

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 651
3074714

BETWEEN	TRADIES LADIES (2016) LIMITED Applicant
AND	MICHELLE McKAY First Respondent
AND	DINELLE GERARD Second Respondent
AND	LISA MAREE HARLAND Third Respondent
AND	ROYALE COURIERS LIMITED Fourth Respondent

Member of Authority: Trish MacKinnon

Representatives: Jeff Goldstein, counsel for the Applicant
Robert Thompson, advocate for the Respondents

Investigation Meeting: 5 November 2019 at Christchurch

Submissions Received: On the day, orally and in writing, from both parties

Date of Determination: 11 November 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Tradies Ladies (2016) Limited (referred to as Tradies Ladies or the company) claims Michelle McKay and Dinelle Gerard have breached express terms of their employment agreements. It also says they both breached their express and implied duty of fidelity whilst employed by Tradies Ladies. The company claims Lisa Harland and Royale

Couriers Limited (Royale Couriers) have incited, instigated, aided or abetted Ms McKay and Ms Gerard's breaches of their employment agreements.

[2] The company seeks interim restraining orders and penalties against Ms McKay and Ms Gerard. It also seeks damages against them. Tradies Ladies seeks penalties against Ms Harland and Royale Couriers.

[3] Ms McKay and Ms Gerard deny that they have breached any express terms of their employment agreements, or that they have breached any express and implied duty of fidelity whilst employed by Tradies Ladies.

[4] Ms Harland and Royale Couriers deny inciting, instigating, aiding or abetting Ms McKay and/or Ms Gerard to breach their employment agreements.

The Authority's investigation

[5] The Authority directed the parties to mediation to take place on an urgent basis which they duly attended but were unsuccessful in resolving the matters between them. The Authority convened an investigation meeting to hear the application for interim restraining orders against the first and second respondents.

[6] The sole director of Tradies Ladies, Michael Allred, provided two affidavits in support of his application. He also provided an undertaking for damages. Ms McKay, Ms Gerard and Lisa Harland, who is the sole Director of Royale Couriers Limited, all provided two affidavits apiece.

[7] The hearing was conducted by way of affidavits and submissions from the parties. The nature of such interim proceedings does not allow for the testing of evidence. The opportunity for that will occur when the substantive matter is heard. It does, however, illuminate the differences over factual matters and perspective in relation to the applicant and the first and second respondents.

Relevant information and the allegations against the first and second respondents

[8] Tradies Ladies is a courier business operating in the Canterbury region. Mr Allred purchased the business, which had previously traded as Tradies Ladies Limited (TLL), in July 2016. He deposes that, as part of the sale and purchase agreement, Ms McKay, who had

been a director and shareholder of TLL, was bound by a restraint of trade provision for three years. This provision, which expired on 31 July 2019, prevented her from setting up and operating a competing business.

[9] Ms McKay was employed by Tradies Ladies as a courier driver and dispatcher from 1 July 2016. She signed an individual employment agreement (IEA) with the company when it took over from TLL. In doing so, Ms McKay agreed to the following relevant provisions:

5.2 Obligations of the Employee

The Employee shall:

- (i) ...
- (ii) ...
- (iii) Conduct their duties in the best interests of the employer and the employment relationship
- (iv) ...
- (v) Deal with the employer in good faith in all aspects of the employment relationship.

11.2 Conflicts of interest

...If, while performing their duties and responsibilities under this agreement, the Employee becomes aware of any potential or actual conflict between their interests and those of the Employer, then the Employee shall immediately inform the Employer. Where the Employer forms the view that such a conflict does or could exist, it may instruct the Employee to take action(s) to resolve that conflict, and the Employee shall comply with that instruction. When acting in their capacity as Employee, the Employee shall not, either directly or indirectly, receive or accept for their own benefit, or the benefit of any person or entity other than the Employer any gratuity, emolument, or payment of any kind from any person having or intending to have any business with the Employer.

