

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 590
3319320

BETWEEN SOURCE AND SUPPLY FOOD
CO LIMITED
Applicant
AND CYNTHIA LORENZO
Respondent

Member of Authority: Rachel Larmer

Representatives: John Dustow, advocate for the Applicant
Danny Gelb, advocate for the Respondent

Investigation Meeting: On the papers

Submissions and Other Information Received: 13, 16, 25, and 27 September 2024, and 1 and 2 October 2024 from the Applicant
13, 23, 24, 26, 27 and 30 September and 2 and 4 October 2024 from the Respondent

Date of Determination: 4 October 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Preliminary determination

[1] This preliminary determination deals with an interim injunction application, as the substantive claims will be subject to an investigation meeting in 2025, if they are not resolved before then.

The applicant's claims

[2] The applicant, Source and Supply Food Co Limited (Source and Supply) has sought an interim injunction against its former employee, the respondent Cynthia Lorenzo.

[3] Ms Lorenzo resigned from Source and Supply on 17 July 2024. Her last day in the workplace was 6 August 2024 and her employment ended on 14 August 2024. Ms Lorenzo started work for her new employer Leonard's which is a brand which owned and operated by Service Foods Limited (Service Foods) on 26 August 2024. Leonard's is Source and Supply's competitor.

[4] Source and Supply claimed that Ms Lorenzo's employment with Leonard's breached the non-compete clause in the employment agreement she had with Source and Supply. Ms Lorenzo signed her individual employment agreement with Source and Food employment agreement on 31 December 2022 and she started working for it in January 2023.

[5] Source and Supply sought an interim injunction pending the Authority's determination of its substantive claims that Ms Lorenzo breached clause 24.2a of her employment agreement (the non-compete clause) and her statutory obligations of good faith, for which Source and Supply sought penalties.

[6] Ms Lorenzo denied the claims Source and Supply had made against her. She said her post employment restraints were unreasonable and therefore unenforceable.

The parties

[7] Source and Supply is a family run business which has been in operation since 1980. The company focuses on the production of bacon, ham, sausages and other smoked meats and cured meat products. Source and Supply also produce a range of Christmas ham products.

[8] Source and Supply is a relatively smaller operation than its competitors, so it said it faced constant challenges in terms of ensuring it remained ahead of its competitors in a very tight and competitive industry.

[9] Service Foods is Ms Lorenzo's current employer. Her role at Service Foods is as the Quality and Compliance Coordinator for Leonard's, which provides small meat goods and Christmas hams.

[10] Source and Supply said Leonard's had been actively attempting to take business from it, although the Authority noted that had pre-dated Ms Lorenzo's employment by Service Foods. Source and Supply claimed Leonard's had previously made it clear that

its intention was to try and undercut and outbid Source and Supply on as many of its clients as possible.

[11] Source and Supply said that for a company like Leonard's to successfully take over Source and Supply's key accounts, all it would need to know is how to meet the new client's production deadlines and how to be able to source the raw product in a cost-effective manner. This was information that Ms Lorenzo had as a result of her employment by Source and Supply.

Ms Lorenzo's roles

[12] Ms Lorenzo has 12 years' experience working in quality assurance in her home country, Argentina. She commenced employment with Source and Supply in January 2023 in the role of Systems Coordinator on a salary of \$65,000 per annum plus a \$10,000 availability allowance. On 16 January 2024 she was given a pay rise of \$6,000 per annum.

[13] In June/July 2023 Source and Supply's Production Manager left and Ms Lorenzo was offered a role in the planning and procurement area of Source and Supply's business. Although she changed role, she was not given a job description for her new planning and procurement role. In all other respects her terms and conditions remained the same.

[14] In February 2024 Ms Lorenzo applied for a job with Service Foods as the National Quality and Compliance Coordinator. Ms Lorenzo was not successful, but Source and Supply kept her details on file and contacted her when another employment opportunity arose in July 2024.

[15] Jess Bowden, who is employed by Service Foods as the Quality and Compliance Lead, contacted Ms Lorenzo on 15 July 2024, offering her a potential role as the Quality and Compliance Coordinator at Leonard's, subject to acceptable references. Ms Lorenzo accepted the offer and signed a new employment agreement with Service Foods on 17 July 2024.

[16] That same day Ms Lorenzo resigned from Source and Supply, giving her contractual four weeks' notice. Her last day of work was to be 16 August 2024, but Source and Supply and Ms Lorenzo subsequently agreed her employment would end two days earlier, on 14 August 2024.

Material background

[17] Ms Lorenzo did not inform Source and Supply or anyone else at that workplace where she would be working after her employment ended. However, Source and Supply heard from others that Ms Lorenzo was going to be working for one of its competitors.

