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RESTRAINT OF TRADE: HOW MUCH PROTECTION CAN AN EMPLOYER OBTAIN?

LLB(HONS) RESEARCH PAPER
EMPLOYMENT LAW (LAWS 532)

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CONTENTS

ABSTRACT

The doctrine of restraint of trade in New Zealand has largely been developed through case law. The doctrine of restraint of trade in the employment context is wide and complex. This essay provides a discussion on general principles and in particular, explores the variables considered in determining the reasonableness of a covenant in restraint of trade. It considers the effects of the Employment Relations Act 2000 on the role of the institutions that deal with such restraints.

The essay analyses the current approach taken by the courts and the Employment Relations Authority in determining the enforceability of restraints of trade. It provides empirical evidence on the range of acceptable practice in New Zealand. It concludes in favour of the current restrictive attitude taken by the courts and the shift from traditional contract law to a wider consideration of the particular circumstances associated with a covenant in restraint of trade.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 12 500 words.

I INTRODUCTION

It is not uncommon for employers to be concerned when their employees leave, they take with them sensitive commercial information, their customers or other existing employees. Employers, particularly in highly competitive industries, often require their employees to agree to a restraint of trade clause incorporated into the employment agreement. Post-employment restraints of trade are restrictive covenants that come into effect upon the termination of employment and are common for more senior employees. The employer aims to protect its legitimate proprietary interest by limiting an employee's freedom in trade.

In recent years there has been a significant increase in cases involving restraint of trade clauses.[1] The doctrine of restraint of trade addresses the tension between the protection of an employer's proprietary interest and the interference of lawful trade. This essay will look at how much protection an employer and an employee can obtain in their rights in relation to restraints in trade. It outlines the main principles of law and discusses the latest developments and possible trends in the future. It provides an analysis of recent New Zealand decisions focusing on restraints of trade and explores the impact of the Employment Relations Act 2000 (ERA) on the enforcement of covenants in restraint of trade in the employment context.

II GENERAL PRINCIPLES

A covenant in restraint of trade is generally an express term often included in an employment agreement. Such a clause may prohibit certain activities or impose conditions upon an employee during employment. More typically, a clause will restrain an employee's activities if and when the employment relationship terminates. It may prohibit an employee from working in competition against their former employer or from engaging in a specific activity. An employer may place restrictions on an employee for a number of

[1] See Gordon Anderson "Recent Case Comment" (1999) 4 ELB 67, 71.

reasons. These reasons include: the desire to protect their trade secrets, other confidential information and trade connections; to prevent former employees from competing against them; and an employer's resentment of disloyal employees.[2]

A Implied Restraints

Although a restraint of trade is generally an express term, the law may imply a restraint of trade as part of the presumed intention of the parties. For example, a restraint of trade was implied in *Norris v Zealfresh International Ltd*[3] on an interim injunction. The defendant was a senior employee, a director and a major shareholder of the company and had made sure that a more junior employee had accepted a restraint. In a similar vein, an employee may be entitled to bring an action for a declaration that a contract between other parties is a restraint of trade.[4]

B Rationale

A covenant in restraint of trade is prima facie void.[5] The common law has "always regarded jealously any interference with trade, even at the risk of interference with the freedom of contract … ."[6] A restraint of trade interferes with a person's freedom to work and to earn a living. The courts have been reluctant to enforce a term that renders an employee idle or unable to earn a living.[7] Moreover, a restraint monopolises an employee's skills and is a disincentive to employees leaving.

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[2] See Anderson, above, 71.
[3] *Norris v Zealfresh International Ltd* [1998] 3 ERNZ 574 (EC) Judge Colgan.
[4] See Part X RESTRAINT OF TRADE IN THE SPORTS CONTEXT.
[5] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co* [1894] AC 535 (HL); *Airgas Compressor Specialists Ltd v Bryant* [1998] 2 ERNZ 42, 53 (EC) Goddard CJ.
[6] *Halsbury's Laws of England* (4 ed, Butterworths, London, 2001) vol 47, Trade, Industry and Industrial Relations, para 13, 21.
[7] *Ogilvy & Mather v Darroch* [1993] 2 ERNZ 258 (EC) Goddard CJ.

A restraint of trade is anti-competitive in nature.[8] There is a public interest in a person's freedom to choose with whom to do business. In *Medic Corporation Ltd v Barrett and Ors*, Chief Judge Goddard stated:[9]

> [C]ovenants in restraint of trade, by their very nature, suppress competition and this is seen as potentially harmful to the public interest and as potentially unfair because at the time when such a provision is negotiated it is often the case that the party demanding the covenant is in a stronger bargaining position than the party on whom it is imposed. Therefore the law starts with an assumption that a covenant in restraint of trade is unenforceable unless the party seeking to enforce it can show that the covenant was reasonable with reference to the private interests of the parties concerned and the interests of the public at large.

Thus, although a restraint is prima facie unlawful, it may be upheld and enforceable if the person imposing the restraint has a legitimate interest meriting protection and the restraint is reasonable as between the parties to the contract with reference to the interests of the public.[10] Hence, it will be upheld if it is "reasonable in all the circumstances of the case."[11]

As the doctrine of restraint of trade is based on public interest, its formulation may vary in conjunction with current thinking and developments in trade and means of communication.[12] For example, in the 18th century, judges were willing to prevent people from combining to restrict trade. This changed at the start of the 19th century with laissez-faire and freedom of contract.[13] Accordingly, it would not be unexpected to find a restraint from earlier times being held today as unreasonable and unenforceable. General principles developed in older decisions however, remain relevant to the determination of issues such as the provision of consideration, severability of the contract and the nature of the parties to the agreement.[14]

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[8] *Force Four v Curtling* [1994] 1 ERNZ 542, 554 (EC) Judge Travis.
[9] *Medic Corporation Ltd v Barrett and Ors* [1992] 3 ERNZ 523, 533-534 (EC) Goddard CJ.
[10] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co* [1894] AC 535 (HL).
[11] *Force Four v Curtling*, above, 554.
[12] *Halsbury's Laws of England* (4 ed, Butterworths, London, 2001) vol 47, Trade, Industry and Industrial Relations, para 22, 30.
[13] *The Laws of New Zealand* (Butterworths, Wellington, 2001) Competition Law, para 2, 3.
[14] *Halsbury's Laws of England* (4 ed, Butterworths, London, 2001) vol 47, Trade, Industry and Industrial Relations, para 22, 30.

In policy terms, there are some of the opinion that covenants in restraint of trade in the employment context should be abolished. Stewart argues that if restrictive covenants were prohibited, there would be greater competition amongst employees for skilled employees.[15] This competition would provide an incentive for rewarding such employees, which in turn, facilitates training, spawns innovation and enhances the productivity of businesses.[16] The weakness of this argument, identified by Stewart, is that in the absence of a protection of proprietary rights, innovators may not receive sufficient return on their investment. This can lead to a loss of incentive for further innovation to the detriment of economic growth.[17]

Further limits to Stewart's argument can be recognised. A reward system would depend on successful monitoring of the improvements and contributions of individual employees to the business, as well as successful negotiations between employers and employees, of such rewards. If negotiations were unsuccessful, employers would be left to rely on the more vaguely defined implied duties of confidentiality and fidelity. Furthermore, Stewart fails to recognise that restraints are not imposed solely on skilled employees. Stewart's argument in favour of prohibiting restraints raises many uncertainties. It may be argued in response that the more developed doctrine of restraint of trade provides a better tool for which to balance and protect the interests of both employers and employees.

C Negative Covenants and Post-termination Restraints

Restraint of trade clauses which are to operate after the employment relationship terminates can be distinguished from restraint clauses which are intended to apply only during the term of employment. Whereas the former are prima facie void, the latter are legally valid. The Court of Appeal has held that the courts have a residual discretion to grant injunctions to restrain current

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[15] Duncan Stewart "Restrictive Employment Covenants" (1997) NZLJ 173.
[16] Stewart, above, 175.
[17] Stewart, above, 173.

employees from entering into the employment of another person if it otherwise amounts to a breach of a negative covenant in the contract.[18] Negative covenants were once particularly relevant to the film industry. In *Warner Brothers Pictures Inc v Nelson*, the Court granted an injunction to restrain a film actress, known professionally as Bette Davis, from acting for any other film company in breach of a negative covenant in her contract.[19]

III IMPLIED DUTIES

Whilst an employment contract is operating, in addition to any express contractual terms, enforceable restraints exist under the common law implied duties of fidelity, confidentiality, and mutual trust and confidence. Under the duty of fidelity, an employee cannot act in a manner which would harm the employer's business.[20] Accordingly, an employee has an obligation not to compete with their employer and not to disclose their employers' confidential information. The implied duty of fidelity does not extend to the period after the termination of employment, whereas the duty of confidentiality generally does. The duty of confidentiality, however, requires that the information sought to be protected meet the common law standard of being "confidential."[21] Thus, while an employment agreement is operating, the employee will owe an employer a stronger obligation in matters of disclosure.

If an express term does not exist, an employer who is concerned about an employee leaving and commencing work for a competitor must rely on the implied duty of confidentiality. However, in contrast to an express term, it is likely to be more vague and more difficult to enforce. Despite the implied term surviving the employment relationship, the most effective way for an employer to protect their proprietary interests is by way of a covenant in restraint of trade. In policy terms, certainty resulting from an express covenant is fairer to

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[18] *McBean and Pope (Manawatu) Ltd v Coley* [1966] NZLR 309 (CA).
[19] *Warner Brothers Pictures Inc v Nelson* [1963] 3 All ER 160 (KB) Branson J.
[20] *Empress Abalone Ltd v Langdon and others* [2000] 2 ERNZ 53, 56 para 9 (CA).
[21] See Part V B 1 Trade secrets and confidential information.

employees.[22] An employee is unable to reject an implied term, but may negotiate or challenge an express term.[23]

IV FIDUCIARY OBLIGATIONS

More recently, the traditional protection acquired through restrictive covenants has been shadowed by the development of fiduciary obligations. It may be possible in some circumstances to argue that an employee owes a fiduciary duty to their employer, in addition to the duty of fidelity. The advantage in this argument is that the courts take a more favourable approach to assessing equitable compensation and the remedies for a breach of fiduciary duty are more wide-ranging than for other breaches of contract.[24] For example, it is possible for an employer to bring a claim for an account of profits or a similar claim in restitution.[25]

The relationship between a director and company falls within the classical categories of relationships where fiduciary obligations arise. The courts have found, on interlocutory applications, that there is an arguable case that a director acting in competition against a former employer, has breached their fiduciary obligation.[26] However, it is unlikely that the courts will seriously consider it arguable that an employee outside "top management" will owe their employer a fiduciary duty.[27] In the recent case of *Jerram v Franklin Veterinary Services (1977) Ltd*, the Employment Court held that the Employment Relations Authority's assumption that Jerram, a referral veterinarian, owed the obligations of a fiduciary to his employer as a "dubious proposition."[28] It was accepted that the parties owed each other reciprocal duties of trust, confidence and good faith but these obligations could not be elevated to the onerous duties

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[22] *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026, 1033 (CA).
[23] *Balston Ltd v Headline Filters Ltd* [1987] FSR 330, 351-352 Scott J.
[24] See generally Peter Churchman and Kit Toogood "When Key Employees Leave"(New Zealand Law Society Seminar, New Zealand, June-July 1999) 17.
[25] Simon Deakin and Gillian Morris *Labour Law* (3 ed, Butterworths, London, 2001) 338.
[26] See *Nedax Systems Ltd v Waterford Security New Zealand Ltd* [1994] 1 ERNZ 491 (EC) Goddard CJ; *Independent Broadcasting Co Ltd v Robb McKay (Media) Ltd* (1991) 5 NZCLC 67, 257 (HC) Thorp J.
[27] See generally Churchman and Toogood, above, 21.

of a fiduciary where Jerram was not a shareholder, director or other officer of the company.[29]

V REASONABLENESS

Common law implied terms and fiduciary obligations in the situation of a director and company, play a significant role in the duties owed by an employee to their employer. The remainder of this essay, however, will focus on express covenants in restraint of trade. One of the most important aspects as to whether a restraint is enforceable is the determination of whether it is reasonable.

