

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 172
3279339

BETWEEN	INTERGROUP LIMITED Applicant
AND	TROY ANDERSEN First Respondent
AND	PIPE VISION NZ LIMITED Second Respondent

Member of Authority:	Peter van Keulen
Representatives:	Bret Gustafson and Kathryn Lydiard, counsel for the Applicant Glenn Finnigan, counsel for the First and Second Respondents
Investigation Meeting:	18 March 2024 by audio-visual link
Submissions Received:	15 and 18 March 2024 from the Applicant 15 and 18 March 2024 from the First and Second Respondent
Date of Determination:	25 March 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Intergroup Limited claims that a former employee, Troy Andersen, is breaching the restraint of trade provisions in his employment agreement by working for Pipe Vision NZ Limited and by soliciting employees and customers of Intergroup.

[2] Intergroup also claims that Pipe Vision is:

- (a) Inducing Mr Andersen to breach the restraint of trade provisions in his employment agreement by employing him and causing him to solicit Intergroup employees and customers; and/or
- (b) Interfering with the contractual relations between Intergroup and Mr Andersen by employing him and causing him to solicit Intergroup employees and customers.

[3] Intergroup has lodged a statement of problem in the Authority against both Mr Andersen and Pipe Vision seeking penalties and/or damages for the alleged breach of the restraint of trade provisions by Mr Andersen and the alleged inducement and/or interference by Pipe Vision.

[4] In addition to the remedies sought for the substantive claims, Intergroup also seeks an interim injunction in the following terms:

Until further order of the [Authority], Pipe Vision NZ Limited will instruct its employee Troy Andersen not to have any involvement in Pipe Vision NZ Limited's Cromwell operation at all including but not limited to:

- a. Not approaching InterGroup Limited's customers;
- b. Not approaching InterGroup Limited's employees and contractors about potentially working in Pipe Vision NZ Limited's business;
- c. Not supplying any information obtained as an employee of InterGroup Limited to any party.

[5] Mr Andersen opposes the interim injunction sought on the basis that the restraint of trade provisions in his employment agreement are unreasonable and unenforceable, he also denies soliciting employees or customers of Intergroup.

[6] Pipe Vision also opposes the interim injunction sought on the basis that it has not induced Mr Andersen to breach his employment agreement, nor has it interfered with the contractual relationship he has with InterGroup.

[7] This determination deals with the application for an interim injunction.

The Authority's investigation

[8] I investigated Intergroup's application for an interim injunction on 18 March 2024. As usual for an interim application, I did not hear any oral evidence as part of my investigation. The evidence I considered was presented through sworn affidavits from:

- (a) Dean McLaughlin, Head of Infrastructure for Intergroup.
- (b) Jonathan Chaplin, Operations Service Lead in Central Otago for Intergroup.
- (c) Bryan Laxa, Driver/Operator for Intergroup.
- (d) Mr Andersen.
- (e) Cameron Muir, Operations Manager for Pipe Vision.
- (f) Peter Knight, Managing Director for Pipe Vision.

[9] In my Investigation Meeting I heard submissions from counsel.

[10] As permitted by s174E of the Employment Relations Act 2000, my determination has not recorded all of the evidence and submissions given but has stated relevant findings of fact and law that I am able to make at this interim stage so that I can express a conclusion on whether the interim orders sought should be granted or declined.

Background

InterGroup and Pipe Vision

[11] InterGroup is an infrastructure and industrial services specialist. The work undertaken by InterGroup includes pipeline inspection, maintenance and repair and hydro-excavation. InterGroup also provides other services such as liquid waste management, specialist industrial and marine management services, ultra high-pressure water jetting and minor civil services such as ripping up road, surveying and reinstatement.

[12] InterGroup operates throughout New Zealand, with 16 branch offices, including in Cromwell. InterGroup also has an “off-shore division” but the extent of this division was not canvassed in the affidavit evidence.