[18] On 6 August 2024 Ms Lorenzo's manager Nicole Burke, who is the Finance Manager for Source and Supply, called Ms Lorenzo into a meeting room in which Source and Supply's HR Adviser, John Dustow, was on a speaker phone.

[19] Ms Lorenzo was asked about the rumours that she was going to work for a competitor, which she denied, saying there was no truth to those rumours. Ms Lorenzo was also specifically asked if she was going to work for Leonard's or any other competitor and she also denied that she was.

[20] Mr Dustow, from the speaker phone, informed Ms Lorenzo that she had a restraint clause in her employment agreement that prevented her from working for a competitor for six months, and that any breaches of that would be taken seriously and could incur penalties of up to \$10,000 per breach.

[21] Ms Burke said Ms Lorenzo confirmed that she understood that and had told them there was nothing to worry about because she was not going to work for Leonard's or any other competitor.

[22] Ms Lorenzo's version of the 6 August 2024 meeting differs from Ms Burke's in respect of some, but not all, details. There is no dispute Ms Lorenzo was asked about rumours she was going to work for a competitor and denied them; she was specifically asked whether she would be working for Leonard's and denied that; and she was warned about the potential consequences of breaching her post-employment restraints.

[23] Ms Lorenzo's affidavit evidence focused on the concerning 'tone' of the meeting and the reference Mr Dustow had made to "10,000". She claimed that Mr Dustow told her he had heard she had a job at Leonard's, and if that was true she would need to pay \$10,000 to Source and Supply. Ms Lorenzo said that terrified her, so in her panicked state she denied everything. She also said she did not remember much else of the meeting because she was focused on where she was going to find \$10,000 to pay Source and Supply.

[24] Ms Lorenzo said she found the meeting intimidating and felt threatened and bullied by Mr Dustow. She said she was so stressed after the meeting that she had to go home sick later in the day. She saw her doctor and was signed off work until her notice period had ended.

[25] These conflicts in the evidence will need to be resolved during a substantive investigation meeting. However, the Authority's preliminary view is that Ms Burke's account appeared to be more credible.

[26] Mr Dustow was an external professional advisor who was attempting to get to the bottom of rumours that Ms Lorenzo had accepted a job with a competitor which breached her restraint. While Ms Lorenzo may not have liked being asked about this, it was not bullying or threatening or intimidation for such questions to be asked of her. She also should not have lied in response to the direct questions that Mr Dustow asked her.

[27] Before Ms Lorenzo went home on 6 August 2024, Ms Burke handed her a letter to sign which recorded Ms Lorenzo's assurances that the rumours that she had accepted a job with one of Source and Supply's competitors or with Leonard's were untrue, and that the potentially serious consequences of breaching her restraint provisions had been explained to her.

[28] In particular, it recorded that Mr Dustow had explained that a breach of the restraint could attract a penalty of up to \$10,000 per breach. The letter recorded that Ms Lorenzo had "verbally reassured us that any rumour that you are going to work for one of our competitors was just wrong."

[29] Source and Supply asked Ms Lorenzo to sign an undertaking which recorded:

- (a) She had been advised of her post-employment restraints;
- (b) She was aware she was not to work for any of Source and Supply's clients or competitors for a period of six months without Source and Supply's prior written consent;
- (c) She had been informed that she could be liable to penalties of up to \$10,000 if she breached the restraint;
- (d) "I hereby give an undertaking that I have not, nor will I breach the terms of these restraint obligations."

[30] Source and Supply asked Ms Lorenzo to sign the undertaking in the letter Ms Burke had handed her on 6 August 2024. Ms Lorenzo was told she was welcome to take the undertaking away and seek advice from a support person or legal representative before responding.

[31] Ms Lorenzo said she obtained advice from the Citizens Advice Bureau that her restraint was unenforceable, so based on that advice she wrote to Mr William Curd, Source and Supply's General Manager, saying that she found the meeting on 6 August 2024 intimidating and that she had felt threatened and bullied during it.

[32] Ms Lorenzo stated that she understood her obligations but considered the restraint of trade in clause 24 of her employment agreement would not apply to her new role, because she was not working in the greater Auckland city area and because she had resigned from her employment with Source and Supply. She did not sign the undertaking or letter confirming what she had told Ms Burke in the 6 August 2024 meeting.

[33] Source and Supply found this response unsatisfactory. It responded to Ms Lorenzo via its representative, Mr Dustow, who pointed out that the post-employment restraint continued to apply regardless of the fact her employment had ended due to her resignation. Ms Lorenzo was informed the restraint applied to any employer which had a Head Office in Auckland and she was given a copy of s 135 of the Employment Relations Act 2000 (the Act) which dealt with penalties.