A Determination of Reasonableness

Whether a restrictive covenant is reasonable and thus valid and enforceable, is fundamentally a question of law which requires a consideration of the particular facts.[30] Reasonableness is considered in the context of the whole of the agreement between the parties and against the background in which the agreement was entered into.[31] The court will have regard to such factors as: the nature of the employer's interest to be protected; the likely effect on the interest were the former employee to take up a position with a competitor of the employer; the likely effect on the employee if the covenant is enforced; and considerations of public interest.[32] These factors are further discussed below.

Reasonableness is usually judged as at the time of making the employment agreement.[33] The onus of proof is on the employer to show on the balance of probabilities that the covenant is no more than reasonable in the interests of the parties. A restraint will be reasonable if it affords no more than adequate

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[28] *Jerram v Franklin Veterinary Services (1977) Ltd* [2001] 1 ERNZ 157, 173 para 52 (EC) Judge Colgan.
[29] *Jerram v Franklin Veterinary Services (1977) Ltd*, above, 173 para 52.
[30] *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490, 495 (CA).
[31] *Debtor Management (NZ) Ltd v Quail* [1993] 2 ERNZ 498 (EC) Judge Colgan.
[32] *Radio Horowhenua Ltd v Bradley* [1993] 2 ERNZ 1085 (EC) Goddard CJ.
[33] *Gallagher Group Ltd v Walley*, above, 496 para 23.

protection for the employer.[34] In general, an employer is not entitled to protection against mere competition on the part of a former employee.[35]

B Proprietary Interests

A restraint of trade clause in an employment agreement is enforceable only if it can be justified as reasonably necessary to protect the proprietary interests of a former employer and in the public interest.[36] The employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business, which can properly be regarded as property.[37] The most obvious examples where protection may be afforded are trade secrets, confidential information and an employer's trade connections.

More recently, the courts have considered the issue of whether an employer has a legitimate interest in keeping key staff, especially in a highly competitive business.[38] A non-solicitation of staff clause may be valid, although it remains subject to the normal requirements of not being unreasonably wide.[39] Furthermore, it may be possible to extend an employer's interest to former fellow-employees.[40] Conversely, where there is no restraint of trade clause in an employment agreement, a former employee is able to solicit or entice an employee of the former employer. However, it will be a breach of the duty of fidelity where the employee solicits fellow employees while still employed.[41]

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[34] *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688, 707 (HL); *Cain v Turners and Growers Fresh Ltd* [1998] 3 ERNZ 314, 329 (EC) Goddard CJ.
[35] *Target Recruitment Services Ltd v Lewin* (1988) 2 NZELC 95,704 (HC) Hillyer J; *Canterbury FM Broadcasting Ltd v Daniels* (1988) 2 NZELC 96,441 (HC) Hardie Boys J.
[36] *Mason v Provident Clothing & Supply Co Ltd* [1913] AC 724, 733 (HL).
[37] *H & R Block Ltd v Sanott* [1976] 1 NZLR 213 (SC) Somers J.
[38] See *Fletcher Aluminium Ltd v O'Sullivan* [2001] 1 ERNZ 46 (CA); *Dawnay, Day & Co Ltd v D'Alphen* [1998] ICR 1068 (CA).
[39] *TSC Europe (UK) Ltd v Massey* [1999] IRLR 22.
[40] For example in *Fletcher Aluminium Ltd v O'Sullivan* [2001] 1 ERNZ 46 (CA) a non-solicitation clause extended to any person who was an employee in the two years preceding O'Sullivan's termination of employment.
[41] See *Communication Arts Ltd v Grant* [2000] 2 ERNZ 324, 346 (EC) Judge Travis.

The tests outlined in *Faccenda Chicken Ltd v Fowler* have been followed by the courts in New Zealand to determine the type of information that can be protected by a covenant in restraint of trade.[42] In *Faccenda Chicken Ltd v Fowler*, the English Court of Appeal held that an employer is able to restrict the disclosure of confidential information by a restrictive covenant if the information sought to be protected is a trade secret or equivalent to a trade secret. In determining whether information meets this standard, it is necessary to have regard to a number of factors. These factors include: the nature of the employment; the nature of the information itself; whether the employer stressed the confidentiality of the information to the employee; and whether the information can be easily isolated from other non-confidential information which is part of the same package of information.[43] In the modern business context, "trade secrets" are not confined to secret formulae used in the manufacture of products and can include confidential information of a non-technical or non-scientific nature.[44] For example, confidential ideas may be regarded as information of some value to an employer.

A former employer may not restrain an employee from using the additional skill and experience inevitably gained in the ordinary course of employment.[45] This information can be used for an employee's own benefit or in the service of a competitor.[46] Information protected as confidential is typically information that is valuable, identifiable, and can be separated from the employee's general knowledge. In *Stenhouse Australia Ltd v Phillips*, Lord Wilberforce stated:[47]

> [T]he employer's claim for protection must be based on the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to

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[42] *Korbond Industries Ltd v Jenkins* [1992] 1 ERNZ 1141, 1152 (EC) Judge Colgan; *Force Four New Zealand Ltd v Curtling* [1994] 1 ERNZ 542 (EC) Judge Travis.
[43] *Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 617, 626 (CA).
[44] *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418 (CA).
[45] *Probert Industries Ltd v Rogers* (29 May 1984) High Court Auckland A394/84 Sinclair J.
[46] *FSS Travel and Leisure Systems Ltd v Johnson* [1988] IRLR 382.
[47] *Stenhouse Australia Ltd v Phillips* [1974] 1 All ER 117, 123 (PC) Lord Wilberforce applied in *Cooney v Welsh* [1993] 1 ERNZ 407, 409 (CA).

appropriate for his own purposes, even though he, the employee, may have contributed to its creation.

2 *Trade connections*

An employer is permitted to protect his or her business connections and can prohibit a former employee from enticing their clients or customers. An employee's influence over an employer's clients can be a matter giving rise to a reasonable restraint.[48] Whether the influence is such as to confer a proprietary interest on the employer will depend on the facts of each case. For example, in a national firm it may be necessary to determine whether a firm's business connections in one locality extend to a different locality.[49] If clients become reliant upon the skill and judgement of a particular employee, or deal with that employee directly, a restraint is more likely to be considered reasonable. In these circumstances, it is likely to be within the power of the employee to entice clients away.[50] Conversely, a non-solicitation covenant will not be held unreasonable merely because it is not limited to clients that the employee had knowledge of, or was in contact with, during the course of employment.[51]

The circumstances of employment may be such as to confer protection on information as to the particulars of customers. Thus, an enforceable restraint may apply to written customer lists and memorised information, particularly if accompanied by a customer's particular requirements and business practices.[52] Information held about clients by junior employees may not be sufficiently sensitive to amount to information of a proprietary nature.

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[48] *Broadcasting Corp of New Zealand v Daniels* (15 December 1986) High Court Christchurch CP 399/86 Holland J; *BFS Marketing Ltd v Field and Anor* [1992] 2 ERNZ 1105 (EC) Judge Colgan.
[49] See *Adia Personnel Ltd v Flynn* (6 October 1997) Employment Court Christchurch CEC 7A/97 Judge Palmer.
[50] See *Broadcasting Corporation of New Zealand Ltd v Nielsen* (1988) 2 NZELC 96,040, 96,049 Hardie Boys J.
[51] *Airgas Compressor Specialists Ltd v Bryant* [1998] 2 ERNZ 42, 53 (EC) Goddard CJ.
[52] *Enterprise Staff Consultants Ltd v Carmichael* (11 August 1987) High Court Auckland CP 1070/87 Thorp J.

C *Area and Length of Restrictions*

In the determination of reasonableness, significant weight is attached to time and spatial limits. The courts are skeptical about provisions restraining trade which are of a substantial duration or cover an extensive area. Consequently, it is more difficult for an employer to establish the reasonableness of such a restriction.[53] The reasonableness of the specified area and duration of restraint will vary according to the circumstances of the particular case. Factors that are taken into consideration include: the employer's business; the nature of the interests to be protected; and the likely effect of the employee opening their own business.[54]

1 Time

Recent case law has highlighted the courts' restrictive attitude toward the duration of a restraint of trade. Generally, it is unusual for a restraint to be enforced for a period greater than twelve months. During this time, it is perceived that information will become outdated or an employer would have had sufficient time to overcome any disadvantage from a former employee's use of such information. In *Gallagher Group Ltd v Walley*,[55] the Court of Appeal upheld the decision of the Employment Court that the covenant in restraint of trade of four years was unreasonable and should be modified to a period of one year. It was held that one year would enable the employer to have a fair opportunity to prepare for, and meet fair competition from the former employee.[56] Much of the information to which the employee was privy would become obsolete or altered at the end of one year. In *Norris v Zealfresh International Ltd*,[57] the employee was restrained from participating in any business involving the marketing of foodstuffs in any region worldwide where

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[53] *Herbert Morris Ltd v Saxelby* [1961] 1 AC 688, 715 (HL).
[54] *H & R Block Ltd v Sanott* [1976] 1 NZLR 213 (SC) Somers J.
[55] *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 (CA).
[56] *Gallagher Group Ltd v Walley*, above, 496.
[57] *Norris v Zealfresh International Ltd* [1998] 3 ERNZ 574 (EC) Judge Colgan.

Zealfresh operated. The Employment Court held that a period of one year was unreasonable and that a period of three months was adequate.

Longer restraints have been upheld, particularly where there are more unusual factual circumstances. In *Condor Insurance Group Ltd & Fraser Bridgeway Insurance Brokers Ltd v Kearns*,[58] Travis J accepted that a two-year restraint is rarely upheld and that in the majority of cases where a restraint prohibited conduct for more than twelve months, it had been struck out or significantly modified in duration. In this case however, Travis J upheld a two-year restraint imposed on an insurance broker who held a senior managerial position. A two-year restraint period was considered reasonable because at the time the employment agreement was negotiated the employer was entitled to protect its proprietary interest in retaining its client base. The Employment Court gave weight to the mutuality of the arrangement. There was an agreement that any client that the employee brought to the firm would remain the employee's property and the employer gave an undertaking not to entice these clients if the employee left.