[13] Pipe Vision is a CCTV pipe cleaning and hydro-excavation company. Pipe Vision services sites throughout New Zealand.

[14] InterGroup and Pipe Vision are competitors in the pipe cleaning and hydro-excavation industry throughout New Zealand.

Mr Andersen’s employment with InterGroup

[15] Mr Andersen was employed by InterGroup to work from its Cromwell branch office. Mr Andersen signed an employment agreement with InterGroup on 2 October 2021 (the IEA) and he commenced work with InterGroup as Driver/Operator on 11 October 2021.

[16] The IEA included the following restraint of trade provisions in a schedule of individual terms:

You will not, except with the prior consent of InterGroup, whether on your own account or as a consultant to or a partner, agent, employee, shareholder, member, or officer or any other person, or in any other way, at any time:

- either during or within 12 months after the date of termination of this agreement, be directly or indirectly interested, engaged or concerned in, or assist financially, any business the same as or similar to intergroup’s business within 100 kms of any place of business of InterGroup;
- at any time after the date of termination of this agreement, solicit or endeavour to solicit away from InterGroup any of its employees, officers, suppliers of goods or services, or customers, whether or not a breach of any contract would result.

You acknowledge that the remuneration contained in your remuneration statement as consideration for agreeing to this.

You agree, that if you are offered employment with another business in competition with InterGroup, or with a client, customer or supplier of InterGroup, that you will notify us immediately.

[17] The first part of this restraint of trade provision prevents Mr Andersen from being a part of any business that competes with InterGroup for a period of 12 months after the termination of his employment (the non-compete restraint).

[18] The second part of this restraint of trade provision prevents Mr Andersen from soliciting or trying to solicit any of InterGroup's employees, officers, suppliers or customers, away from it for any period of time (the non-solicitation restraint).

[19] Whilst Mr Andersen's role was described in the IEA rather generically as Driver/Operator, he primarily drove and operated vacuum/excavation trucks and drain cleaning trucks and associated units. Mr Andersen has approximately 15 years' experience operating these types of vehicles. This experience includes work with other organisations including Pipe Vision.

[20] In his role, Mr Andersen reported to Mr Chaplin, the Cromwell branch manager.

[21] These two aspects of Mr Andersen's role are not in dispute. There is however a large amount of dispute between Mr Andersen and InterGroup as to the status of his role and as a result, his responsibilities; InterGroup stating that Mr Andersen was effectively the second in charge in the Cromwell office and as a result had access to confidential information and was pivotal in establishing and maintaining many customer relationships; Mr Andersen denies this and says he was simply a driver/operator and was never asked to take on any management or 2IC responsibilities.

Mr Andersen's resignation

[22] Mr Andersen says that by early July 2023 he had become very unhappy in his role with InterGroup. As a result, he decided he no longer wanted to be involved with intergroup.

[23] Mr Andersen resigned from InterGroup on 10 July 2023 providing InterGroup with 20 days' notice as required in the IEA. Mr Andersen did not have alternative employment to go to at that point.

Mr Andersen's employment with Pipe Vision

[24] Mr Andersen says that around mid-August 2023 Mr Knight contacted him to ask if he was interested in a role with Pipe Vision setting up a branch for it in the lower South Island.

[25] Mr Andersen had previously worked for Pipe Vision and Mr Knight knew him and knew about his work experience.

[26] Pipe Vision made a formal offer of employment to Mr Andersen on 15 September 2023. Mr Andersen accepted this offer and commenced employment with Pipe Vision on 25 September 2023.

[27] Mr Andersen's role with Pipe Vision is South Island Regional Manager and he is based in Cromwell.

InterGroup says Mr Andersen has solicited InterGroup customers and employees

[28] InterGroup says that within a week of Mr Andersen commencing employment in Cromwell for Pipe Vision Mr Andersen contacted one of InterGroup's major customers. That customer is a government joint venture called Wakatipu Transport Programme Alliance (WTPA).