[34] Source and Supply's response pointed out to Ms Lorenzo that she had denied working for Leonard's or its associated companies, so she was told that if it turned out she was working for one of its competitors then she was in breach of her obligation to be truthful, which carried a potential penalty of up to \$10,000. The letter stated:

So if you are working for a competitor, you are required to tell us ASAP so we can mitigate any potential issues. If you fail to respond and it is found that you are, Source and Supply will take action against you.

[35] Ms Lorenzo sought advice on 19 August 2024. Her representative, Mr Gelb, wrote to Mr Dustow on 20 August 2024 stating that Ms Lorenzo's restraint was not enforceable on the basis it was "overreaching" and the stated duration was excessive.

[36] Source and Supply responded on 20 August 2024, notifying Ms Lorenzo that she was required to cease breaching her post-employment obligations or to provide

sufficient information that would satisfy Source and Supply that she was not in breach of her post-employment restraints. Failure to do so would result in an application being made to the Authority for an injunction and costs.

[37] Source and Supply also contacted Service Foods regarding its concerns about Ms Lorenzo's potential employment with them. The response from Service Foods confirmed that Ms Lorenzo had a position with them, so from Source and Supply's perspective that had breached her post-employment restraint. Ms Lorenzo was given until 22 August 2024 to satisfy it that she was complying with her post-employment restraints. That did not occur.

[38] Ms Lorenzo did not disclose her new employment situation to Source and Supply until she was directed to do so by the Authority. The parties have attended directed mediation, which was unsuccessful.

Material clauses in the employment agreement

[39] Ms Lorenzo's employment agreement with Source and Supply provided that either party was to give four weeks' notice of termination of employment, unless a lesser period of time was agreed on in writing by both parties.

[40] Clause 29 was a confidentiality clause that stated:

- 29.1 The Employee will not, either during the term of this agreement or at any time thereafter, except so far as may be necessary for the proper performance of the Employee's duties under this agreement, or as may be required by law:
 - a. Disclose to any person any information relating to clients of the business, or the nature or financial situation of the business, or other confidential information or trade secrets relating to the business, which has come to the Employee's knowledge in the course of the performance of their duties under this agreement;
 - b. Use or attempt to use any such information for the Employee's own personal benefit, or the benefit of any other person or organisation.

Post-employment restraints

[41] Clause 24 of the employment agreement set out the post-employment restraints.

It stated:

24 Restraint of Trade

- 24.1 You will not at any time after the date of termination of your employment represent yourself as being in any way connected with or interested in the company.
- 24.2 You will not, without the prior written consent of the Company:
- a. for the period of six months after the termination of your employment (for whatever reason) be directly or indirectly engaged, interested or concerned whether on your own account or as a shareholder, employee, partner, agent, representative, consultant, lender of money, guarantor or in any other capacity in a business or activity in the greater [Wellington or Auckland city] area which is, or is likely to be in competition with any business or activity carried on by the Company as at the date of termination of your employment and with which you have been connected during the six month period prior to the date of termination of your employment;
 - b. for the period of six months after the termination of your employment (for whatever reason) either by or on benefit of or for the benefit of yourself or any other person, firm or company directly or indirectly solicit the custom of any person, firm or company which is or was at any time during the period of two years prior to the date of termination of your employment, a customer or supplier of the company and with whom you have had contact within the period of six months prior to the date of termination of your employment;
 - c. for the period of six months after the date of termination of your employment (for whatever reason) solicit the services of or endeavour to entice away from the company or any director or employee of the company or other person (whether or not such person would commit any breach of contract or terms of employment by leaving his or her employment) and nor will you knowingly comply, aid or assist in or procure the employment by any person, firm or company with which the employee is associated, of any such person.
 - d. the salary payments made to the Employee under the employment agreement between the parties will constitute adequate consideration for this restraint of trade agreement.

Undertakings

[42] Source and Supply lodged an undertaking as to damages which provided that if an interim injunction was issued, and Ms Lorenzo suffered damage that the Authority considered Source and Supply needed to compensate, then it would comply with an order by the Authority that it pay Ms Lorenzo damages.