The length of the employment relationship has been of some relevance in considering the period of the restraint. In *Cooney v Welsh*,[59] the Court of Appeal held that the severity of a restraint that prevented a solicitor from practising in Ashburton for two years as unreasonable and against public interest. He had worked at the law firm for eight years and the restraint would have the effect of forcing him to move. The Court narrowed the scope of the restraint to dealings with the former employer's clients. In contrast, the Employment Court attached no significance to the length of the former employee's employment in *Condor Insurance Group Ltd & Fraser Bridgeway Insurance Brokers Ltd v Kearns*.[60] The restraint was as long in duration as the former employee's employment.

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[58] *Condor Insurance Group Ltd & Fraser Bridgeway Insurance Brokers Ltd v Kearns* (5 May 1999) Employment Court Auckland AEC 35/99 Judge Travis.
[59] *Cooney v Welsh* [1993] 1 ERNZ 407 (CA).

2 Area

A restraint of trade may relate to a specified type of activity in a specified geographical area. As with considerations of time, restrictions in area will also depend on the underlying circumstances of the case. For example, spatial restrictions may not be necessary if a former employer wishes to prohibit the solicitation of clients, whereas a covenant against the use of confidential information in competition is likely to require specific spatial limits. A firm with a purely local connection is unlikely to be able to enforce a restraint that prohibits a former employee's competition outside the area of that connection.[61]

Geographic restrictions imposed by a restraint will depend on the nature of the industry in question. For example, a nationwide restraint might be considered reasonable in the computer industry[62] or where an employer's customers operate from nationwide sites. Developments in technology have allowed some businesses to carry out trade irrespective of actual location. Such an example is that of internet sales where consumers are able to purchase goods from suppliers worldwide without leaving home. It would be expected that the courts would not be as quick to modify a restraint as unreasonably broad. This means that the permissible geographical area may become wider.[63]

A worldwide restriction is only likely to be enforceable if to be reasonably effectual, the restriction must be worldwide.[64] In *Gallagher Group Ltd v Walley*, the Court of Appeal upheld a worldwide restraint because of the nature of the electric and security fencing business and the practical inability of enforcing confidentiality if a narrower restriction was imposed.[65] In contrast,

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[60] *Condor Insurance Group Ltd & Fraser Bridgeway Insurance Brokers Ltd v Kearns*, above.
[61] *Bates v Gates* (1987) 1 NZELC 95,269 (HC) Thorp J.
[62] See generally *Brooks Ross Associates Ltd v Bevin* (13 November 1987) High Court Tauranga CP 16/87 Gallen J; *Business Associates Ltd v Telecom Corporation of NZ Ltd* (1992) 4 TCLR 685 (HC) Gallen J.
[63] *Debtor Management (NZ) Ltd v Quail* [1993] 2 ERNZ 498 (EC) Judge Colgan.
[64] *Force Four NZ Ltd v Curtling* [1994] 1 ERNZ 542 (EC) Judge Travis.
[65] *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 (CA).

in *Kemp v NZ Rugby Football League*, the restriction imposed on a rugby league player wishing to transfer overseas was held unreasonable, as it was unlimited as to place.[66]

D Manner of Terminating Employment

The circumstances surrounding the termination of employment may affect the reasonableness of a covenant in restraint of trade. A justified dismissal will not automatically cause such a restraint to cease to operate. However, a term may cease to operate if a dismissal is constructive and unjustifiable.[67] When an employee accepts an employer's repudiatory breach, he or she is discharged from contractual obligations, including any post-termination restrictive covenants.[68]

E Nature of Employee

The position held by the employee is relevant to the reasonableness of a restraint. It will be easier to establish that a restraint imposed upon a very senior employee is reasonable, than to establish that the corresponding restraint is reasonable in the case of a junior employee. This reflects the greater access to confidential information on the part of senior employees.[69] In addition, it is likely to be within the power of a senior employee who exerts substantial influence over clients, to entice such clients away.

F Bargaining Power

The determination of reasonableness includes taking into account the respective bargaining power between the parties to the employment agreement at the time the restraint was agreed to. A restraint is more likely to be held

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[66] *Kemp v New Zealand Rugby Football League* [1989] 3 NZLR 463 (HC) Henry J.
[67] See generally *Grey Advertising (New Zealand) Ltd v Marinkovich* (18 October 1999) Employment Court Auckland AC 70C/99 Judge Travis; Gordon Anderson and others (eds) *Employment Law Guide* (5 ed, Butterworths, Wellington, 2001) 1082.
[68] *General Billposting Co Ltd v Atkinson* [1909] AC 118 (HL).
[69] *Rank Xerox NZ Ltd v U-Bix Copiers (NZ) Ltd* (20 December 1985) High Court Auckland A1407/85 Barker J.

reasonable if the parties are of equal bargaining power.[70] Generally, in the employment relationship the bargaining power between the employer and employee is not equal. The extent of bargaining power was addressed by the Court of Appeal in *Gallagher Group Ltd v Walley*.[71]

In *Gallagher Group Ltd v Walley*, Walley had been employed by the defendant, Gallagher Group Ltd, and had reached a senior position in management. The relationships within senior management deteriorated when a new deputy chief executive officer was appointed without Walley being consulted. Consequently, it was agreed that the employment relationship with Walley should terminate. Walley's contract included a confidentiality clause, a clause relating to inventions and a four-year worldwide restraint of trade clause. In effect, Walley was prohibited from engaging in the electric and security fencing business.

The Employment Court considered the very competitive nature of the industry internationally but balanced this against the fact that the restraint would seriously restrict Walley's future employment prospects.[72] The Employment Court modified the restraint to a period of one year. Gallagher Group Ltd appealed this decision.

The question on appeal concerned the validity of the restraint of trade. Of particular interest is the appellant's argument about the respective bargaining strength between the parties. It was argued that in the absence of evidence as to the imbalance of bargaining strength in the negotiation of covenants in restraint of trade, restraints in employment contracts of senior employees should be upheld in the same way as covenants that restrain vendors of businesses from competing. The Court of Appeal rejected this argument, stating:[73]

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[70] See Part VI VENDOR/PURCHASER SITUATION.
[71] *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 (CA) Gault J.
[72] *Gallagher Group Ltd v Walley* [1998] 3 ERNZ 489 (EC) Judge Colgan.
[73] *Gallagher Group Ltd v Walley*, above, 497 paras 25-26 (CA).

> The difficulty with this argument is that to the extent that a restraint clause is unreasonable and unnecessary for the legitimate protection of the former employer's rights there must be a presumption of unequal bargaining strength. The reasonableness of the restraint may well be a more reliable measure of the comparative bargaining positions than the evidence given subsequently by the parties to a complex employment relationship.
>
> ... [T]he policy of the law towards employee restraint is well established. The positions of vendor and purchaser of goodwill are quite different.

The Court of Appeal endorsed the approach taken by the Employment Court by explicitly refusing to take a traditional contractual approach and instead, giving more weight to the bargaining strength between the parties.[74]

G Consideration

The time that the parties agree to a restraint clause will be taken into account when considering reasonableness. This is particularly relevant as to whether or not consideration was paid by the party seeking to enforce the restraint. A restraint is more likely to be enforced where it forms part of the original employment agreement. At the outset of the employment relationship, the employer offers the employee employment and pays the employee any entitled contractual benefits.

Where the restraint is imposed by way of variation in terms of the original employment agreement, evidence of valuable consideration is likely to be required before such a restraint is enforced. In *Airgas Compressor Specialists Ltd v Bryant*,[75] at the interim injunction stage, the former employee argued that the restraint of trade clause was unenforceable. The employment contract had been signed some time after the employment relationship had commenced on the basis of an oral agreement. The restraint provisions had not been discussed at the initial stage. Chief Judge Goddard implied that on a full hearing it might be possible for the former employee to have the restraint set aside because the

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[74] See Gordon Anderson "Recent Case Comment" (1999) 4 ELB 67, 71.
[75] *Airgas Compressor Specialists Ltd v Bryant* [1998] 2 ERNZ 42 (EC) Goddard CJ.

written contract constituted some variation of an earlier oral contract, which the former employee was prevailed to sign without any consideration. Thus, it would be important for an employer to acknowledge and document that a restraint had been discussed with an employee and that consideration had been provided.[76]

A further example highlighting the significance of consideration is the case of *CE Elley Ltd v Burgess*.[77] The employer converted an employment contract into a contract for services with tradesmen at the same time a restraint of trade clause was inserted. The High Court took into account the fact that no consideration was given as well as the imbalance of bargaining power between the parties. In refusing to uphold or modify the restraint clause, the Court differentiated between parties accepting such a clause at the onset of an employment relationship and parties accepting a clause at a later stage.

The provision of valuable consideration is not a sole determining factor in the reasonableness of a restraint of trade. In *Force Four New Zealand Ltd v Curtling*,[78] during the course of employment, an employee was faced to sign a contract which included a covenant in restraint of trade. Although the employer provided consideration by way of an increase in remuneration, the Employment Court declined to enforce the restraint on the grounds of the employee's weaker bargaining position, which included his financial circumstances.

Of particular relevance to the issue of consideration is the question of taxation. It is interesting to note that a payment for a restraint of trade is not assessable income for the purposes of income tax legislation and therefore not taxable.[79] Accordingly, it would be important that employment agreements

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[76] See generally Peter Churchman and Kit Toogood "When Key Employees Leave" (New Zealand Law Society Seminar, New Zealand, June-July 1999) 27.
[77] *CE Elley Ltd v Burgess* (1997) 7 TCLR 582 (HC) Gallen J.
[78] *Force Four New Zealand Ltd v Curtling* [1994] 1 ERNZ 542 (EC) Judge Travis.
[79] *Henwood v Commissioner of Inland Revenue* (1995) 17 NZTC 12,271 (CA); *Commissioner of Inland Revenue v Fraser* (1996) 17 NZTC 12,607 (CA) decided under the Income Tax Act 1976.

clearly differentiate between a payment in consideration of a restraint of trade and a payment for services.

H Public Interest

If an employer has shown that a covenant in restraint of trade is reasonable, the onus is on the employee to show that it is unreasonable with reference to public interest.[80] What is required for a restraint to be reasonable in the interests of the public? In *Airgas Compressor Specialists Ltd v Bryant*, Chief Judge Goddard stated: [81]

> To be reasonable in the interests of the public, the restraint must not be injurious to the public. Reasonableness in reference to the public interest must be expressed in one or more propositions of law rather than in reference to preconceptions about or anecdotal evidence of the interests of the public at large. For example, a proposition of law which has been expressed is the right of every person to trade freely subject to reasonable restraints which are in keeping with the contemporary organisation of trade.

It can be argued in favour of the employee that this proposition is unduly restrictive in the determination of reasonableness in the interests of the public. Such an example is in the provision of health care. Restraints of trade in health care involve unique complexity because of the patient's right to choose their doctor and the doctor's ethical obligation to treat the patient.[82] It is difficult to envisage that the public interest in patients having their choice of doctors will meet the legal standard stated by Chief Judge Goddard.