[29] In connection with this, InterGroup says that it was as a result of Mr Andersen contacting WTPA that WTPA switched to using Pipe Vision rather than InterGroup. This switch occurred because Pipe Vision, through Mr Andersen, offered WTPA a rate which was \$16 per hour less than the InterGroup rate.

[30] InterGroup also says that it has been told by various engineers of InterGroup clients that Mr Andersen has visited at various sites and called various people to attempt to gain new work for Pipe Vision.

[31] Since Mr Andersen commenced working at Pipe Vision, another employee of InterGroup has resigned and commenced work at Pipe Vision in Cromwell. InterGroup has spoken to that employee about his move to Pipe Vision and he advised that that he found the job advertised on Seek. InterGroup suspects however that this employee was contacted by Mr

Andersen about the role as other employees of InterGroup say that this employee told them that Mr Andersen had been trying to get him to work for Pipe Vision.

[32] In addition to this a current employee of InterGroup has stated that Mr Andersen told him if he was looking for a job then he should give him a call as they were looking for drivers at Pipe Vision.

[33] Mr Andersen and Pipe Vision deny that Mr Andersen has been involved in soliciting or attempting to solicit clients and employees of InterGroup. In addition to their denials, in its affidavit evidence Pipe Vision sets out how it was able to contact WTPA to quote for and obtained work with it; this contact being through Mr Muir.

InterGroup asserts its claims against Mr Andersen and Pipe Vision

[34] In a letter dated 11 October 2023 from the solicitors acting for InterGroup at the time, InterGroup advised Mr Andersen of his post-employment obligations, the non-compete restraint and the non-solicitation restraint and it referenced Mr Andersen's obligations in relation to InterGroup's confidential information. The letter went on to state that by working for Pipe Vision Mr Andersen was in breach of the non-compete restraint but InterGroup would hold off with enforcing that breach if Mr Andersen did not breach the non-solicitation restraint and his confidentiality obligations. A copy of this letter was sent to Pipe Vision.

[35] Then in a letter dated 14 November 2023 the solicitors acting for InterGroup at that time advised Pipe Vision that by employing Mr Andersen it was inducing a breach of Mr Andersen's employment agreement with InterGroup. The letter concluded by advising Pipe Vision that unless it stopped inducing Mr Andersen to breach his employment agreement (which presumably could only be affected by it ceasing to employ Mr Andersen for a period of time) InterGroup would likely take action to seek an urgent injunction.

InterGroup commences its claim against Pipe Vision

[36] On 12 December 2023, after an exchange of correspondence between the relevant solicitors, InterGroup filed an application against Pipe Vision, for an interim injunction, in the High Court.

[37] After a hearing in the High Court on 7 February 2024 Justice Anderson issued a judgement on 13 February 2024 stating that the High Court did not have jurisdiction to hear the application as InterGroup's claim was within the exclusive jurisdiction of the Authority.¹

[38] On 19 February 2024 InterGroup lodged this claim in the Authority.

The law relating to interim injunctions

[39] The law relating to the assessment of an interim injunction application is well established. In short, the three steps are:²

- (a) Is there a serious question to be tried?
- (b) Where does the balance of convenience lie?
- (c) Where does the overall justice lie?

[40] Based on this, the issues to be determined for InterGroup's interim application are:

- (a) Is there a serious question to be tried that:
 - a. Mr Andersen has breached the non-compete restraint and/or the non-solicitation restraint?
 - b. Pipe Vision has induced a breach of contract by Mr Andersen and/or interfered with the contractual relationship between InterGroup and Mr Andersen?
- (b) Where does the balance of convenience lie pending a substantive investigation and a final determination on the claims?
- (c) Where does the overall justice of this case lie from now until the completion of the substantive investigation and issuing of a final determination?

¹ *InterGroup Limited v Pipe Vision NZ Limited* [2024] NZHC 159.