[43] On 13 September 2024 Ms Lorenzo signed a written undertaking on a no admission of liability basis. The undertaking stated:

Undertakings in relation to duty of fidelity and use of information

1. I have not and further undertake onwards not to:
 - a. Retain any information relating to SOURCE AND SUPPLY FOOD CO. LIMITED (my Former Employer).
 - b. Share any information with my new employer that I have retained in my mind about anything to do with my Former Employer, including, but not limited to information about my Former Employer's:
 - i. Clients, their specific requirements and prices that they pay;
 - ii. Suppliers, raw products used and purchase costs;
 - iii. Planning details; and
 - iv. Marketing and other strategies.
2. At all times from the date of these undertakings onwards:
 - a. I will abide by those confidentiality obligations contained in my employment agreement with my Former Employer that are intended to remain in effect following termination of employment.
 - b. Without limitation, I will not:
 - i. Make use, at any time, of confidential or commercially sensitive records belonging to my former employer, such as in client lists or contact details of its employees; or
 - ii. Use confidential or commercially sensitive information without my Former Employer or its customers or clients, which I gained access to through my employment with my Former Employer, in ways that are contrary to the interests of my Former Employer; or
 - iii. Cause or permit my new employer, or any person acting on behalf of my new employer, to make use of confidential or commercially sensitive information about my Former Employer or its customers or clients, which I gained access to through my employment with my Former Employer, in ways that are contrary to the interests of my Former Employer.

[44] Service Foods provided an undertaking via Ms Bowden which was dated 13 September 2024. This provided on a no admission of liability basis the following undertaking:

Undertakings in relation to requests of information

I will not request any information from Ms Lorenzo with regards to any knowledge that she may have retained regarding our current competitor and her prior employer SOURCE AND SUPPLY FOOD CO. LIMITED; I have instructed the Service Foods Limited senior management team that they are also not to request the above information.

Source and Supply's concerns

[45] Source and Supply said that the enforcement of Ms Lorenzo's post-employment restraints are vital for the protection of its business.

[46] It claimed she had possession of confidential and secret information which would be valuable to any of its competitors. She was not a junior employee and had access to most parts of the business. Source and Supply said it needed time to shore up and protect this information, so it considered the six month restraint period was reasonable in all of the circumstances.

Ms Lorenzo's position

[47] Ms Lorenzo's position was that her post-employment restraint was unreasonable and therefore not legally enforceable. She claimed that she was ambushed in the 6 August 2024 meeting, which she said was contrary to Source and Supply's good faith obligations to her.

[48] Ms Lorenzo said that as a Systems Coordinator she did quality control tasks from January 2023 until September 2023 under the supervision of the Quality Manager. This included doing quality control checks, internal auditing, the checking of Standard Operating Procedures (SOPs) if they were updated, checking production paperwork to ensure it was completed, a daily controls check and supporting her QA on investigation of any non-performance issues that arose.

[49] In September 2023 Ms Lorenzo's role changed to that of Planning and Procurement, and she worked in that position until her employment ended. The Planning and Procurement role was initially under the supervision of the General Manager, Mr Curd. In the last month of her work it changed to being under the supervision of the Finance Manager, Ms Burke.

[50] Ms Lorenzo said that while working for Source and Supply she did not do any health and safety tasks, or work on any product specification or the changing of recipes, as those tasks were the responsibility of the Quality Manager, Food Technologist and the General Manager.

[51] Ms Lorenzo said that she had not retained any information from Source and Supply other than that retained in her own mind. She has never printed any of Source and Supply's records and has never taken any business information of any kind from her former employer.

[52] Ms Lorenzo said her knowledge comes from her study and professional experience, not from Source and Supply. Ms Lorenzo described herself as a junior employee at Source and Supply, not a senior member of staff, which she said was reflected in her salary and place within the organisation of the company.

[53] However, in her supplementary submissions it was "conceded that [she] does have some proprietary interests ...". That was taken by the Authority to be an acknowledgement that Source and Supply had a legitimate proprietary interest in some of the confidential and commercially sensitive information that Ms Lorenzo carried in her head from her employment with Source and Supply.

Deletion of work emails

[54] Source and Supply claimed that Ms Lorenzo had deleted emails just prior to her leaving work on 6 August 2024. Mr Curd said that made him concerned that she was "continuing down a path of deception in these proceedings to minimise her conduct." The Authority noted that there was no evidence that any emails had been improperly inappropriately deleted by Ms Lorenzo.

[55] Ms Lorenzo's explanation to the 'deleted emails' concern was that she had trained another employee on her tasks and how to access her username and computer. She said that items were left for handover with Ms Burke, including a list of daily tasks to check. Ms Lorenzo said she did that to ensure that her role was left organised for the next person who filled it.

[56] Ms Lorenzo said her emails had folders with each subject to have a look into in case the new person in her role needed any potential information. She said it was her aim to leave her role organised and tidy, and that she has definitely not tried to hack,

delete or hide information, which is what Source and Supply appeared to have implied. Any deletions occurred had to be viewed within the context of her organising her work for the person who would do her role, not as a result of any wrongdoing.