The limit of Chief Judge Goddard's proposition has been addressed in the case of *The University of Auckland Primary Health Care Trust v Sewell*.[83] A contract included a restraint of trade provision prohibiting clinical practitioners from recommencing practice within a five-kilometre radius of the plaintiff for a period of three years. The employer had a proprietary interest in protecting its

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[80] *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688, 700 and 706 (HL).
[81] *Airgas Compressor Specialists Ltd v Bryant* [1998] 2 ERNZ 42, 54 (EC) Goddard CJ.
[82] *The University of Auckland Primary Health Care Trust v Sewell* [2000] 1 ERNZ 781, 798 (EC) Judge Travis.
[83] *The University of Auckland Primary Health Care Trust v Sewell*, above.

patient base because it was a self-sufficient charitable trust organisation and needed to survive.[84] The Employment Court held that the period of the restraint was unreasonable and unenforceable unless modified. The provision was also held unreasonable in its scope because it prohibited the defendant from practising in Manurewa, when all that was required was to prevent her from taking patients from the practice. The Employment Court, however, held that the public interest in patients having their choice of doctors would not prevent a restraint, if otherwise found to be reasonable, being enforced due to the public interest in the sanctity of contract.[85]

The cost of medical care in relation to the issue of public interest was considered in *Medic Corporation Ltd v Barrett and Ors*.[86] A sales representative of medical supplies set himself up in business in competition with his former employer. The public interest in reducing the cost of medical treatment was taken into account in determining the reasonableness of the restraint of trade.

VI VENDOR / PURCHASER SITUATION

A potentially valid restraint of trade may be found in both the employment context and the situation of a sale and purchase of a business. However, a non-competition agreement that accompanies the sale of a business differs to that of a general restrictive covenant. A distinction can be drawn between the situation of a vendor and purchaser of goodwill and a restraint on an employee. The law takes a more favourable attitude to covenants restraining vendors of businesses from competing so as to derogate from the value of the goodwill sold.[87] Accordingly, a restraint held reasonable as between a vendor and purchaser of business may be held unreasonable as between an employer and employee.

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[84] *The University of Auckland Primary Health Care v Sewell*, above, 799.
[85] *The University of Auckland Primary Health Care Trust v Sewell*, above, 801.
[86] *Medic Corporation Ltd v Barrett and Ors* [1992] 3 ERNZ 523 (EC) Goddard CJ.
[87] *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490, 497 (CA) Gault J.

In a non-competition agreement associated with a sale, the inequality of bargaining power between the parties is diminished. There is consideration paid in the form of the purchase price to the seller in exchange for, inter alia, physical property, goodwill, the transfer of business and a covenant not to compete. The transaction is at arm's length with an opportunity to negotiate. Frequently, both parties seek legal advice. In contrast, in the employment context, a covenant in restraint of trade forms part of an employment "package", usually with little opportunity for a prospective employee to object or negotiate. The employee is unlikely to seek legal advice and is in a vulnerable position, susceptible to unfair pressure to agree to a restraint on facing the risk of losing prospective employment. The employer does not purchase goodwill but purchases an employee's services, skill and knowledge.

An example of a vendor and purchaser situation is the case of *Brown v Brown*.[88] This case involved the acquisition, by one shareholder, of the shares of his brother in a company with an established well-drilling business. A covenant restraining the seller from competing with the company was upheld, although the duration was modified from twenty to twelve years. The Court emphasised the freedom of a party to make its own bargain.

In *Gallagher Group Ltd v Walley*, the Court of Appeal considered the issue of whether restrictive covenants freely agreed to by competing parties under no disadvantage in bargaining strength, should be upheld in the same way as other contractual terms.[89] The subsequent case of *Fletcher Aluminium Ltd v O'Sullivan*[90] cannot be seen to mark any change in the approach taken by the Court in *Gallagher Group Ltd v Walley* to restraint of trade clauses in the employment context.[91] The case of *Fletcher Aluminium Ltd v O'Sullivan* is particularly interesting and worth some discussion.

O'Sullivan entered into a contract of employment with Fletcher Aluminium Ltd. The contract included a non-solicitation clause and a two-year restraint of

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[88] *Brown v Brown* [1980] 1 NZLR 484 (CA).
[89] See Part V F Bargaining Power.
[90] *Fletcher Aluminium Ltd v O'Sullivan* [2001] 1 ERNZ 46 (CA).

trade clause which prevented O'Sullivan from entering into competition with Fletcher Aluminium's "design, marketing, sales, and distribution of windows and doors in New Zealand". In addition, O'Sullivan received a payment of $1.7 million for the sale of his intellectual property in aluminium joinery system designs to Fletcher Aluminium and for otherwise entering into the contract. Thus, Fletcher Aluminium contracted for the intellectual property and O'Sullivan's services as an employee in its product development team. There was no suggestion of unequal bargaining power and both parties had received extensive legal advice. O'Sullivan subsequently left Fletcher Aluminium and sought a declaration from the Employment Court that the restraint was unenforceable.

The Employment Court made a distinction between the situation of a sale by an employee to an employer and that of a sale and purchase of goodwill as discussed by the Court of Appeal in *Gallagher Group Ltd v Walley*.[92] Here, there was a sale by an employee to an employer. The Employment Court held that the restraint was unreasonable and modified it to a term of six months.

The Court of Appeal subsequently reversed this decision and reinstated the restraint. In discussing the categorisation of restraint clauses, the Court stressed that they are not to be confined to either a restraint covenant in an employment contract or a restraint associated with the sale of goodwill of a business.[93] Thus, even in the absence of the purchase of goodwill, the covenantee may have a legitimate interest that should be protected by a restraint covenant.[94]

The Court of Appeal held that the Employment Court failed to consider all the aspects of the transaction apart from O'Sullivan's acquisition of Fletcher Aluminium's proprietary information and trade secrets during the course of employment. The Employment Court had held: "What was bought and sold was the intellectual property in designs protected by effective statutory

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[91] See Gordon Anderson "Recent Case Comment" (2001) 3 ELB 52, 53.
[92] *O'Sullivan v Fletcher Aluminium* [2000] 2 ERNZ 431, 439 para 39 (EC) Judge Colgan.
[93] *Fletcher Aluminium Ltd v O'Sullivan*, above, 54 para 29.

schemes following registration ... ."[95] Accordingly, the Court of Appeal made comments on the approach taken by the Judge in the Employment Court:[96]

> He reached that position by reference to the anticipated intellectual property right protection. That led to the case being treated as involving a straightforward employer/employee situation as in the *Gallagher* case: 'a mid-level manager with knowledge of confidential product, sales and marketing information'.

Fletcher Aluminium had, however, sought protection extending beyond merely allowing time for it to register intellectual property to that of protecting itself against competition from a vendor. The Court of Appeal saw no reason why Fletcher Aluminium should not be able to protect itself against competition from a vendor:[97]

> That raises the question whether, as a matter of public interest, it should be possible to restrain, by covenant on the vendor of intellectual property rights, conduct beyond the scope accorded those rights under the law. We see no reason in principle why it should not be possible. The restraint is against only the vendor. Others may compete outside the scope of the statutory protections. The restraint on that one person as vendor, so long as it is reasonable, simply permits the purchaser full enjoyment of that which has been purchased – the opportunity to commercially exploit the rights free from competition from the vendor.

The Court of Appeal emphasised that when determining whether a restraint was enforceable, the totality of the transactions had to be taken into account. This included considering factors such as: the bargaining power of the parties; evidence as to fair dealing; and other contractual provisions. The Court stressed its reluctance to intervene by holding a term unreasonable where there is equal bargaining power of a willing vendor and willing purchaser in a commercial transaction. Here, the two parties negotiated at arm's length, on equal terms and with access to legal advice. Fletcher Aluminium paid a substantial sum for the protection of the restraint

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[94] *Fletcher Aluminium Ltd v O'Sullivan*, above, 54 para 30.
[95] *O'Sullivan v Fletcher Aluminium*, above, 439 para 39.
[96] *Fletcher Aluminium Ltd v O'Sullivan*, above, 54 para 32.
[97] *Fletcher Aluminium Ltd v O'Sullivan*, above, 56 para 39.

on O'Sullivan.[98] The Court held that the transaction in this case was essentially a commercial arrangement consisting largely of a sale and purchase with an employment element joined on.[99]

The statements made in *Fletcher Aluminium Ltd v O'Sullivan* suggest that the courts will give as much weight to the factors relevant to determining the reasonableness of non-employment restraints as are given to employment factors. These statements are particularly relevant to arrangements where a business is sold and the vendor is given employment in a management capacity.[100]

VII A COMPARISON: OLD AND RECENT CASES

Surveys of employment cases involving covenants in restraint of trade can provide valuable information on the range of acceptable practice. Both the Employment Court in *Walley v Gallagher Ltd*[101] and the Court of Appeal in *Aoraki Corporation Ltd v McGavin*[102] have shown interest in empirical evidence on contemporary employment practices when evaluating aspects of restraints of trade and redundancy clauses, respectively. An examination of recent New Zealand cases and United Kingdom cases from last century highlight some differences in the approaches taken by the courts to restraints of trade.

A United Kingdom

The courts have considered restraints in relation to a variety of trades and professions. The cases in the following table represent some of the restraints upheld as reasonable in the United Kingdom in the late 19th and early 20th centuries.

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[98] *Fletcher Aluminium Ltd v O'Sullivan*, above, 58 para 45.
[99] *Fletcher Aluminium Ltd v O'Sullivan*, above, 58 para 45.
[100] See Gordon Anderson "Recent Case Comment" (2001) 3 ELB 52, 53.
[101] *Walley v Gallagher Ltd* [1998] 3 ERNZ 1153, 1187 (EC) Judge Colgan.
[102] *Aoraki Corporation Ltd v McGavin* [1998] 1 ERNZ 601, 621 (CA).

Table: United Kingdom cases on restraint of trade

Case	Occupation	Restraint of Trade
Hastings v Whitley (1848) 2 Exch 611	assistant surgeon	10 miles, no time limit
Baines v Geary (1887) 35 ChD 154	dairyman	customers during service, no time limit
National Provincial Bank of England v Marshall (1888) 40 ChD 112	banker	2 miles, 2 years
Badische Anilin v Schott & Segner [1892] 3 Ch 447	commercial traveller	no spatial limit, 3 years
Dubowski & Sons v Goldstein [1896] 1 QB 478	dairyman	customers during service, no time limit
Haynes v Doman [1899] 2 Ch 13	hardware traveller	25 miles, no time limit
Edmunson v Render [1905] 2 Ch 320	law clerk	15 miles, no time limit
Bromley v Smith [1909] 2 KB 235	bread deliverer	10 miles, 3 years
Gadd v Thompson [1911] 1 KB 304	apprentice architect	10 miles, 10 years
Fitch v Dewes [1921] 2 AC 158	managing clerk at law firm	7 miles, no time limit

These cases exemplify some of the more liberal approaches taken by the courts to restraints of trade. Wider restraints are more likely to be upheld as reasonable where businesses had customers that were widely distributed, such as in the case of travelling salesmen.

