

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 156/07  
5111304

BETWEEN RYAN SECURITY AND  
CONSULTING (OTAGO)  
LIMITED  
Applicant

AND KEVIN BOLTON  
Respondent

Member of Authority: Philip Cheyne

Representatives: Peter Anderson, Counsel for Applicant  
Kevin Bolton in person

Investigation Meeting: 18 December 2007 at Dunedin

Determination: 18 December 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Kevin Bolton worked for Ryan Security and Consulting (Otago) Limited in Dunedin as its operations manager from July 2006 until he resigned on 2 October 2007 by giving 4 weeks notice in writing. Mr Bolton and Ryan Security then agreed that his employment would terminate on Sunday 4 November 2007.

[2] There is a written employment agreement signed and dated by Mr Bolton on 23 May 2007. It contains express provisions about confidential information and restraint of trade. Ryan Security says that Mr Bolton is breaching these provisions. In its statement of problem, Ryan Security seeks a compliance order, penalties and an account of profits against Mr Bolton as well as penalties against two companies said to have aided and abetted Mr Bolton in breaching his employment agreement. In addition to these remedies, Ryan Security seeks ex parte an interim injunction against Mr Bolton to prevent any breach of his contractual obligations. This determination

deals with only the latter aspect of the problem. As usual, it is based on untested affidavits and other information so any findings expressed here are solely for the purposes of determining whether an interim injunction should be issued against Mr Bolton. Final findings of fact will be made in due course after a full investigation meeting and the opportunity to test evidence by questions.

[3] Although the application for an interim injunction is urgent I have not dealt with it ex parte. The statement of problem and other documents were served on Mr Bolton and he was given a limited opportunity to lodge any affidavits in reply. Mr Bolton did not do that but he appeared and was heard at the investigation meeting. Mr Bolton sought an adjournment on the basis that he had not had sufficient opportunity to get advice or to prepare a response to the material lodged by the applicant. The adjournment was declined. This is a proper matter for urgency. However, there will be a further opportunity for Mr Bolton to respond as explained below. Mr Bolton then made some points in response to Ryan Security's case. Mr Bolton's statements are unsworn evidence but I will treat them as if sworn for the purpose of determining this matter.

#### **Arguable case?**

[4] I am satisfied that Ryan Security has a strongly arguable case of breach of employment agreement by Mr Bolton.

[5] Mr Bolton's employment agreement says:

9.1 ***Confidential Information:*** *You must keep all information relating to our business and clients strictly confidential at all times, except to the extent that disclosure is necessary for you to perform this agreement.*

...

10.1 ***You must not compete with us:*** *During your employment with us, and for the Restraint period and in the Restraint Area specified in Schedule 1 commencing on the termination of your employment, you will not (without our prior consent) on your own account, or as a director, consultant, partner, employee or in any capacity, directly or indirectly:*

(a) *provide services of the type we provide to any clients of ours, or that were clients of ours in the 12 months prior to the termination of your employment; or*

(b) ...

10.2 ...

10.3 ***Consideration already included:*** *You acknowledge that your remuneration includes consideration for entering into this restraint.*

10.4 ***Restraint reasonable:*** *You confirm that you consider these restrictions to be reasonable in all the circumstances. However, if a Court or Authority finds any of those to be unenforceable, both of us agree to any modification of the Restraint Period or Restraint Area required to make the restriction enforceable.*

[6] The restraint period is six months and the restraint area is New Zealand. An earlier employment contract between Mr Bolton and Ryan Security provided for a similar restraint of trade but for only 3 months. While the area is specified as *New Zealand* its practical effect covers only Otago since the applicant company does not have clients outside Otago.

[7] A company called Up Front Security Limited was incorporated on 1 October 2007. The directors and shareholders have been casual employees of Ryan Security so are known to Mr Bolton. Mr Bolton said they approached him to work for them after learning of his resignation from Ryan Security. The registered office and address for service of the company is Mr Bolton's residential address.

[8] Warwick Diack is the marketing and sponsorship manager for Basketball Otago and general manager of the Otago Nuggets basketball franchise. He is currently in discussions with Ryan Security about part-time employment as Mr Bolton's replacement. Mr Diack says that Mr Bolton told him that he (Mr Bolton) got those casual Ryan Security employees to set up Up Front Security Limited for him because of problems with his (Mr Bolton's) contract. That happened on 15 November 2007 when Mr Bolton approached Mr Diack prospecting for security work on behalf of Up Front Security Limited. Mr Diack was at his office in the Edgar Centre, an events venue in Dunedin. Mr Diack also refers to another occasion when Mr Bolton

has been at the Edgar Centre on behalf of Up Front Security Limited. Mr Bolton denies prospecting for work from Mr Diack. However, for current purposes, Ryan Security is entitled to the assumption that Mr Diack's evidence may be upheld in due course.

[9] Mr Diack says that on 1 December 2007, there was a function at the Edgar Centre that required security. Mr Diack was told by a receptionist that Ryan Security provided that security. However, he knew that Ryan Security was not doing that. On investigation he found that one of the directors of Up Front Security was doing the work. Mr Diack then spoke to the general manager of the Edgar Centre who said that the security arrangement had been made with Mr Bolton.