The Authority's investigation

[57] By agreement with the parties, the Authority has determined the interim injunction application 'on the papers'. Both parties lodged affidavits, relevant documents and submissions. Each party had two witnesses who each provided two affidavits.

[58] Source and Supply provided two affidavits from Mr Curd and Ms Burke. Ms Lorenzo lodged two affidavits and so did her new manager Ms Bowden.

Onus of proof

[59] Source and Supply bears the onus of establishing on the balance of probabilities that when it entered into the restraint with Ms Lorenzo on 31 December 2022 (being the date she signed her employment agreement), it had a legitimate proprietary interest which required protection in relation to her employment at that time.

[60] Source and Supply has been able to discharge that onus.

[61] Ms Lorenzo had access to commercially sensitive and confidential information in the course of her role which included, but was not limited to, pricing information, cost of raw materials and global supply chains, supplier information, pricing structure and cost of items, factory requirements and any unique customer requirements. She also had all of the pricing information that would enable competitors to undercut Source and Supply's pricing regarding raw materials, markups and charges to their clients.

Issues

[62] 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 lie?
- (c) What does the overall justice of the case require?
- (d) What costs should be awarded?

Does the applicant have an arguable case?

[63] Whether or not there is an arguable case is a low bar to clear.

[64] The claim that Source and Supply has made to enforce a post-employment restraint in the employment agreement that Ms Lorenzo had with it cannot be said to be frivolous or vexatious. Ms Lorenzo freely and voluntarily signed a written individual employment agreement that included post-employment restraints. It is therefore arguable the restraints are enforceable.

Legitimate proprietary interest?

[65] Source and Supply established on the balance of probabilities that Ms Lorenzo holds in her head, as a result of her employment with it, commercially sensitive and confidential information that if disclosed would be very damaging to its business. Such information amounts to a legitimate proprietary interest that is capable of protection for a period of time after the employment relationship has ended.

Reasonableness of restraint?

[66] It cannot be said that it was not arguable that the post-employment restraints were enforceable. The duration of six months was not so clearly excessive to have made it obvious Source and Supply had no chance of enforcing it. For example, a 12 months non-compete restraint would have been clearly excessive.

[67] The question of whether the duration of the restraint was arguable has been established by the currently available evidence. The 'arguable case standard' Source and Supply had to meet regarding the reasonableness of the restraint was a low bar for it to clear, which it achieved.

Where does the balance of convenience lie?

Restraints are prima facie against public policy and unenforceable

[68] 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 are therefore prima facie enforceable.

[69] 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, meaning it was drafted no wider than was necessary in order to protect the legitimate proprietary interests.

What is the legitimate proprietary interest that can be protected?

[70] Ms Lorenzo had in her head all of the information that a company like Leonard's would need to successfully take over customer accounts from Source and Supply.

[71] Ms Lorenzo was responsible for purchasing raw material from global supply chains, she knew the pricing of the raw material and which parts of meat worked best for the requirements of each of Source and Supply's clients. She also knew the pricing structure for Source and Supply's clients and how much they paid for its products and service. Ms Lorenzo had end knowledge of how each of Source and Supply's clients were serviced.

[72] Ms Lorenzo was also familiar with the planning of the factory requirements needed in order to meet Source and Supply's clients' needs. As an example, its client Hello Fresh had a unique requirement as to timelines and delivery for Source and Supply to meet, which Ms Lorenzo was aware of. That similar type of knowledge also applied to other clients of Source and Supply.

[73] Mr Curd said Source and Supply had developed and fine tuned its processes to be able to meet specific requirements its clients had, which Ms Lorenzo was fully aware of. He was concerned that by Ms Lorenzo having this current knowledge while working for a direct competitor it put Source and Supply's business at "great risk".

[74] Mr Curd's affidavit said that if Leonard's obtained information that Ms Lorenzo had acquired from Source and Supply such as customer requirements, where raw materials could be sourced, the specific arrangements that each customer wanted in terms of the types of products supplied, what Source and Supply paid for the raw material and what it charged the client, as well as how the factory met each client's stringent requirements, then this commercially sensitive information could be used by Leonard's to plan and execute an undercutting process to take Source and Supply's clients from them.

[75] Ms Lorenzo's had up to date and current information that Source and Supply said would take at least six months or longer to become stale. However, Mr Curd's claim that Ms Lorenzo could destroy Source and Supply's entire business, with the loss

of more than 70 jobs, if she disclosed any of the commercially sensitive and/or confidential information she had to Leonard's/Service Foods appeared overstated.