The modern approach taken to the scope of restraints in the United Kingdom has been generally more restrictive.[103] However, recent decisions have indicated that restraints with no area restriction may be reasonable in certain circumstances as a means of protecting an employer's interests.[104] Furthermore, the recent case of *Hollis & Co v Stocks*, illustrates a liberal attitude taken to the construction of a restraint. Here, although the terms of the restrictive covenant did not specify work "as a solicitor", the Court of Appeal construed the words "advising or representing clients" to plainly mean that and that those words were to be read into the restraint clause.[105]

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[103] See Simon Deakin and Gillian Morris *Labour Law* (3 ed, Butterworths, London, 2001) 344.
[104] Deakin and Morris, above, 344; *Office Angels Ltd v Rainer-Thomas* [1991] IRLR 214 (CA); *Dentmaster (UK) Ltd v Kent* [1997] IRLR 636 (CA).
[105] *Hollis & Co v Stocks* [2000] IRLR 712 (CA).

B New Zealand: A Survey of Decisions

An analysis of recent New Zealand employment cases provides an interesting contrast to United Kingdom cases of last century. Data was extracted from cases made available on Brooker's Employment Library.[106] An analysis was based on cases reported in the Employment Reports of New Zealand and unreported employment cases. It is possible to make some observations from the information gathered.[107]

The survey comprised 46 restraints from 39 cases between 1998 and 2002 (to date). The institutions that dealt with the cases ranged from the Employment Relations Authority to the Court of Appeal. The employer initiated the proceedings in the majority of cases (82 per cent). Approximately half of all the cases were dealt with at the interim stage only.

The restraints that were enforceable, including those that had been modified, were more likely to be of a three to four month duration (38 per cent) or a one-year restraint (28 per cent). No restraints were enforced for longer than two years. One restraint of four years was not upheld. Restraints were more common for senior employees, such as managers and supervisors (31 per cent), and those employees in the occupation of sales or service (47 per cent). There was no consistent correlation between the length of the employment relationship and the duration of the restraint.

A finding that restraints are more common for senior employees is questionable, as it may be confounded by other variables. Senior employees may have more direct access to legal representation and be more aware of their legal rights than some other groups and consequently, such an employee is

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[106] Brooker's Employment Library <http://www.brookers.co.nz> (last accessed 16 September 2002).

[107] See APPENDIX ONE - TABLE: RESTRAINT OF TRADE CASES 1998-2002 and APPENDIX TWO – TABLE: OCCUPATION AND DURATION OF RESTRAINT for a summary of the results.

more likely to bring an action.[108] Indeed, of the cases surveyed, where the employee initiated proceedings, the employee was of a more senior or professional nature. This finding was not evident where it was the employer that had brought a claim. Thus, such a survey may under-represent those restraints that are associated with more junior employees who do not bring an action.

It is noteworthy that, in contrast to the Labour Relations Act 1987, the Employment Contracts Act 1991 (ECA) encouraged more written employment contracts, and the importance of the written terms to the interpretation of such contracts has been stressed.[109] Similarly, under the ERA there is a statutory requirement for employment agreements to be in writing.[110] The adoption of standard form contracting facilitates this requirement but it can be perceived as leading to more restraint of trade clauses.[111] Employers may extend the use of a standard template to employees at a lower level.

Despite these factors, it is important to note that a large proportion of the cases surveyed are made up of employees in sales and service at varying levels of seniority. With the introduction of easier access to the dispute resolution process through mediation, it will be particularly interesting to observe whether junior employees become more proactive toward restraints through such processes.

Those restraints enforced for a duration of at least one year were more likely to involve employees of a professional nature or in a managerial role. More specifically, the longer restraints that were found reasonable involved more

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[108] See Ian McAndrew "Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload and Representation" (1999) 24(3) NZJIR 365, 370. It is possible to extend some of the speculations made about the correlations in personal grievance cases to cases on restraint of trade.

[109] See *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681, 687 (CA) Cooke P.

[110] Employment Relations Act 2000, ss 54(1)(a) and 65(1)(a).

[111] For example *TNT Worldwide Express (NZ) Ltd v Cunningham*, above; *Walden v Barrance* [1996] 2 ERNZ 598 (EC) Goddard CJ.

unusual factual circumstances.[112] Overall, the survey illustrates a restrictive attitude taken by the courts in New Zealand. The decisions highlight the relevance of taking into consideration, all the particular circumstances of an individual case when determining the reasonableness and enforceability of a restraint.

VIII GARDEN LEAVE

The courts tend to view a restraint that renders a former employee unable to obtain work as unreasonable. "Garden leave" can be provided by an employer to counteract this situation. This is an alternative to a formal covenant in restraint of trade. The employee is made subject to a notice period during which the employer continues to remunerate the employee, although not requiring him or her to actually work.[113] In return, the employee is bound not to take up employment elsewhere during this period.

The ability of an employer to place an employee on "garden leave" was considered in *Ogilvy & Mather (NZ) Ltd v Turner*.[114] McKay J observed that it is not clear whether an employer can require an employee not to work and that the construction of the contract was important. He was of the view that if, on the construction of the employment contract, the employee is not given the right to work, but merely a right to remuneration, the employer would not be in breach of the contract.[115] McKay J also stated that in many situations employees are interested in not only remuneration but also the opportunity to use their skills.[116]

A "garden leave" clause may be open to abuse by an employer who ensures that an employee is unable to work for a long period of notice. The employee is deprived of the chance to get a better paid job and also, by being out of

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[112] See V C 1 Time and the discussion on *Fletcher Aluminium v O'Sullivan* [2001] 1 ERNZ 46 (CA) and *Condor Insurance Group Ltd & Fraser Bridgeway Insurance Brokers Ltd* (5 May 1999) Employment Court Auckland AEC 35/99 Judge Travis.
[113] *Ogilvy & Mather (NZ) Ltd v Turner* [1995] 2 ERNZ 398, 405 (CA).
[114] *Ogilvy & Mather (NZ) Ltd v Turner*, above.
[115] *Ogilvy & Mather (NZ) Ltd v Turner*, above, 406.
[116] *Ogilvy & Mather (NZ) Ltd v Turner*, above, 406.

employment, their value to any future employer may be reduced.[117] In the United Kingdom, the courts generally enforce "garden leave" clauses by way of interim injunction but only for the shortest period possible.[118]

The issue of "garden leave" was considered by the English Court of Appeal in the case of *William Hill Organisation Ltd v Tucker*.[119] Tucker, a senior dealer in the business of spread betting, handed in his notice of resignation intending to join one of his employer's competitors. His employer, William Hill, did not accept this because it had not met the contractual requirement of six months' notice. Instead, William Hill put Tucker on "garden leave" for the six-month notice period, despite the absence of an express clause in his employment contract.

In the Court of Appeal, Morritt LJ concluded that all skilled employees should be permitted to exercise their skills even during their notice period, provided that there was work to be done. This was not restricted to employees such as actors and musicians. In this case, in the absence of a contractual term, the employer had a duty to provide Tucker with work during the notice period so as to enable him to exercise his skills.[120]

Morritt LJ gave an indication as to the approach to be taken to an application for an injunction where there is an express "garden leave" clause. The approach was to be consistent with that taken to interlocutory applications to enforce restrictive covenants. Employers are required to justify the validity of the period of "garden leave" by reference to the particular circumstances of the individual employee.[121] Thus, an employer cannot rely on a "garden leave" clause to ensure that a former employee does not take up new employment with a rival trader, in an attempt to extend the coverage afforded by a justifiable covenant in restraint of trade.

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[117] See generally Simon Deakin and Gillian Morris *Labour Law* (3 ed, Butterworths, London, 2001) 341.
[118] See *Provident Financial v Haywood* [1989] ICR 160, 165 (CA) Dillon LJ.
[119] *William Hill Organisation v Tucker* [1999] ICR 291 (CA).
[120] *William Hill Organisation v Tucker*, above, 317 Morritt LJ.
[121] *William Hill Organisation v Tucker*, above, 318 Morritt LJ.

IX RESIGNATION NOTICE PERIOD AS A RESTRAINT

An employer may rely on a period of notice for termination of employment as a means of obtaining a restraint. There are potential advantages for the employer in doing this. During the resignation notice period an employee remains subject to the implied duties of fidelity and confidentiality. In addition, it may be possible for an employer to direct the employee to undertake other duties while the employer builds upon personal relationships with clients, suppliers, and replacement staff.

It can be envisaged that an employer may unreasonably incorporate an excessively long notice period in an employment agreement to function effectively as a restraint of trade clause. The Employment Court considered the issue of an allegedly long notice period in *Minet Archer Ltd v Doyle*.[122] The case involved an application for an interim injunction to restrain former employees from competing during a reasonable notice period. Four senior employees of an insurance broker terminated their employment relationship, three resigning and giving four weeks' notice and the fourth claiming constructive dismissal. There was no express period of resignation or restraint of trade clause. The employer claimed that a reasonable notice period was three months. The employees argued that the employer was seeking to extend the reasonable period of notice as a means of obtaining a restraint of trade, without negotiation or consideration.

In assessing the reasonableness of the notice period, the Court considered the protection of the employer from competition. Despite the absence of an express restraint, the Court held that the employer required protection while it attempted to consolidate the insurance business after the employees left. The Court held that there was at least an arguable case that three months was a reasonable period of notice. Thus, the case suggests that the form of the restraint is not as important as the substantial effect of the restraint itself.

Although the doctrine of restraint of trade is normally applied to post-employment restraints, there is no reason why it should not apply to contracts that contain a provision for a long notice period.[123]

X RESTRAINT OF TRADE IN THE SPORTS CONTEXT

A restraint of trade may arise from an agreement between employers. It is particularly important that an employee is able to challenge such a restraint even though it is not contained in his or her own employment agreement. Third party restraints have been exemplified by restraints of trade in the sports context.

In the cases of *Blackler v New Zealand Rugby Football League (Inc)*[124] and *Kemp v New Zealand Rugby Football League*,[125] professional rugby league players sought clearance to enter into contracts to play professionally in Australia. The League's rules, although not negotiated by the players, governed their transfer to overseas leagues. In both cases, the Courts concluded that the rule was an unreasonable restraint of trade and unenforceable. Similarly, in *Adamson v New South Wales Rugby League*, the Federal Court of Australia held that such rules were contrary to the common law principles that people are entitled to practise their trade, and exercise and develop their skills as they wished.[126] It reversed the lower court decision that the New South Wales Rugby League rules were justified in order to maintain the competitiveness of the teams.

Transfer arrangements of rugby league players has fallen under the sphere of the Commerce Act 1986. The Commerce Act prohibits arrangements among competitors that substantially lessen competition.[127] However, the Commerce

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[122] *Minet Archer Ltd v Doyle* (20 June 1997) Employment Court Auckland AEC 64/97 Judge Finnigan.
[123] See Simon Deakin and Gillian Morris *Labour Law* (3 ed, Butterworths, London, 2001) 341; *Evening Standard Co Ltd v Henderson* [1987] ICR 588 (CA).
[124] *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547 (CA).
[125] *Kemp v New Zealand Rugby Football League* [1989] 3 NZLR 463 (HC) Henry J.
[126] *Adamson v New South Wales Rugby League* (1991) 100 ALR 479; (1992) 103 ALR 319 (FCA).
[127] Commerce Act 1986, s 27.