11.4 Non-competition

The Employee agrees that for a period of six months following the termination of their employment for whatever reason, they shall not carry on business in competition with the employer within a radius of 20 kilometres from the employer's premises.

11.5 Non-solicitation of clients

The Employee agrees that for a period of 12 months following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, seek to solicit or carry out any work of the same nature for any client or customer of the employer with which the Employee had any contact or dealings whilst employed by the employer.

11.6 Non-solicitation of Employees

The Employee agrees that for a period of 12 months following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, solicit or engage or employ any employee of the employer with whom the Employee had any dealings whilst employed with the employer.

[10] Tradies Ladies claims that Ms McKay breached her duty of fidelity and her duty of good faith under clause 5.2(iii) and (v) by encouraging an employee to leave her employment with it and offering to write the employee a reference. It claims she directly breached her post-termination obligations to Tradies Ladies under clause 11.4 of her IEA by setting up Royale Couriers Limited, the fourth respondent.

[11] The third respondent, Ms Harland, is Ms McKay's sister and, although the Companies Register records Ms Harland as the sole director and sole shareholder of Royale Couriers, Tradies Ladies asserts this has been done to conceal the true ownership of that company.

[12] Tradies Ladies also asserts Ms McKay has breached clause 11.5 of her IEA by soliciting its clients. The company claims the breaches are ongoing and have resulted in it sustaining a loss of business and profit. It asserts an award of damages will not of itself be a sufficient remedy.

[13] Ms Gerard, the second respondent, commenced employment with Tradies Ladies on 6 November 2017. She was employed as a courier driver. Her IEA contains the same provisions with regard to employee obligations and restraints as that of Ms McKay.

[14] Tradies Ladies claims Ms Gerard breached her duty of fidelity with it by informing one of its clients, while she was employed by Tradies Ladies, it would have to find another courier provider as Tradies Ladies was too busy to undertake its work. The company says this was done without its knowledge or authority.

[15] It also claims in the two months preceding her resignation Ms Gerard treated one of its employees badly with the aim of making her leave her employment. It says she was successful in this attempt and the employee left its employ on 9 July 2019. Tradies Ladies alleges Ms Gerard engaged in these activities to damage its business.

[16] The applicant also alleges Ms Gerard has breached her post-termination obligations, firstly by setting up Royale Couriers, in breach of clause 11.4 of her IEA and secondly by

soliciting its clients, in breach of clause 11.5. Tradies Ladies cites six clients in particular which it says Ms Gerard has solicited. It claims the breaches are ongoing and has resulted in its sustaining a loss of business and profit, for which an award of damages will not of itself be a sufficient remedy.

[17] Mr Allred deposes that he became aware of the situation from customers, staff and his own research. This included ascertaining that the mobile phone numbers Ms McKay and Ms Gerard had respectively used when they were employees of Tradies Ladies had now both been transferred to Royale Couriers, the fourth respondent. Mr Allred instructed his lawyers write to Ms McKay and Ms Gerard. He sought undertakings from them that they would immediately cease operating a competing business and soliciting clients. He said Ms McKay left him a voice mail message in which she denied owing a courier business, and said her sister owned one and she was entitled to give her sister (the third respondent) advice.

[18] Mr Allred's evidence was that Ms Gerard had contacted his lawyers and informed them, inter alia, that she was employed by Ms Harland; and that she had given a Royale Couriers' price list to one of Tradies Ladies customers.

[19] Neither Ms McKay nor Ms Gerard provided the undertakings that had been sought by Tradies Ladies.

[20] It appears the respondents have made an open offer to resolve the matter, which included undertakings as to non-solicitation. The representatives of the parties referred to this in the course of their oral submissions and the respondents' affidavits mentioned such an offer, although not in detail.