[76] Notwithstanding that, the Authority accepted there was a real risk of damage to Source and Supply's business if Ms Lorenzo disclosed its commercially sensitive or confidential information to her new employer. There was also a significant risk that she could expose such information inadvertently.

[77] Source and Supply did not have confidence Ms Lorenzo would not share any of its commercially sensitive and/or confidential information because she had not acted in good faith while still employed, and had lied about obtaining work with Leonard's. She had also attempted to undermine Source and Supply's legitimate concerns by asking why her word was not good enough, in response to being asked to sign a letter that recorded her responses during the 6 August 2024 meeting, and which had also contained an undertaking. She did not sign this letter or undertaking.

[78] Mr Curd said that had Ms Lorenzo been open and honest about her future employment plans then that would have given Source and Supply some confidence that it had the ability to mitigate risks. Instead, that opportunity was not given to it, because Ms Lorenzo misled it about going to work for its competitor, Leonardo's.

[79] Leonard's has a small team. Ms Lorenzo had a reporting line to the General Manager, and would likely be working in close proximity to others in a small office environment in her new role at Leonard's. Such circumstances created an environment that was ripe for inadvertent disclosure to occur.

[80] Source and Supply said it needed six months to ensure that the pricing structures, raw material prices and customer prices information Ms Lorenzo had, had become stale. The deals it has in place relating to its Christmas hams were also sensitive, so needed time to expire. This confidential information included pricing structures, where it sourced the raw product from, yields and recipes as well as who its key account clients are.

[81] Ms Lorenzo had attended strategy meetings in June and July which occurred every Tuesday. These had included discussion about marketing strategies, locations for where Source and Supply was looking to place its products, new packaging ideas and how best to position itself in the market. That information was therefore current when she resigned.

[82] Source and Supply also needed sufficient time to protect itself from Leonard's attempts to take its clients by securing exclusive deals with its suppliers and shoring up client relationships to make it less likely that they would want to go to Leonard's, even if they were offered a better deal. Mr Curd believed it would take about six months for the confidential information Ms Lorenzo had and for the commercially sensitive deals she knew about to become stale.

[83] Although Ms Lorenzo denied that she had confidential information that could potentially be misused to Source and Supply's detriment, her evidence about that did not appear credible, at least at this preliminary stage.

[84] Ms Lorenzo in her affidavit admitted she had been responsible at Source and Supply for placing purchase orders for materials, packaging and meat, and that she asked for prices from different suppliers. Although she did not have the ability to change formulas, she did have access to recipes and knew what raw materials were being purchased, how much they cost, how they were being used and what the clients were charged. She also printed work orders, so knew what customers were ordering what products and what the pricing was for the products each client ordered.

[85] Ms Lorenzo had information about the Christmas season 2023 and the upcoming Christmas season 2024. That included access to commercially sensitive information about the Christmas meat products, pricing of raw material and end products, customer preferences and quantities that Source and Supply provided its clients.

[86] The fact that Source and Supply had a legitimate proprietary interest in protecting commercially sensitive and confidential information Ms Lorenzo carried in its head favoured Source and Supply.

Confidentiality clause

[87] The Authority accepted Source and Supply's submissions that the confidentiality clause in Ms Lorenzo's employment agreement with it, which continued even though her employment had ended, was more likely than not insufficient to adequately protect its legitimate proprietary interests.

[88] The factors that lead to that conclusions included Ms Lorenzo's:

- (a) Denial that she would be working for one of Source and Supply's competitors;
- (b) Insistence that her word about that should be sufficient in the face of her refusal to sign a written undertaking which confirmed the information she had passed to Source and Supply about her new employment during the meeting on 6 August 2024;
- (c) Claim that she did not have any information that was capable of being protected by a post-employment restraint;
- (d) Inability to separate out what information could be disclosed from what information had to be protected;
- (e) High level of dissatisfaction about her employment with Source and Supply;
- (f) Issues she said she had with Ms Burke.

[89] These factors combined to create a situation where it was understandable that Source and Supply was concerned about protecting its proprietary information from future breaches.

[90] Ms Lorenzo's failure to recognise that she has commercially sensitive and/or confidential information that could be damaging to Source and Supply's business if disclosed to Leonardo's strongly weighed in favour of the need for the post-employment restraint to be enforced to protect that information from inadvertent disclosure. It was also necessary for Source and Supply to have some time to shore up its relationships with suppliers and clients.

[91] Source and Supply established, at least at this preliminary stage, that it was more likely than not that the confidential information clause in Ms Lorenzo's agreement did not afford it the necessary level of protection it required for its proprietary interests. That favoured Source and Supply.