Commission may authorise such arrangements if it is satisfied that public benefits from such arrangements outweigh the lessening of competition.[128] In 1996, the Commerce Commission authorised the proposed transfer arrangements. The feature of the arrangements is a quota system which restricts the number of players transferring to any one provincial union, transfer fees and transfer periods.[129]

The Commission considered the main detriment of the proposed quota system on player transfers to be a restriction on the allocation of players to teams that most valued them. However, this was outweighed by the benefit to the public from eliminating the potential for the dominance of stronger and richer competitors, preservation of representative teams, sponsorship and tourism. The Auckland High Court upheld the Commission's decision on appeal.[130]

Although the Commerce Act was invoked in the situation of rugby league players, it is unlikely to have a significant role in restraints of trade in employment. A covenant in restraint of trade imposed on an employee is unlikely to meet the requirement of "substantially lessening competition in a market."[131]

XI SPARE TIME ACTIVITIES

Can the courts determine the reasonableness of a restraint of trade imposed on an employee during their term of employment? In *Warner Bros Pictures Inc v Nelson*, Branson J observed:[132]

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[128] Commerce Act 1986, ss 58 and 61.
[129] See generally Commerce Commission "Commission Authorises NZRFU Transfer Rules" (17 December 1996) Media Release 1996/103 <http://www.comcom.govt.nz/publication/display_mr.cfm?mr_id=29> (last accessed 29 August 2002).
[130] *Rugby Union Players' Association Inc v Commerce Commission (No 2)* [1997] 3 NZLR 301 (HC).
[131] Commerce Act 1986, ss 27 and 28.
[132] *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209, 214 Branson J.

> Where … the covenants are all concerned with what is to happen whilst the defendant is employed by the plaintiffs and not thereafter, there is no room for the application of the doctrine of the restraint of trade.

This statement has been criticised as being too wide.[133] Accordingly, the doctrine of restraint of trade has no application where a contract restricts the provision of services exclusively to another, except where such restrictions appear unnecessary or reasonably capable of enforcement in an oppressive manner.[134] In these situations, restraints must be justified before they are enforced. Consequently, it can be argued that contracts should be subject to examination where in effect there is a restraint on an employee's spare time activities. This is particularly relevant in the current employment climate where it is not unusual to find a person relying on secondary employment. An employee should not be unduly restricted in their freedom to exercise discretion on the use of their spare time.

The issue of a restraint of trade arising during the term of an employment relationship was considered in *Tisco Ltd v Communication & Energy Workers Union*.[135] The employee was employed as an electronics technician and in his spare time, operated a private business repairing and selling electronic equipment. In the Employment Court, Chief Judge Goddard stated that an employee who completes their hours of work is free to spend their spare time as they please.[136] They can use some of this time to augment earnings by undertaking other employment, subject to contractual obligations. However, spare time activities would be prohibited if the contract expressly or impliedly imposed such a prohibition.[137] In this case, it was not sufficient merely that the employer had forbidden the employee from engaging in the particular activity of pursuing electronic trade practices for reward without the employer's knowledge. The Employment Court concluded that the employee was not prohibited from dealing with appliances in his spare time although prohibited

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[133] See *Halsbury's Laws of England* (4 ed, Butterworths, London, 2001) vol 47, Trade, Industry and Industrial Relations, para 40, 43.
[134] *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, 622 (HL).
[135] *Communication & Energy Workers Union v Tisco Ltd* [1992] 2 ERNZ 1087 (EC) Goddard CJ.
[136] *Communication & Energy Workers Union v Tisco Ltd*, above, 1095.

him from accepting private repair work.[138] The express term did not contain the element of competition in electronic trade practice and therefore did not encompass the situation.[139]

On appeal, the Court of Appeal focused on the employee's breach of the implied term of mutual trust and confidence. Cooke P did not discuss the appropriate limitations on the right of employees to use spare time for their own purpose.[140] Although the Court of Appeal found the Employment Court's interpretation of the express term "surprising", no appeal was open on this point.[141] The employer was concerned that the employee's activities had the potential to cause third parties, namely other retailers, to lose sales. Accordingly, it appears that the Court of Appeal had little difficulty in extending implied terms that favour employers so as to unduly restrict an employee's freedom. The Court's decision has the potential to create considerable difficulties for part-time employees who face the risk of breaching vaguely defined implied duties whilst outside the workplace.

It is of particular interest to note that the Court of Appeal in *Empress Abalone Ltd v Langdon and others*, considered the approach taken by the Court in *Tisco Ltd v Communication and Energy Workers Union* in dealing with the broad implied duties of an employee.[142] The Court preferred to take a more conservative approach in the determination of the extent of any duty owed by an employee, stating that it is ultimately a question of fact in any case.[143]

XII REMEDIES

There have been a number of recent changes in relation to remedies under the ERA. In particular, there have been changes relating to the application for the

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[137] *Communication & Energy Workers Union v Tisco Ltd*, above, 1095.
[138] *Communication & Energy Workers Union v Tisco Ltd*, above, 1103.
[139] *Communication & Energy Workers Union v Tisco Ltd*, above, 1096.
[140] *Tisco Ltd v Communication & Energy Workers Union* [1993] 2 ERNZ 779 (CA).
[141] *Tisco Ltd v Communication & Energy Workers Union*, above, 781.
[142] *Empress Abalone Ltd v Langdon and others* [2000] 2 ERNZ 53, 56 para 10 (CA).
[143] *Empress Abalone Ltd v Langdon and others*, above, 56 para 11.

modification or deletion of a restraint and the institutions that deal with such an application. These issues and enforcement in general are discussed below.

A Enforcement

The most effective means by which an employer can enforce a restraint clause is to obtain an injunction. If injunctive relief is obtained before a former employee takes up a new position, it may be possible for an employer to minimise any potential loss to their business. An injunction provides an employer with the opportunity to protect its trade secrets and other such information, and time for which confidential information becomes outdated.[144] Frequently, a former employee knows of the existence of a covenant in restraint of trade and acts in breach of its terms by entering into new employment with a rival trader. An injunction may prevent the former employee from continuing in such employment.

Many restraint of trade cases never reach a substantive hearing before the term of the restraint expires. Consequently, the result of an application for interim relief often determines substantive issues. Under the ECA, an employer seeking to enforce a restraint covenant in an employment contract could apply either to the Employment Tribunal for a compliance order[145] or to the Employment Court for an injunction.[146] The Tribunal had no express jurisdiction to grant a compliance order on an interim basis,[147] and the Tribunal's own compliance orders could only be enforced by the Court.[148] Under the ERA, any application for an interim injunction commences with the Employment Relations Authority.

There are four issues that are considered in an application for an interim injunction to enforce a restraint of trade clause. In brief, these issues are:

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[144] See Peter Churchman and Kit Toogood "When Key Employees Leave"(New Zealand Law Society Seminar, New Zealand, June-July 1999) 36.
[145] Employment Contracts Act 1991, s 55.
[146] Employment Contracts Act 1991, s 104(1)(g) and (h).
[147] *NZ Labourers Union v Fletcher Development and Construction Ltd* [1990] 2 NZILR 1016 (EC) Judge Colgan.
[148] Employment Contracts Act 1991, ss 55(7) and 56(7).

whether there is an arguable case; where the balance of convenience lies; the other remedies that are available to the plaintiff; and the overall justice of the case.[149] Where there is a delay before a substantive hearing, the courts in the United Kingdom have held it to be appropriate to consider the strength of the parties' cases and the likelihood of success at the eventual trial, instead of the usual test of an "arguable case".[150]

The Court of Appeal has emphasised the issue of the balance of convenience.[151] The assessment of the "balance of convenience" allows for a variety of factors to be considered that are specific to the parties involved. The factors considered include: the ability of the parties to meet damages awarded; the appropriateness of damages; and the effect that any injunction may have on the former employee's ability to earn a living.[152]

B Employee Actions

An employee who is faced with a covenant in restraint of trade may act in breach of express terms and await the employer's response or alternatively, he or she may seek declaratory relief. If an employer obtains injunctive relief, the Employment Relations Authority or the courts may award damages for the breach against the employee. For example, the employer may claim damages for losses in respect of any business which might reasonably be expected during the restraint period but for the employee's action, and loss of opportunity to retain the custom of business because of the employee's unlawful activity.[153] The Employment Court has indicated that employees who believe they are bound by undue restraint, to apply for a declaration to delete or modify the restraint rather than acting in breach of it.[154]

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[149] *Tasman Pulp & Paper Co Ltd v New Zealand (with exceptions) Shipwrights etc Union & Ors* [1991] 1 ERNZ 886, 894 (Labour Court); *Klissers Farmhouse Bakers Ltd v Harvest Bakers Ltd* [1985] 2 NZLR 140 (CA).
[150] *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418 (CA) applying dicta of Balcombe LJ in *Lawrence David Ltd v Ashton* [1991] 1 All ER 385 (CA).
[151] *Port of Wellington v Longwith* [1995] 1 ERNZ 87 (CA).
[152] *Business Associates Ltd v Telecom Corporation of New Zealand Ltd* (20 November 1989) High Court Wellington CP 876/89 Jeffries J.
[153] *BFS Marketing Ltd v Field and Anor* [1992] ERNZ 1105 (EC) Judge Colgan.
[154] *TVNZ v Bradley* (10 March 1995) Employment Court Auckland AEC 14/95 Judge Colgan.

There are potential difficulties for employees who take a proactive approach. A significant deterrent of litigation is the cost of challenging a restraint, particularly if the employee is faced with no future employment. Moreover, questions had been raised under the ECA as to whether public policy demands that employees should take the initiative in setting aside restraints on employment given the free market economy, the intent of the ECA to establish an efficient labour market, the emphasis by the Employment Court on the right to work, and the obligation for an employee to assume that a restraint is binding when prima facie void.[155]

The Authority's recent determination in *Brown v Allied Real Estate (1977) Ltd*[156] illustrates the risks an employee faces on failing to take a proactive approach. Mrs Brown, a property manager, brought a successful claim for unjustified dismissal. She abided by a restraint of trade which restricted her prospects of working in the area for 12 months unless she obtained her former employer's permission. She did not take up the opportunity of a job offer that arose during the restraint period. Although her claim for unjustifiable dismissal was successful, the Employment Relations Authority limited the amount of compensation awarded to her, stating that she should have raised the matter on the restraint with her former employer.[157] Thus, she had failed to mitigate her loss. Effectively, Mrs Brown lost the opportunity of another job and the total loss claimed because of her failure to approach her former employer.

C Illegal Contracts Act 1970

One of the changes brought about by the ERA is the application of the Illegal Contracts Act 1970 by the Employment Court. Under the ECA, the Employment Court had jurisdiction to apply section 8 of the Illegal Contracts

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[155] See generally Peter Churchman and Kit Toogood "When Key Employees leave" (New Zealand Law Society Seminar, New Zealand, June–July 1999) 42.
[156] *Brown v Allied Real Estate (1977) Ltd* (24 July 2002) Employment Relations Authority Wellington WA 61/02 PR Stapp (member).
[157] *Brown v Allied Real Estate (1977) Ltd*, above, 10 para 39.