Principles applicable to grant of interim relief

[21] When considering whether to exercise its discretion in an interim injunction application, the Authority is required to consider the following questions. Firstly, whether there is an arguable case for substantive relief. Secondly, where the balance of convenience between the parties lies in the period until the substantive application has been determined. This will include consideration of whether there are other adequate remedies. The final question to consider is, standing back and looking at the matter objectively, where the overall justice sits.

Arguable case?

[22] Restraint of trade clauses are treated differently from other contractual provisions in that the starting point is that they are prima facie invalid and unenforceable because they are contrary to the public interest in restricting peoples' ability to work. Tradies Ladies has the onus of showing that the restraint provisions in Ms McKay and Ms Gerard's IEAs were reasonable at the time those agreements were entered into, are not against the public interest, and are no wider than necessary to protect the company's legitimate protectable interests.¹ The advocate for the first and second respondents submits the provisions are not enforceable as they do not protect a legitimate proprietary interest and are unreasonable in the circumstances.

Proprietary interest

[23] In the Applicant's submission the restrictions are reasonably necessary to protect proprietary interests of Tradies Ladies and it is in the public interest that restraints freely entered into are upheld. The Applicant submits it has a legitimate proprietary interest in its business relationships with its customers, including the customer preferences.

[24] It says the roles the first and second respondents had with it as, respectively, dispatcher predominantly and courier driver, were client-facing roles where both formed strong relationships with its regular customers.

[25] Submissions on behalf of the first and second respondent reject that Tradies Ladies has a proprietary interest to protect. In their submission, Ms McKay and Ms Gerard were not senior employees in Tradies Ladies and neither held knowledge or information that could be regarded as proprietary information. While they had exposure to clients, it was limited in terms of the duration of each contact they had. Neither had access to any trade secrets or confidential information.

[26] I prefer Tradies Ladies' submission regarding the proprietary interest it has in its customer connections. The company is not relying on trade secrets but relationships which, particularly in Ms McKay's case, had been established and maintained over several years. I find it a reasonable assumption that the relationships with customers are likely to be one of the several key factors in the success of a courier business.

¹ Transpacific [2011] NZEmpC 63 at [92]

[27] Although it had been three years since Ms McKay had owed the business now known as Tradies Ladies (2016) Limited, her continued association with its customers as a dispatcher arguably put her in a position to wield some influence over the choices they made when deciding whether to remain with that company or switch to a competitor.

[28] Ms Gerard had a much shorter association with Tradies Ladies but, as a courier driver, she was to a large extent one of the faces of the company as far as customers were concerned and arguably was also in a position to exert some limited influence over their choices.

Reasonableness

[29] Tradies Ladies submits both the length of the restraints and the geographical distance involved in the non-competition restraint are justified in the circumstances. It submits it is essential that Ms McKay and Ms Dinelle be ordered to adhere to the non-solicitation clauses of their IEAs. In particular, that they cease soliciting or carrying out any work of the same nature for any client or customer of the employer with which or with whom they had any contact or dealings whilst employed by Tradies Ladies.

[30] The first and second respondents submit Tradies Ladies is attempting to stop them both from working in the occupations that utilised their skills, and which constituted the majority of their work experience, namely courier driving and dispatching. They say the 20 kilometre geographical restraint in clause 11.4, the non-competition provision, is unreasonable and means they can only operate outside the boundaries of the city they live in. They have not made specific submissions as to the six month duration of the restraint.

[31] The respondents have, however, submitted that the 12 month timeframe for the non-solicitation restraint is unreasonable in the circumstances. They have cited the non-managerial nature of their positions and submit a three month non-solicitation timeframe to be arguably sufficient, noting that time period had already passed.

[32] The respondents submit clause 11.5 deals not just with non-solicitation, but also with non-dealing. They say the non-dealing part of the clause is too broad and goes beyond what is necessary to protect the proprietary relationships. It would result in Ms McKay being unable to work in any call centre for a courier company because she would not be able to screen all the calls for potential breaches. Nor would she be able to answer the phone if a new employer had a relationship, contact or dealing with any of Tradies Ladies' customers.