² *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90; and *Intellihub Ltd v Genesis Energy Ltd* [2020] NZCA 344.

A serious question to be tried

[41] The threshold for a serious question is that the claim is not frivolous or vexatious.³ My decision on the serious question issue is based on a judicial assessment of the evidence, albeit untested, and the submissions advanced.⁴

[42] The question of whether Mr Andersen has breached the non-compete restraint and/or the non-solicitation restraint involves assessing:

- (a) Whether the non-compete restraint is a valid and enforceable restraint of trade.
- (b) Whether the non-solicitation restraint is a valid and enforceable restraint of trade.
- (c) If either restraint is valid and enforceable, has Mr Andersen breached the restraint(s).

[43] The question of whether Pipe Vision induced a breach by Mr Andersen and/or interfered with contractual relations between Mr Andersen and InterGroup turns firstly on an assessment of whether Mr Andersen has breached the restraints as set out above. If he has, then secondly, there is an assessment of Pipe Vision's role in those breaches to ascertain if it has induced Mr Andersen or interfered.

[44] So, the first step in terms of the serious question to be tried in relation to both Mr Andersen and Pipe Vision is to assess if the non-compete restraint and the non-solicitation restraint are enforceable.

³ I note here that counsel for Mr Andersen and Pipe Vision submitted that a serious question to be tried requires InterGroup to establish that it has a "strong case". I do not accept that proposition based on the case law – I proceed on the basis that InterGroup need only establish there is a serious question by showing that its claims are not frivolous or vexatious. That said, the question of whether the claims are strong or not is relevant to the balance of convenience assessment.

⁴ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90; and *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36.

Are the non-compete restraint and the non-solicitation restraint enforceable?

[45] The prima facie position in respect of any restraint of trade clause is that it is unenforceable. As a result, in this case, the onus lies with InterGroup to show that the non-compete restraint and non-solicitation restraint are enforceable.

[46] To establish that the restraints are enforceable InterGroup must show that it has legitimate proprietary interests that it wishes to protect and that each restraint is no wider than is reasonably necessary to protect that proprietary interest.⁵

[47] It is important to note that this assessment applies at the time Mr Andersen and InterGroup entered into the non-compete restraint and the non-solicitation restraint and it is an objective assessment of the overall extent of restraints, that is the assessment is not based on what InterGroup seeks in terms of the injunction.⁶

What are InterGroup's proprietary interests?

[48] The two sets of proprietary interests relating to Mr Andersen that InterGroup claims to protect through the restraint provisions are confidential information Mr Andersen has had access to and the client relationships or goodwill that he established or was part of.

[49] My first observation in respect of these proprietary interests is that confidential information is a proprietary interest capable of being protected through a restraint of trade provision.⁷ And customer relationships or goodwill in those relationships are also a proprietary interest that can be protected.⁸

[50] My second observation is that based on the affidavit evidence I am satisfied that InterGroup has confidential information and customer relationships or goodwill.

[51] There is another aspect of the proprietary interests, which is less straight forward. There is conflicting affidavit evidence about whether Mr Andersen had access to these interests and therefore whether he needs to be bound by any restraints.

⁵ *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153 at paragraph 23.

⁶ *Mike Pero (New Zealand) Ltd v Heath* [2015] NZHC 2040.

⁷ *Air New Zealand v Kerr* [2013] NZEmpC 153.

⁸ *Stephen Green v Transpacific Industries Group (NZ) Limited* [2011] NZEmpC 6.

[52] My third observation is that despite the conflicting evidence, I am satisfied that there is at least an arguable case that Mr Andersen had access to these proprietary interests in the course of his employment with InterGroup. Therefore, I find there is an arguable case that the non-compete restraint and the non-solicitation restraint can be applied to Mr Andersen to protect these interests.

Are the non-compete restraint and the non-solicitation restraint no wider than is reasonably necessary to protect InterGroup's proprietary interests?