Act.[158] Pursuant to this section, a court can sever an unreasonable restraint of trade from the contract or modify the provision so that it is reasonable. The court takes into account a number of factors in deciding whether to exercise its discretion under section 8: the surrounding circumstances; the balance of bargaining power; the consideration paid; and whether the clause was intended to protect goodwill.[159]

Section 8(1) has been invoked in a number of employment cases, at both interim and substantive hearings, frequently to reduce the duration of the restraint. The High Court has indicated a reluctance to invoke the section at the interim injunction stage.[160] In *DB Breweries Ltd v Marshall*, Colgan J held that the existence of a power to amend a restraint should not be the sole reason for upholding an unmodified restraint by interim injunction. However, the possibilities of the final outcome should be taken into account in determining interlocutory injunction proceedings.[161] Once modification has been effected, the court may award damages on the basis that the modification relates back to the date of the execution of the contract.[162]

The ECA posed difficulties for a party wanting the Employment Court to exercise its powers of modification pursuant to the Illegal Contracts Act. If a matter was heard in the Employment Court, an additional test provided by section 104(2) of the ECA required the Court to be satisfied beyond reasonable doubt that the order was to be made. The effect of this section limited the power of the Employment Court to modify unreasonable restraint clauses. Thus, if the Court concluded that a restraint was unreasonable and void, it would be difficult for a former employer to satisfy the Court beyond reasonable doubt that the restraint should be modified. Chief Judge Goddard in *Radio Horowhenua v Bradley* stated: "This bizarre but rigorous double requirement

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[158] Employment Contracts Act 1991, s 104(1)(h).
[159] See generally Gordon Anderson and others (eds) *Employment Law Guide* (5 ed, Butterworths, Wellington, 2001) 1092.
[160] *Greenwich v Murray & Stewart* [1977] 1 NZIPR 181, 186-187 Barker J; *Castle Parcels Ltd v Dale* (1989) 2 NZELC 96,774, 96,777 (HC) Henry J.
[161] *DB Breweries Ltd v Marshall* [1994] 1 ERNZ 98, 107 (EC) Judge Colgan.
[162] *H & R Block Ltd v Sanott* [1976] 1 NZLR 213 (SC) Somers J.

... could rarely be met in the case of an unreasonable restraint of trade."[163] On occasion, such cases were taken to the High Court where the additional test was not required.

Currently, both the Employment Relations Authority and the Employment Court have jurisdiction to apply the Illegal Contracts Act 1970. As the ERA contains no equivalent provision to section 104(2) of the ECA, it can be assumed that plaintiffs will no longer try to bring such claims to the civil courts.

The ability of the Employment Relations Authority or the Employment Court to vary an employment agreement under section 8 of the Illegal Contracts Act 1970 is constrained by the provisions of the ERA.[164] An order to vary an individual employment agreement or any such term may only be made if four conditions are satisfied: the Authority or the Court has identified the problem and directed the parties to attempt in good faith to resolve it; the parties must have attempted to resolve the problem in good faith by using mediation; despite mediation the problem remains unresolved; and the Authority or the Court must be satisfied that any remedy other than an order varying the agreement would be inappropriate or inadequate.[165] This restriction reflects one of the objects of the ERA, prompt low-level resolution by the parties themselves, namely mediation in good faith.[166] The mediation of problems surrounding restraints of trade is potentially advantageous for a former employee who may no longer need to face the costs of litigation.

Michael Feely, the National Manager of Mediation Services, has observed that mediation is relatively successful for restraint of trade problems with significantly more than 85 percent being resolved at this stage. Parties tend to compromise rather than face the risk of losing altogether. Feely further notes that those problems that are taken beyond the mediation process involve legitimate restraints that protect a high degree of intellectual property. In

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[163] *Radio Horowhenua v Bradley* [1993] 2 ERNZ 1085, 1097 (EC) Goddard CJ.
[164] Employment Relations Act 2000, ss 164 and 190.
[165] Employment Relations Act 2000, ss 164 and 190.

contrast, there are some restraint of trade clauses associated with "revenge attacks", which are difficult for an employer to substantiate reasonableness and ultimately have little chance of success in enforcement.[167] Despite the benefits of mediation, however, there is a risk that a party with little knowledge of their legal rights, settles for less than they are legally entitled to.

D Institutions

Several areas of jurisdiction which were conferred on the Employment Court under the ECA, have no counterpart in the ERA. Under the ECA, the Employment Court had exclusive jurisdiction to determine any proceedings based on an employment contract.[168] With the removal of this power, under the ERA, the Employment Court will hear and determine actions such as an alleged breach of a restraint of trade only in specific situations. For example, the Employment Relations Authority may refer a matter to the Employment Court because an important question of law is likely to arise, there is public interest involved in the matter,[169] or because a party elects to challenge the Authority's determination.[170]

The ERA allows the Employment Relations Authority to make any order that the civil courts are entitled to make "under any enactment or rule of law relating to contracts," in matters relating to employment agreements.[171] Therefore, the Authority may issue an injunction to restrain a threatened breach of a covenant in restraint of trade or award damages against an employee who has breached such a covenant. In contrast, the Employment Tribunal was held not to have the power to award damages after the employment relationship had terminated.[172]

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[166] Employment Relations Act 2000, s 143.
[167] Interview with Michael Feely, National Manager of Mediations Services, Department of Labour's Employment Relations Service (the author, Wellington, 5 August 2002).
[168] Employment Contracts Act 1991, s 3.
[169] Employment Relations Act 2000, s 178(2)(a) and (b).
[170] Employment Relations Act 2000, s 179.
[171] Employment Relations Act 2000, s 162.
[172] *Lewis v Davis Trading Co Ltd* [1992] 1 ERNZ 421 (EC) Judge Castle.

The investigative role of the Employment Relations Authority in relation to restraint of trade is summed up well by Neville Taylor, a member of the Employment Relations Authority:[173]

> I don't know whether it is a trend but there seems to be quite a number of applications to the Authority on the matter of enforcement (usually by way of interim injunction) of restraint of trade provisions in contracts. They give rise to interesting questions about ss 162-164 of the Act. The Authority now has a wide discretion regarding the various contractual statutes under s 162, but has restrictions (ss 163 and 164) on its ability to modify contractual provisions containing restraint of trade covenants in accordance with s 8 of the Illegal Contracts Act 1970. Issuing a direction under s 164 to propose a variation of an individual employment agreement can take up precious time if there is urgency dictated by an interim injunction application. On the other hand, such a direction can assist the parties in settling the matter.

Jerram v Franklin Veterinary Services (1977) Ltd[174] was one of the first cases where the determination of the Employment Relations Authority was challenged. The case is significant in raising issues concerning the procedures and jurisdiction under the ERA where a party elects to challenge a determination. However, of particular relevance to a discussion about the jurisdiction of the Authority, the case highlights problems in the ability of the Authority to deal with complex legal issues such as those regarding restraint of trade at the interim stage.

In this case, Jerram was employed as a referral veterinarian under a contract of employment that included a confidentiality clause and a twelve-month restraint of trade clause that prohibited him from working as a referral veterinarian in Auckland and Waikato and soliciting the employer's clients. The employment relationship terminated with Jerram intending to work for a competing referral veterinarian if unrestrained. The former employer sought an interim injunction to enforce the restraint.

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[173] Neville Taylor "The Employment Relations Authority Investigation Process" (2001) 2 ELB 17, 21.
[174] *Jerram v Franklin Veterinary Services (1977) Ltd* [2001] 1 ERNZ 157 (EC) Judge Colgan.

The Employment Court held that the Employment Relations Authority erred in a number of respects. The Authority's determination contained a number of orders based on fundamental legal errors. For example, it had not properly considered whether there was an arguable case on questions of law, instead confining its decision largely to factual matters.[175] In addition, the Authority incorrectly assumed that Jerram owed the more onerous duties of a fiduciary where he was not a shareholder or director of the company.[176] The Authority's orders were set aside and a modified interim injunction granted.

The case reveals problems in providing the Authority with the jurisdiction to determine complex legal matters. These problems may merely reflect the recent reforms in the dispute resolution process and the newly found jurisdiction conferred on Authority members. Such errors may represent an inevitable trade-off in access to justice with the shift in the Authority's process from legalism and fairness controls. It will be particularly interesting to observe whether similar errors are an ongoing feature of the processes under the ERA. It may merely warrant the Authority to give earlier recognition to referring questions of law to the Court for its opinion.[177]

XIII RESTRAINT OF TRADE AND PERSONAL GRIEVANCE

The ERA has been regarded as being unintentionally capable of affecting the common law relating to restraint of trade.[178] Jagose bases his argument on section 103 of the ERA. Under section 103(b), a personal grievance is a claim that can now include "any condition that survives termination of the employment" that was affected to the employee's disadvantage by the employer's unjustifiable action. Thus, this provision extends to a restraint of trade. Jagose states that if a restraint of trade is prima facie unlawful, an employee can claim that the enforcement of such a restraint is an unjustifiable action to his or her detriment and pursue a personal grievance.[179]

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[175] *Jerram v Franklin Veterinary Services (1977) Ltd*, above, 172.
[176] *Jerram v Franklin Veterinary Services (1977) Ltd*, above, 173.
[177] Pursuant to section 177 of the Employment Relations Act 2000.
[178] Pheroze Jagose "Employment Relations" (2001) NZLJ 436.
[179] Jagose, above, 436.

Jagose stresses the significance of this argument to the determination of restraints on an application for interim injunction. An employee who has difficulty in identifying interests of justice which would permit unrestrained post-employment conduct, now has the additional argument that an employer is affecting him or her to his or her disadvantage. Consequently, in addition to being otherwise lawful, an employer's enforcement of a restraint may need to be justifiable. Jagose argues that the employer must be able to establish that its genuine proprietary interests were actually threatened by the employee's post-employment conduct. Thus, the Authority and the Court are likely to be slow in ordering an injunction that may end up becoming an unjustifiable action.[180]

It is questionable whether Jagose's argument that a covenant in restraint of trade falls within the reach of the personal grievance provision, would actually have any practical effect. A potential barrier to his argument is identified. "Unjustifiable action" excludes any action "deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision" of an employment agreement.[181] Attempts to enforce a restraint of trade may fall within this exclusion so that an employer acting on a restraint does not amount to an "unjustifiable action". Moreover, it is difficult to envisage a situation where a personal grievance claim will be successful where the Authority or Court has applied the appropriate common law tests in granting an interim injunction to enforce a restraint. In other words, the enforcement of a restraint is unlikely to be held as an unjustifiable action after careful consideration is given to the particular circumstances of the case in granting an interim injunction.

XIV CONCLUSION

Underlying the doctrine of restraint of trade is a tension between freedom of trade and the principle of freedom of contract. The ECA and traditionally, the Court of Appeal have emphasised freedom of contract. When two parties

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[180] Jagose, above, 437.

freely enter a contract they are bound, and the function of the court is to enforce that contract.[182] Conversely, a covenant in restraint of trade can be opposed on grounds of inhibiting a free labour market, particularly under the former policies surrounding the ECA.