Adequacy of the undertakings provided by Ms Lorenzo and Service Foods

[92] Although Service Foods and Ms Lorenzo both provided written undertakings they would not use Source and Supply's confidential information, the Authority has accepted Source and Supply's submissions that these undertakings were more likely

than not insufficient to adequately protect its legitimate proprietary interest in the interim until its substantive claims could be determined.

[93] While the Authority accepted that Ms Lorenzo was unlikely to deliberately disclose confidential and/or commercially sensitive information, and Service Foods will not ask her to do so, the fact she now works for Leonard's in a small team, where everyone works in close proximity, and she has direct access to Service Food's General Manager, meant there was a real risk of inadvertent disclosure.

[94] This real risk increased in light of Ms Lorenzo's belief (as per her affidavit) that she did not have any information that was capable of being protected as a legitimate proprietary interest. Her advocate subsequently appeared to have acknowledged in his supplementary submission, lodged after Ms Lorenzo's affidavits, that Source and Supply did have a legitimate proprietary interest that could be protected by a reasonable restraint.

[95] The tension that is evident in that position is evidence that it would likely be difficult for Ms Lorenzo to understand where the line has to be drawn between information she can use and disclose and information that she needed to continue to protect, so could not be disclosed.

[96] Ms Lorenzo's dishonesty in the face of direct questioning from Source and Supply about whether she would be going to work for a competitor was also of concern. That made it more likely Source and Supply could not readily trust her to be truthful if there was an inadvertent breach, and it needed to question her about that. Having already misled Source and Supply while employed, there was a risk she would find it even easier to do that again when not employed, if in future she was faced with difficult questions about her conduct.

[97] The currently available evidence fell far short of establishing Ms Lorenzo understood the significance of the commercially sensitive information she has in her head regarding Source and Supply's pricing, suppliers, raw materials, markups and future business strategy. This was also information that could not readily be easily separated in her own mind from what she could use in her new job.

[98] That therefore created a serious potential risk of misunderstandings, miscommunication, confusion and possibly even inadvertent breaches occurring.

[99] This weighed in favour of Source and Supply.

Source and Supply's undertaking to pay damages

[100] The adequacy of potential remedies was a relevant factor at this interim stage.

[101] Source and Supply provided an undertaking that it would pay Ms Lorenzo damages if the Authority so ordered, to compensate her for any loss or damage that she suffered as a result of the interim injunction being granted.

[102] That provided Ms Lorenzo with an adequate remedy if Source and Supply was ultimately unsuccessful. It would be easy to calculate her actual loss, being lost wages for the period the restraint was enforced. There was also no suggestion that Ms Lorenzo would lose her new job with Service Foods if Source and Supply's restraint was enforced on an interim basis.

[103] By contrast, as assessment of damages should commercially sensitive or confidential information be disclosed which resulted in loss to Source and Supply would likely be more complicated to address than a simple lost wages claim. Based on Ms Lorenzo's second affidavit, there was a risk she would not be able to pay any damages that could potentially be awarded against her if a serious breach occurred which had caused Source and Supply quantifiable loss. This favoured Source and Supply.

Currency of the information

[104] There was sufficient evidence produced by Source and Supply to establish that Ms Lorenzo had current and up to date information that would likely not become stale for a number of months. That favoured Source and Supply.

Geographical restraint

[105] Source and Supply told Ms Lorenzo, Service Foods and the Authority that it was not seeking to enforce the restraint in Wellington. It said that the reference to Wellington should have been deleted from Ms Lorenzo's employment agreement. It was however seeking to enforce the restraint for the greater Auckland region.

[106] The reference to the "greater Auckland city area" should objectively be read as meaning the greater Auckland region. To do otherwise would render the word "greater"

ineffective. Given the nature of the Source and Supply's business, this geographical restraint appeared on the face of it to be reasonable.

[107] Ms Lorenzo's new employment was based in East Tamaki and Service Foods operated in Auckland, so both scenarios fell within the greater Auckland region identified in the restraint. That weighed in Source and Supply's favour.

Duration of the restraint

[108] The Authority's preliminary view, at this interim stage of these proceedings, is that the six month non-compete restraint appeared to be longer than absolutely necessary. That weighed in Ms Lorenzo's favour.

Is the restraint likely to be modified?

[109] The Authority's preliminary view, based on the currently available evidence, was that it was likely the duration of the restraint would be modified to a shorter period, such as three months.

[110] Source and Supply did have a legitimate proprietary interest that was capable of protection by a post-employment restraint, so some level of protection was likely to be considered appropriate. That weighed in Source and Supply's favour.

Time remaining on the restraint

[111] The non-compete restraint if enforceable would not expire until 16 February 2025, which seemed a long time away, given Ms Lorenzo resigned on 16 July 2024 and had not been in the workplace since 6 August 2024.

