson to hear the substantive matter.

Costs

[88] Costs are reserved until the substantive matter is resolved.

Antoinette Baker
Member of the Employment Relations Authority