[53] The next step then is to consider if the non-compete restraint and non-solicitation restraint no wider than is reasonably necessary to protect InterGroup's proprietary interests. This analysis requires consideration of the duration of the restraint, its scope and geographical limits.⁹

[54] These three component parts of non-compete restraint are:

- (a) Duration - for 12 months from 31 July 2023.
- (b) Scope – not to be directly or indirectly interested, engaged or concerned in or financially assist any business that is the same as or similar to InterGroup's business.
- (c) Area - within 100 kilometres of any place of business of InterGroup.

[55] The three component parts of non-solicitation restraint are:

- (a) Duration - from 31 July 2023, indefinitely.
- (b) Scope – not to solicit or endeavour to solicit away from InterGroup any employee, officer, supplier or customer of InterGroup.
- (c) Area – no geographical limitation.

⁹ *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153.

[56] I will deal with the three parts specifically to address the reasonableness of each but start with my overall conclusion; all three parts of both restraints are excessive. Two examples show why this is the case:

(a) First, the non-compete restraint would prevent Mr Andersen from being employed in June 2024 by a business based in Auckland that specialises in ultra high-pressure water jetting. The InterGroup confidential information and goodwill that Mr Andersen might have relates to pipe cleaning and hydro-excavation for customers in Cromwell and that information and goodwill is likely to be old and ineffective 11 months after Mr Andersen left InterGroup. The proprietary interests would not be at risk in this employment scenario.

(b) Second, Mr Andersen could not be involved in pitching for work for that Auckland based ultra high-pressure water jetting business in ten years' time if that involved an InterGroup customer despite the fact Mr Andersen would have had no prior contact with that InterGroup customer nor any knowledge about InterGroup's relationship with it including the specific services provided, pricing and other terms of business. Again, the proprietary interests would not be at risk in this scenario.

[57] Turning to duration of both restraints, it is clear to me that both time frames are excessive. The problem is compounded because the affidavit evidence provided by InterGroup does not address what time frame it needs to protect the interests. I proceed on the basis that 12 months is too long and indefinite period is excessive. I will require further evidence on this point but it seems to me that it is more likely that three months for the non-compete restraint and six months non-solicitation restraint are appropriate.

[58] My consideration of the scope of both restraints is that both are too wide. InterGroup's business is wider in scope than just the type of work undertaken by Mr Andersen. InterGroup's customers, suppliers and employees are far greater than the customers, suppliers and employees Mr Andersen had contact with and therefore had InterGroup proprietary information in relation to. Both restraints need to be tailored to the work Mr Andersen did so

that he is restricted from being involved in work of the type he did with InterGroup before the termination of his employment. And he is restricted from soliciting customers or employees he had contact with prior to the termination of his employment.

[59] In terms of geography, InterGroup is a national business with some international aspects. It appears that the confidential information and customer relationships Mr Andersen had are localised given his role. The extent of information and client relationship might justify a geographic area wider than 100 km radius of Cromwell but it would not extend to a national area.

[60] I accept counsel for InterGroup's submission that if either restraint is too wide then I can modify the restraints appropriately.¹⁰

[61] I note here that modification is not about modifying either restraint at this interim stage rather it is about acknowledging and accepting that modification is possible to ensure a restraint is reasonable but at this interim stage that informs the strength of the serious question to be tried.¹¹

[62] In terms of any required modification to make the restraints reasonable I note that based on my assessment of the reasonableness of the restraints, both would require significant modification to the time frame, geographical coverage and overall scope. I am not persuaded at this interim stage that I would be able to make such extensive modifications as this might engage s 86(3) of the Contract and Commercial Law Act 2017 which provides that a substantial modification that changes the bargain between the parties should not be made and enforced.

Conclusion on the enforceability of the non-compete restraint and the non-solicitation restraint

[63] Overall, I conclude that InterGroup has established that there is a serious question to be tried in respect of enforceability of the non-compete restraint and the non-solicitation restraint. However, this is only because based on the claims and the affidavit evidence I

¹⁰ Section 83 of the Contract and Commercial Law Act 2017.