[112] Source and Supply's suggestion that Ms Lorenzo should simply find alternative employment until then was not considered to be realistic. She already had a permanent full time job and will likely to face challenges in obtaining new employment for a limited period of time. This weighed in Ms Lorenzo's favour.

Ms Lorenzo's personal circumstances

[113] Ms Lorenzo is single and does not have children. She has two sisters and two nieces in Argentina that she helps financially support. One of her sisters was diagnosed with an issue that required surgery, which Ms Lorenzo was contributing financial assistance towards. Ms Lorenzo said that if she was not able to work then she would not be able to continue to send her sisters regular money any more.

[114] Ms Lorenzo rents a house with flatmates in New Zealand and pays \$260 a week plus additional expenses. She said she does not have family here or anyone else in New Zealand to help support her. She has no other sources of income apart from her job at Service Foods. She said she does not have significant savings and had no idea how she would support herself if she was required to stop working for Service Foods.

[115] Ms Lorenzo expressed concern that the current job market was soft and that if she could even find a job it would be at a much reduced salary and likely to involve mundane tasks. She said that the issuing of an interim injunction would have a significant financial impact on her. That strongly weighed in Ms Lorenzo's favour.

Ms Lorenzo's conduct

[116] Ms Lorenzo elected to start work for Leonardo's on 26 August 2024, even though she knew Source and Supply considered that breached her non-compete restraint. Ms Lorenzo did not give the Authority any time to determine the interim injunction application, but instead elected to work for Leonardo's while that process was underway.

[117] Ms Lorenzo also misled Source and Supply when it raised concern about her going to work for a competitor, and in particular Leonardo's. Despite Source and Supply's repeated requests for information about her new job to address its concerns, she did not disclose any information about that until directed to do so by the Authority. Ms Lorenzo cannot be said to have come to the Authority with 'clean hands'. That favours Source and Supply.

Substantive investigation

[118] The substantive investigation of this matter will not occur until the first quarter of 2025. An interim solution is therefore required to ensure that the restraint clause, and Source and Supply's substantive claims, are not rendered nugatory. This factor favoured Source and Supply.

The Authority's conclusion on the balance of convenience

[119] The balance of convenience favoured granting an interim injunction to ensure Source and Supply's legitimate proprietary interests were protected.

[120] There was a real risk that Ms Lorenzo may inadvertently disclose to Leonardo's commercially sensitive and/or confidential information which could potentially seriously harm Source and Supply's business.

Where does the overall justice lie?

[121] At this point the Authority had to stand back and assess where the overall justice lay, pending its determination of Source and Supply's substantive claims. That involved an objective balancing of the rights, obligations and inconveniences involved for all of the parties. This included Service Foods, in terms of not having the benefit of a newly appointed employee to work in their business if an interim injunction was issued.

[122] In terms of assessing risk in this matter, based on the currently available evidence, the Authority was satisfied Source and Supply appeared to have a legitimate proprietary interest that was capable of protection by a post-employment restraint, and that while the duration of the existing restraint appeared to be too long, a modified period of three months would likely be reasonable.

[123] Modification of the duration of the non-compete restraint in clause 24.2a of Ms Lorenzo's employment agreement from six to three months would result in a restraint period that ran from 14 August 2024 (being her agreed early date of termination) to 14 November 2024, being three months after her employment with Source and Supply ended. That meant that Source and Supply has effectively had from 17 July 2024 (the date Ms Lorenzo resigned) to take steps to protect its legitimate proprietary interests.

[124] The overall justice of this matter required Source and Supply to be granted some post-employment protection, although for a more limited duration than it had sought.

Outcome

[125] The Authority has issued an interim injunction based on a modification that would likely be made at the substantive investigation to the post-employment non-compete restraint in Ms Lorenzo's employment agreement with Source and Supply. That has effectively reduced the non-compete period from six months to three months.

[126] This meant Ms Lorenzo has been prevented from continuing to work for Service Foods up to and including 14 November 2024. She is therefore free to continue working for Service Foods from 15 November 2024 onwards.

[127] Accordingly, Source and Supply's interim injunction application has succeeded.

What if any costs should be awarded?

[128] As the successful party, Source and Supply is entitled to a contribution towards its actual legal costs. If the parties did not agree costs, and a costs determination was required, then this matter would be assessed as having involved a half-day investigation meeting for the purposes of applying the Authority's usual notional daily tariff.

[129] However, the Authority has elected to reserve costs, pending the outcome of the substantive matter.

Rachel Larmer
Member of the Employment Relations Authority