The doctrine of restraint of trade in the employment context has developed in New Zealand through case law. Statute law has been largely inapplicable. A covenant in restraint of trade reflects a limitation on an employee's freedom of association. Freedom of association is strongly recognised in the ERA. However, its emphasis is on unions and collective bargaining, rather than freedom of trade. Section 17 of the New Zealand Bill of Rights Act 1990 gives statutory recognition to the right to freedom of association but does not apply to employment agreements between private parties.[183] Furthermore, it will be uncommon to find that the Commerce Act 1986 has been invoked in the employment context. A restraint of trade imposed on a former employee is unlikely to substantially lessen competition.

Some employers have attempted to impose restraints that are unlikely to be upheld as reasonable. Empirical research has indicated the range of acceptable practice in New Zealand and overall highlights the courts' more restrictive attitude to restraint clauses. Decisions have made it clear that restraints will be confined to protecting legitimate proprietary interests rather than competition per se. The various circumstances surrounding the agreement of the restraint will be considered in determining its reasonableness and enforceability, not just the effect of an isolated provision. This approach is welcomed. For example, the Court of Appeal has endorsed the approach of giving weight to the bargaining strength between the parties instead of concerning itself with traditional contract law. Moreover, the Court of Appeal has stressed the importance of taking into account the totality of the transactions when determining whether a restraint is enforceable, in particular where the agreement is comprised of a mixture of employment and sale and purchase.

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[181] Employment Relations Act 2000, s 103(3).
[182] *Printing & Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465.

With advancing technology and globalisation, the concept of reasonableness is dynamic and it would not be unexpected to find a variation in enforceable restraints over time.

With the onset of the ERA, the requirements for remedies have changed. It is questionable whether the Employment Relations Authority is equipped to deal with complex issues of law surrounding restraint of trade issues. The requirement for the parties to attempt mediation in good faith reflects the object of the good faith element of the Act. It remains to be seen whether the constraints to remedies imposed by the ERA places parties at any significant disadvantage in their legal rights.

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[183] *Alectus Recruitment Consultants Ltd v Gibson* (8 May 1997) Employment Court Auckland AEC 40/97 Judge Colgan.

APPENDIX ONE – TABLE: RESTRAINT OF TRADE CASES 1998-2002

Case	Institution	Hearing interim	Occupation	Duration of employment	Restraint of trade	Outcome
Postless v Airways Corp of NZ Ltd WC7/02 (19 March 02)	EC		solicitor	4 years 6 months	1 year non-competition	no breach
Humphrey v Telecom New Zealand Ltd WC3/02 (25 Feb 02)	EC		telecommunications technicians		2 years no employment with Connectel	unreasonable
Forlong & Maisey Ltd v Ward AA238/02 (14 Aug 02)	Authority		technical manager animal health products		1 year, New Zealand non-competition/solicitation	enforced non-solicitation/ confidentiality
Green Drycleaners v Wooding AA229/02 (8 August 02)	Authority		drycleaning assistant	1 year	1 year non-solicitation	no breach
Devenport v Curtis NZ Springs Ltd AA182/02 (17 June 02)	Authority		senior sales engineer		18 months, New Zealand non-competition/solicitation	modify: employment in two specific companies
Networks Direct Ltd v Scott AA23/022 (8 Feb 02)	Authority		software developer	1 year 6 months	6 month non-solicitation	no breach
Networks Direct Ltd v Scott AA23/022 (8 Feb 02)	Authority		salesperson computer equipment	8 months	6 month non-solicitation	no breach
Spotless Services v Walters [2001] 1 ERNZ 2236	EC		food services manager	7 months	12 months, Tokaroa non-competition	enforced
Jerram v Franklin Veterinary Services [2001] 1 ERNZ 157	EC		referral veterinarian	1 year 5 months	12 months Auckland & Waikato, non-competition/solicitation	modified: 3 months, Auckland
Fletcher Aluminium Ltd v O'Sullivan [2001] 1 ERNZ 46	CA		development manager aluminium joinery	1 year 6 months	2 years, New Zealand non-competition/solicitation	enforced
New Zealand Office Products v Howard AA124/01 (3 Sept 01)	Authority		national sales manager office products	1 year	6 months, NZ & Australia non-competition/solicitation	modified: 4 months

Case	Institution	Hearing interim	Occupation	Duration of Employment	Restraint of Trade	Outcome
Claymark Industries v Catt AA106A/01 (9 Aug 01)	Authority	interim	timber mill		12 months, unlimited area non-competition	enforced until substantial hearing (3 weeks)
Quest Mobile Ltd v Love WA38/01 (3 July 01)	Authority	interim	sales representative	8 months	6 months, same area as employer non-competition/solicitation	declined
James & Wells v Sims AA58/01 (25 May 01)	Authority	interim	patent attorney	3 years	1 year, Bombay Hill to Taupo non-competition	declined
James & Wells v Sims AA58/01 (25 May 01)	Authority	interim	patent attorney	6 years	1 year, Bombay Hill to Taupo non-competition	declined
Wrightson v Swale CA1A/01 (15 March 01)	Authority		livestock representative	15 years	3 months non-competition/solicitation	modified: 2 months 25 km radius from Mossburn
Assoc Property Holdings Ltd v Smith CP426-SW99 (3 Feb 00)	HC		manager property investment		1 year non-solicitation	discharged
Uni of Auckland Primary Health care v Sewell [2000] 1 ERNZ 781	EC		doctor	1 year 9 months	3 years, 5 km radius	modified: 1 year, patients of practice
Space Industries v McKavanagh [2000] 1 ERNZ 490	EC		sales manager cleaning chemicals	4 years 7 months	1 year, unspecified area non-competition	enforced, current customers
Space Industries v McKavanagh [2000] 1 ERNZ 490	EC		sales representative cleaning chemicals	10 months	6 months, unspecified area	enforced, current customers
Assoc Property Holdings (NZ) Ltd v Ward CC28/00 (3 Nov 00)	EC	interim	property salesperson	1 year 10 months	indefinite non-competition	declined
Chubb New Zealand Ltd v Jones AC54/00 (7 July 00)	EC	interim	site supervisor security services		non-competition non-solicitation	modified: no Sanford security work until trial
Bruce Smith Ltd v Porteous AC50/00 (23 June 00)	EC		textiles sales representative	14 years	12 months non-competition	enforced

Case	Institution	Hearing interim	Occupation	Duration of Employment	Restraint of Trade	Outcome
Servilles Ltd v Whiting AC47/00 (21 June 00)	EC	interim	hair stylist	3 years	6 month, 5 km radius non-competition/solicitation	modified: 3 months, 5 km
Walkers Advertising v Bettle AA5/00 (19 Dec 00)	Authority	interim	marketing websites advertising industry	9 months	6 months, universal non-competition	declined
Grey Advertising v Marinkovich [1999] 2 ERNZ 844	EC	interim	creative director advertising company	4 years 8 months	12 months, Grey business areas non-competition/solicitation	enforced
Gallagher Group Ltd v Walley [1999] 1 ERNZ 490	CA		technical manager fencing equipment	10 years 5 months	4 years, worldwide non-competition/solicitation	modified: 1 year, worldwide
Candle NZ Ltd v Riley [1999] 1 ERNZ 251	EC	interim	recruitment manager IT field		3 months, 50 km non-competition/solicitation	reasonable, expired
Vancouver Fisheries v Curtis CC30/99 (21 Sept 99)	EC	interim	supervisor scallops		non-competition/solicitation	declined
Vancouver Fisheries v Curtis CC30/99 (21 Sept 99)	EC	interim	administration, sales		non-competition/solicitation	declined
Meade v Gibson Design Ltd WC23/99 (14 May 99)	EC	interim			non-solicitation	enforced until substantial hearing
Condor Insurance & Fraser v Kearns AC27/99 (5 May 99)	EC		senior insurance broker	2 years 8 months	2 years non-solicitation	enforced
Invacare NZ v Shand CP138-SW99 (14 April 99)	HC		services manager medical supplies	12 years 6 months	6 months non-competition	unreasonable
Mechanical Consultancy v Dalley [1998] 3 ERNZ 574	EC	interim	vehicle inspector	8 months	3 years 50 km non-competition	modified: 2 months, expired
Enterprise Staff Consultants NZ Ltd v Dunro [1998] 3 ERNZ 547	EC	interim	personnel consultant for accountants	1 year 1 month	6 months, Auckland non-solicitation	modified: 3 months, Auckland

Case	Institution	Hearing interim	Occupation	Duration of Employment	Restraint of Trade	Outcome
Norris v Zealfresh International [1998] 3 ERNZ 574	EC	interim	senior trader/director seafood sales	7 months	no express restraint of trade	implied restraint of trade, 3 months
Norris v Zealfresh International [1998] 3 ERNZ 574	EC	interim	trader seafood	1 year 3 months	1 year worldwide non-competition	3 months
Candle NZ Ltd v Thompson [1998] 3 ERNZ 339	EC	interim	recruitment consultant IT industry	3 years 6 months	3 months 50 km radius non-competition/solicitation	enforced
Candle NZ Ltd v Thompson [1998] 3 ERNZ 339	EC	interim	recruitment consultant IT industry	1 year	3 months 50 km radius non-competition/solicitation	enforced
Cain v Turners & Growers [1998] 3 ERNZ 339	EC		sales supervisor wholesale produce	19 years 5 months	6 months New Zealand non-competition	modified: 3 months, Wellington
EFTPOS NZ Ltd v Walker [1998] 3 ERNZ 304	EC	interim	helpdesk technician terminal supplies	1 year 3 months	6 months no area limit non-competition	restraint until trial
Manchester Property Care Ltd v O'Connor [1998] 2 ERNZ 305	EC		manager of cleaning contracts	8 months	12 months non-competition	modified: 4 months
Airgas Compressor Specialists v Bryant [1998] 2 ERNZ 42	EC	interim	sales manager air compressors	5 months	6 months non-competition	declined
Fuji Xerox NZ v Service [1998] 1 ERNZ 438	EC	interim	salesperson office equipment	4 years 7 months	3 months, South Is, Wellington, Palm Nth, non-competition	enforced
Copylink v Butler CC32/98 (10 Sept 98)	EC	interim	senior sales manager printing	1 year 8 months	unlimited time, Canterbury non-competition	modified: 6 months, Canterbury

Institutions: Court of Appeal (CA); High Court (HC); Employment Court (EC); Employment Relations Authority (Authority).

Data obtained from Brooker's Employment Library <http://www.brookers.co.nz> (last accessed 16 September 2002).

APPENDIX TWO -

TABLE: OCCUPATION AND DURATION OF RESTRAINT

Occupation	less than 1 month	1-2 months	3-4 months	5-6 months	1 year	1.5 years	2 years	Total
manager: administration			1					1
manager: technical					2	1		3
manager: sales/service			2	1	2			5
supervisors			1					1
professionals			1		2			3
administrators			3					3
technicians & associated professionals				2	1	1	1	5
sales/service		2	4	2	2			10
agriculture	1							1
Total	1	2	12	5	9	1	2	32

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