[33] Ms Gerard would be unable to pick up or deliver items if her employer had contact or dealt with a customer of Tradies Ladies. The first and second respondents submit the restrictions heavily impacted on their ability to secure and maintain employment in their chosen industry. In their view the non-dealing provisions of the non-solicitation clause is against public policy and effectively prevents them from working in the industry while simultaneously attempting to prevent Tradies Ladies' customers from using a competitor of their choice.

[34] I have considered that submission but conclude it exaggerates the effect of the provision particularly in relation to the applicant's customers but also in relation to Ms McKay and Ms Gerard. I find that the scope of the clause is arguably reasonable. I am not, however, confident of the reasonableness of the 12 month term of the restraint.

[35] However, while any definite findings must be deferred for the substantive hearing of Tradies Ladies' claims, I am satisfied that a weighing of the proprietary interests and the reasonableness of restraints leads me to conclude Tradies Ladies has an arguable case, although I would not characterise it as a strongly arguable case, for substantive relief.

Balance of convenience

[36] This factor requires a consideration of the detriment Tradies Ladies and the first and second respondents respectively may incur as a result of orders being granted or not. It entails balancing the potential injustice that will be caused to Tradies Ladies if the relief it seeks is not granted, against the potential injustice to the first and second respondents if that relief is granted. It also entails considering whether adequate alternative remedies exist.

[37] It is submitted for Mr Allred that there are no adequate alternative remedies as the damage to Tradies Ladies will have been done unless the first and second respondents are restrained from affecting its business. Mr Allred deposed that, since the establishment of Royale, Tradies Ladies' business revenue from 28 clients, named in his affidavits, has dropped by 30 percent.

[38] In September 2019 alone Mr Allred says the company's sales from those clients dropped by almost \$22,000. He says he is looking at making two employees redundant, out of a total staff of 11, and may need to look at further job losses if the company continues to

sustain losses on the current scale. That would jeopardise not just the future of the company but the livelihoods of a number of its employees.

[39] Although much of Mr Allred's evidence of Ms McKay and Ms Gerard breaching their restraints of trade was disputed by them, both made some acknowledgements which at least in part supported his claims.

[40] The first respondent, Ms McKay, denies breaching her duty of fidelity and good faith; denies breaching any non-competition obligations; and denies soliciting any client of Tradies Ladies. Her affidavits acknowledge she has:

- (a) Provided general advice, information and support to the third respondent, Lisa Harland, to set up Royale Couriers;
- (b) Assisted the third respondent by making deliveries "on the very rare occasion"²;
- (c) Helped out the third respondent "from time to time" by doing deliveries or pick-ups.³

[41] In undertaking these actions the first respondent has potentially breached clause 11.4 and 11.5 of her IEA. In her supplementary affidavit, Ms McKay responded to specific allegations made by Mr Allred of doing pick-ups and deliveries on specified dates. She has provided evidence that may prove those allegations baseless. Ms McKay has not, however, denied other specific claims made in Mr Allred's first affidavit regarding his observations of Ms Gerard and her picking up deliveries from five named customers of Tradies Ladies.⁴ While she has denied soliciting any of those customers, the question of whether she has breached the non-dealing aspect of the non-solicitation clause in relation to those customers remains unanswered and open.

[42] Ms Gerard has acknowledged she is employed by Royale Couriers as a courier driver and dispatcher but denies soliciting clients. However, she acknowledges in her affidavit of 2 October 2019 that she had provided a Royale price list to a customer of Tradies Ladies. Ms Gerard deposes that after receipt of the cease and desist letter from Tradies Ladies' legal representative, Ms Harland advised her not to hand out any further price lists or any

² Paragraph 9 of Ms McKay's affidavit of 2 October 2019.

³ Paragraph 2 of Ms McKay's affidavit of 30 October 2019.

⁴ At paragraph 36 of Mr Allred's affidavit of 12 September 2019.

information to any clients of Tradies Ladies. Ms Gerard says she has abided by that instruction.