¹¹ *Team Group Realty Limited Trading as Harcourts Paremata v Martin Cardno & Ors* [2024] NZHC 553.

cannot say that seeking enforcement of the restraints is frivolous or vexatious. The claim to enforce the restraints is weak because both restraints would require significant modification; modification that is arguably too significant.

Breach of the restraint of trade provisions in the IEA

[64] There is no dispute that Pipe Vision is a competitor to InterGroup in the pipe cleaning and hydro-excavation industry. It follows that being employed by Pipe Vision in the Cromwell area within two months of the termination of his employment means Mr Andersen will be in breach of the current non-compete restraint or a modified version if either is enforceable.

[65] In contrast there is a significant dispute over whether Mr Andersen has solicited or attempted to solicit any of InterGroup's customers or employees. Suffice to say that on the affidavit evidence it is at least arguable that Mr Andersen has undertaken some of these actions.

[66] For these reasons there is a serious question to be tried as to Mr Andersen's alleged breaches of the non-compete restraint and the non-solicitation restraint.

Claims against Pipe Vision

[67] The InterGroup claims against Pipe Vision are tort claims of inducing a breach of contract and unlawful interference with a contract.

[68] The elements of the tort of inducement to breach a contract as they relate to the claim against Pipe Vision include:¹²

- (a) There must be an enforceable contract in existence between Mr Andersen and InterGroup.
- (b) Pipe Vision must have engaged in conduct which induced Mr Andersen to breach his contract with InterGroup.

¹² *Driver v Loktronic Industries Ltd* [2012] NZCA 131.

- (c) Pipe Vision must have known that its conduct would induce Mr Andersen's breach.
- (d) Pipe Vision's conduct that induced the breach by Mr Andersen must have caused loss to InterGroup.
- (e) Pipe Vision may have a defence of justification.

[69] The elements of the tort of unlawful interference with the contract between Mr Andersen and InterGroup includes:

- (a) InterGroup has an economic interest in Mr Andersen.
- (b) Wrongful interference by Pipe Vision with the actions of Mr Andersen.
- (c) An intention by Pipe Vision to cause loss to InterGroup.

[70] I do not need to deal with each element of the respective tort claims at this interim stage. Having considered the elements, the affidavit evidence and the respective submissions of counsel I am satisfied that InterGroup's tort claims against pipe Vision are not frivolous or vexatious and therefore there are serious questions to be tried in respect of the claims.

Conclusion on serious question to be tried

[71] In conclusion I find there is a serious question to be tried that the non-compete restraint and the non-solicitation restraint are enforceable and that by working for Pipe Vision, Mr Andersen is in breach of both. And based on the potential breaches by Mr Andersen there is also a serious question to be tried as to whether Pipe Vision has induced these breaches or interfered with the contractual relationship between Mr Andersen and InterGroup.

[72] That said, I find the serious question to be weak in all aspects given the extent of modification that will be required to make the restraints reasonable and enforceable and the considerable factual disputes that need to be resolved.

The balance of convenience

[73] The balance of convenience involves an assessment of:¹³

- (a) The adequacy of damages for each party.
- (b) Preservation of the status quo.
- (c) The strengths of the parties' cases.
- (d) The conduct of the parties.
- (e) Any impact on third parties.

[74] The question of the balance of convenience in this case turns on two of these aspects: the adequacy of damages and the strength of the parties' cases.

Adequacy of damages

[75] The adequacy of damages is about assessing whether a party can be compensated by damages if I grant the injunction but subsequently decide there was not a breach or if I do not grant the injunction but subsequently decide there has been a breach.

[76] Having assessed these scenarios, I find that damages are less likely to be an adequate remedy for InterGroup if I do not grant the injunction.