[10] Daniel Wilson is Ryan Security's operations manager for Christchurch and has been assisting to cover Otago since Mr Bolton's resignation. His evidence is to the effect that Mr Bolton and one of the directors of Up Front Security Limited provided security at a bar (Toast Bar) in Dunedin on 9 and 10 November 2007. Toast Bar had been one of Ryan Security's clients up to then requiring security on Friday and Saturday nights. Mr Diack says that he saw Mr Bolton and one of the directors, both in Up Front Security uniforms, providing security at the Toast Bar on Friday 30 November 2007. Mr Bolton says that he was involved in the provision of security for Toast Bar at its request after Ryan Security was unable to provide appropriate staff.

[11] This evidence establishes to a strongly arguable standard that Mr Bolton has in some capacity been providing services of the type provided by Ryan Security. Mr Bolton did not deny doing so.

[12] Jayson Ryan is the sole director of Ryan Security. His and Mr Wilson's evidence is that the Toast Bar has been a regular client and Ryan Security has provided security on Friday and Saturday nights. Mr Ryan and Mr Diack both say that Basketball Otago is a client of Ryan Security. Ryan Security is also a major sponsor of Otago Basketball and its franchises. Mr Ryan says that there is information to suggest that Mr Bolton provided security services but not on behalf of Ryan Security to Beachlands Speedway on 3 November 2007. Beachlands Security is a client of Ryan Security. Mr Bolton's answer is that he has not provided or offered security services to anyone with whom Ryan Security has a written contract. He did not deny providing security services to Beachlands Speedway but said they approached him.

[13] This evidence establishes a strongly arguable case that those to whom Mr Bolton has recently been providing security services (or offering to do so) are Ryan Security clients or have been such within the 12 months before Mr Bolton's resignation.

[14] In *Fuel Espresso Limited v Hsieh* 9/3/07, Hammond, O'Regan & Arnold JJ, CA88/07 the Court of Appeal held that extra consideration was not required for a valid restraint of trade and that mutual promises could act as consideration for each other. On that basis there is a strong argument that the restraint provision included in Mr Bolton's second agreement is contractually valid.

[15] The *Fuel Espresso* case concerned a three month restraint. The restraint period in this case is six months. However, it is apparent from an email and a memorandum sent by Mr Bolton to Mr Ryan prior to the employment that Mr Bolton was offering Ryan Security the benefit of his experience and contacts in the security industry around Dunedin as part of the employment. One of the tasks for the operations manager is to maintain contact with clients and to seek out new business opportunities. In these circumstances, it is strongly arguable that a restraint period of 6 months might be reasonable. The same cannot be said of a restraint that extends to the whole of New Zealand. However, it is at least arguable that the restraint area could be modified to cover Dunedin or Otago resulting in it being reasonable and therefore enforceable.

[16] Mr Ryan says that Ryan Security and the Edgar Centre have verbally agreed to a contract for Ryan Security to be its preferred provider of security but the written agreement is still unsigned. It awaits the signature of the general manager of the Edgar Centre, the person who apparently arranged for Mr Bolton to provide security services at the Edgar Centre on 1 December 2007. Mr Ryan says that Mr Bolton would have had access to pricing and other confidential information that formed the basis of the unsigned written agreement. Ryan Security is therefore concerned that Mr Bolton would have used that information in reaching whatever agreement there is between him or Up Front Security Limited and the Edgar Centre for the provision of security services.

[17] The *confidential information* clause arguably applies to Mr Bolton even after the termination of his employment. There is at least an arguable case that Mr Bolton has breached those obligations in his dealings with the Toast Bar, the Edgar Centre and Beachlands Speedway and that he would have done so if Basketball Otago had

shown interest in his approach, if that is what happened between Mr Bolton and Mr Diack.

### **Balance of Convenience**

[18] The balance of convenience favours Ryan Security.

[19] For Ryan Security, the matter is critical. It requires a certain level of business to justify a continued presence in Dunedin and the loss of significant clients such as the Toast Bar and the Edgar Centre threatens its viability.

[20] Ryan Security and Consulting (Otago) Limited has provided an undertaking as to damages.

[21] Ryan Security wrote to Mr Bolton and Up Front Security Limited raising its concerns as detailed in the affidavits. There has been no response from Up Front Security Limited. Mr Bolton sent an email to Ryan Security's solicitor on 5 December 2007 promising to reply when he was not so busy. A substantive reply has not been received.

[22] Part of Mr Bolton's request for an adjournment related to him being fully occupied with work at present. It seems that he has work available that would not fall foul of the restraint provision, that being limited to him working for those who have within the last 12 months been clients of Ryan Security.

### **Overall Justice**

[23] Standing back, it seems this matter is no less straight forward than the *Fuel Expresso* case in which the Court of Appeal had no hesitation in concluding that the terms of the agreement should be enforced.

[24] There was some delay on the part of Ryan Security in lodging these proceedings. However I am satisfied that the delay is explained by the illness of one of the deponents.

### **Summary**

[25] An interim injunction shall issue, pending further order of the Authority, restraining Mr Bolton from providing services of the type provided by Ryan Security and Consulting (Otago) Limited, to any person for whom Ryan Security and

Consulting (Otago) Limited had provided such services within the twelve months ending on 4 November 2007. A further interim injunction shall issue, pending further order of the Authority, requiring Mr Bolton to abide by clause 9.1 of the employment agreement dated May 2007.

[26] Mr Bolton may seek to have these orders varied or discharged by application to the Authority supported by affidavits. If such material is received, a phone conference will be convened as a matter of urgency. The applicant will need to make arrangements to enable any application to be dealt with despite counsel's forthcoming absence on leave.

[27] The parties are directed to mediation.

[28] Costs are reserved.

Philip Cheyne  
Member of the Employment Relations Authority