[43] In her affidavit of 30 October 2019, Ms Gerard acknowledges that she did, as alleged by Mr Allred, give a price list to another named customer of Tradies Ladies. She makes no reference to Mr Allred's other allegations that she also handed that customer a credit application form and business card. Ms Gerard deposes she did not realise that customer was using Tradies Ladies and that, had she known, she would not have given them a price list.

[44] In the same affidavit Ms Gerard acknowledges she picked up an item or items from another customer of Tradies Ladies and provided them with a Royale Couriers' price list at the customer's request.

[45] From the acknowledgements Ms Gerard has made, it seems she has breached both the non-solicitation and non-dealing parts of clause 11.5 of her IEA. Despite deposing that she had followed her employer's instruction after receiving the cease and desist letter from the applicant, she has acknowledged handing out price lists since that time. This factor favours the granting of orders for non-solicitation.

[46] Ms McKay deposes any work she has undertaken for the fourth respondent has been unpaid and has been by way of helping out a family member. She is less likely to be as adversely impacted by the imposition of orders sought by the applicant than Ms Gerard who is dependent on her employment for providing the means to financially support her family.

[47] I am not persuaded that either or both of the respondents set up a business in opposition to Tradies Ladies. The untested evidence regarding the transfer of their mobile phone numbers to the fourth respondent provides the strongest support for that claim, which is otherwise based largely on speculation, but is by no means sufficient to determine the matter.

[48] Taking all these factors into account I find the balance of convenience favours Tradies Ladies.

Overall justice

[49] I am now required to step back and consider the strengths of the applicant's and the first and second respondents' respective cases to ascertain where the overall justice lies. I

have found Tradies Ladies has an arguable case although it is not strongly arguable. I have found the balance of convenience tips in Tradies Ladies favour and I do not find damages to be an adequate remedy in the circumstances. I conclude the overall justice lies with the applicant.

[50] Turning to the orders sought by the applicant, I am not persuaded the evidence indicates Ms McKay is doing more than assisting a family member on an unpaid basis and I am not persuaded Ms Gerard has any role in the fourth respondent other than as an employee. The non-competition clause is a restraint from carrying on business and it is arguable whether the clause applies to either respondent.

[51] The clause has an ambiguity of ambit unlike the non-solicitation clause which makes clear that the employee is restrained from undertaking the activity "either personally, or as an employee, consultant or agent for any other entity or employer". The non-competition clause could be interpreted as being restricted to the person owing or controlling the business or it could be interpreted as being applicable to persons who come within the range defined in the non-solicitation clause. Faced with wording that is arguably not applicable to either respondent, I am unwilling to make interim orders relating to that clause.

[52] That is not the situation with the non-solicitation clause which is clear in the range of persons it is intended to cover. I am satisfied both the first and second respondents are within the scope of that clause and it is just to make interim orders accordingly.

Orders

[53] Michelle McKay shall not, pending the determination of the substantive proceedings, or for a period of 12 months from 21 July 2019, either personally, or as an employee, consultant or agent for any other entity or employer, seek to solicit or carry out any work of the same nature for any client or customer of Tradies Ladies (2016) Limited with which she had any contact or dealings whilst employed by Tradies Ladies (2016) Limited.

[54] Dinelle Gerard shall not, pending the determination of the substantive proceedings, or for a period of 12 months from 2 August 2019, either personally, or as an employee, consultant or agent for any other entity or employer, seek to solicit or carry out any work of the same nature for any client or customer of Tradies Ladies (2016) Limited with which she had any contact or dealings whilst employed by Tradies Ladies (2016) Limited.

Costs

[55] The issue of costs is reserved until after the hearing of the substantive matter.

Next steps

[56] The Authority will be in contact with the parties shortly to arrange a telephone conference for the purpose of progressing the substantive matter.

Trish MacKinnon
Member of the Employment Relations Authority