[77] Quantifying the damages caused by a breach of the restraints by Mr Andersen may be difficult to do and damage may continue on beyond any determination of the substantive claim if clients are lost indefinitely. The Court has recognised these factors concluding it might be impossible to put a party back in a position it would have been in but for the breach.¹⁴

[78] In contrast Mr Andersen has not shown that an injunction imposed now would have an effect on him that could not be compensated by damages. I accept that being unable to work

¹³ *Team Group Realty Limited Trading as Harcourts Paremata v Martin Cardno & Ors* [2024] NZHC 553 at [66].

¹⁴ *Janet Pottinger & Ors v Kelly Services (New Zealand) Limited* [2012] NZEmpC 101.

will have a financial impact on him but there is no evidence to show that this would cause a loss that could not be remedied by damages if necessary. I note that the evidence shows he was, in fact, prepared to resign from InterGroup without a job to go to and therefore able to be without income for a period of time.

[79] However, the question of damages for InterGroup is not as straight forward as the ability to assess the quantum. The issue that impacts on this is that it has been over seven months since Mr Andersen left InterGroup and it is arguable that any damage caused by a breach of the non-compete restraint is done and any further damage is probably outside any reasonable period of the restraint. So, I will in any event have to calculate damages if the substantive claim proceeds and I find there has been a breach. Granting an injunction now will not make that any easier, nor is it likely to limit any damages.

[80] Overall, I am not satisfied that an assessment of damages indicates that the balance of convenience favours either party.

The strengths of the parties' cases

[81] I have already stated that I find InterGroup's case to be weak and that weighs the balance of convenience in favour of Mr Andersen and Pipe Vision.

Conclusion on balance of convenience

[82] My conclusion after an assessment of the balance of convenience is that it does not support the granting of the interim injunction.

The overall justice

[83] The overall justice assessment is essentially a check on the position that has been reached after my analysis of the serious question to be tried and the balance of convenience.¹⁵

[84] In terms of the assessment, counsel for InterGroup referred me to an Employment Court decision, *DB Breweries Ltd v Marshall and Lion Breweries Ltd*.¹⁶ In this case the Court found the overall justice of that case favoured DB Breweries because the defendants

¹⁵ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

¹⁶ *DB Breweries Ltd v Marshall and Lion Breweries Ltd* – unreported, BC199471261.

had chosen to proceed contrary to the restraint in question in the hope that DB Breweries would not enforce the restraint or if it did it would not be successful.

[85] I accept that this is a factor here. It was open to Mr Andersen and Pipe Vision to seek a declaration as to the enforceability of the restraints rather than simply proceed potentially in breach of the restraints on the basis that InterGroup would have to enforce its rights. However, I am not persuaded that it is decisive of the assessment of the overall justice.

[86] When I stand back and look at this case, the overall justice does not favour granting the injunction because:

- (a) InterGroup's case against both Mr Andersen and Pipe Vision is weak.
- (b) If there has been a breach or breaches by Mr Andersen and Pipe Vision then these actions will need to be remedied by damages regardless of whether an injunction is ordered now. And it is not clear that an injunction being granted now will restore InterGroup to the position it would have been in but for any breach nor will it prevent further loss from being incurred.
- (c) Given that it is over seven months since Mr Andersen has left InterGroup and that any modification of the restraints would reduce the time periods to six months or less, an injunction now would effectively give InterGroup more than it would be entitled to; that is, Mr Andersen would be restrained for a period of seven months onward since he left InterGroup and the modified restraint will most likely not give InterGroup this protection.

Conclusion

[87] Whilst I am satisfied that InterGroup has established that there is a serious question to be tried in respect of the alleged breaches by Mr Andersen and Pipe Vision the claims as currently set out and based on the affidavit evidence are weak. The balance of convenience does not favour granting an interim injunction for InterGroup. The overall justice of this case also does not favour granting the injunction sought.

[88] InterGroup's application for an interim injunction is declined.

Costs

[89] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority