

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

ATTENTION IS DRAWN TO
THE ORDER PROHIBITING
PUBLICATION OF
CERTAIN INFORMATION
REFERRED TO IN THIS
DETERMINATION

[2019] NZERA 658
3045413

	BETWEEN	TRADESTAFF GROUP LIMITED Applicant
	AND	CHERYL BAILEY First Respondent
	AND	MOTION RECRUITMENT LIMITED Second Respondent
Member of Authority:	Helen Doyle	
Representatives:	Anna Oberndorfer and Tarryn Saville, advocates for the Applicant John Shingleton and Hiromi Jin'o, counsel for the Respondent	
Investigation Meeting:	23 and 24 July 2019 in Christchurch	
Submissions [and Further Information] Received:	Further information provided 2 August 2019 Submissions lodged 12 August 2019 from the Applicant Submissions lodged 15 August 2019 from the First and Second Respondent	
Date of Determination:	14 November 2019	

DETERMINATION OF THE AUTHORITY

- A Cheryl Bailey breached her restraint of trade covenant and express confidentiality obligations in her employment agreement with Tradestaff Group Limited. She did not breach the non-solicitation covenant.**
- B Motion Recruitment Limit did not aid or abet the breaches of Ms Bailey's employment agreement.**

- C Cheryl Bailey is ordered to pay to Tradestaff Group Limited \$5,915 in penalties within 28 days from the date of this determination. An instalment plan for payment will have to be agreed if the full amount is not able to be paid within that time frame.**
- D Cheryl Bailey is ordered to comply with the confidentiality obligations in clauses 12.3, 12.4 and 12.5 of her employment agreement with Tradestaff from the date that she receives a copy of this determination.**
- E Costs are reserved and failing agreement a timetable has been set.**

Non-Publication

[1] I prohibit from publication under clause 10.1 of the Employment Relations Act 2000 (the Act) information of a commercially sensitive nature that is not referred to in the determination and the attachments to the reply statement of evidence of Amy Green.

Employment Relationship Problem

[2] Tradestaff Group Limited (Tradestaff) is a duly incorporated company that provides permanent and temporary recruitment and payroll services throughout New Zealand. Its head office is in Christchurch.

[3] The New Zealand general manager of Tradestaff is Janice McNab.

[4] Tradestaff employed Cheryl Bailey as a recruitment consultant on 20 July 2015 in Christchurch. Subsequently Ms Bailey became a senior recruitment consultant and then a team leader.

[5] Ms Bailey provided notice of her resignation to Tradestaff on 3 October 2018 with her resignation to take effect after 24 October 2018 which was her last day of work. She went to work for Motion Recruitment Limited (Motion) as a recruitment consultant from 29 October 2018.

[6] Tradestaff say that Ms Bailey commenced employment with Motion in breach of the restraint of trade covenant in her employment agreement and that Ms Bailey has attempted to solicit at least one of the clients of Tradestaff.

[7] Tradestaff also say that Ms Bailey removed and used confidential information in breach of the confidentiality obligations in her employment agreement.

[8] Tradestaff say that Motion has incited, instigated, aided or abetted the breaches by employing Ms Bailey in breach of the restraint of trade clause and that it has used the confidential information taken by Ms Bailey in its business.

[9] Tradestaff seeks an order for penalties against Ms Bailey for the three breaches of the restraint of trade and non-solicitation and the express confidentiality obligations in the employment agreement.

[10] An order is sought for compliance by Ms Bailey with the express terms of her employment agreement with respect to confidential information.

[11] An order is sought for penalties against the second respondent for two breaches of obligation.

[12] An order is sought that any penalties be applied in favour of Tradestaff. Although in the amended statement of problem Tradestaff sought damages Ms Oberndorfer confirmed they are no longer sought.

[13] Ms Bailey accepts that she commenced employment with Motion and that Motion is a company that operates in the same industry of Tradestaff.

[14] Ms Bailey does not accept that the restraint of trade is reasonable or enforceable or alternatively if it is then she says she complied with it except for a short period of about one week.

[15] Ms Bailey accepts that she removed information of a confidential nature from Tradestaff. Although denied in the statement in reply lodged on her behalf, Ms Bailey accepted in her evidence to having used two of the documents removed from Tradestaff.

[16] Motion does not accept that it incited, instigated, aided or abetted the breaches by continuing to employ Ms Bailey. It further denies it has used confidential information taken by Ms Bailey in its business.

Issues

[17] The Authority needs to determine the following issues for the claim against Ms Bailey:

- (a) What obligations in the employment agreement are alleged to have been breached?
- (b) Did Tradestaff have a legitimate proprietary interest to protect with the post-employment restrictive covenants?
- (c) Were the restrictive covenants reasonable and capable of enforcement and in particular as submitted on behalf of Ms Bailey was the restraint of trade clause unclear?
- (d) If the restrictive covenants are found to be reasonable and enforceable:
 - (i) Was there a breach of the non-solicitation covenant?
 - (ii) Was there a breach of the restraint of trade covenant?
- (e) If additionally to the accepted breaches of confidentiality obligations there are breaches of the restrictive covenant of non-solicitation and restraint of trade should penalties be awarded, and if so, in what quantum and who should they be payable to?
- (f) Should there be orders for compliance, deliver up or destruction with respect to confidential information?

[18] The Authority needs to determine the following issues for the claim against Motion

- (a) If there are breaches found by Ms Bailey of her employment agreement then did Motion incite, instigate, aid or abet those breaches?
- (b) Did Motion use the confidential information taken by Ms Bailey?
- (c) If there were breaches on the part of Motion then what penalties should be awarded and to whom should penalties be paid?

The Employment Agreement

[19] Ms Bailey was party to an individual employment agreement that was provided to her under cover of letter from Tradestaff dated 7 July 2015. The employment agreement was signed on 14 July 2015. The employment agreement provided in clause 1.7:

1.7 This agreement, its schedules, the letter offering you employment and the job description, shall constitute the employment agreement.

[20] The restrictive covenants were contained in the letter offering Ms Bailey employment and the obligations of confidentiality were contained in the employment agreement which had more general terms and conditions. In accordance with clause 1.7 of the employment agreement both the letter of offer and the agreement constituted the employment agreement.

[21] The restrictive covenants and the confidentiality provisions are set out below:

Post –Employment Restrictive covenants

1. You affirm that in taking up a career in the recruitment industry and accepting employment with us, you understand and accept that:
 - 1.1 The recruitment industry is highly competitive requiring companies to protect their businesses from the misuse of confidential information by former employees;
 - 1.2 Accordingly, there are restrictions on what employees are allowed to do when leaving one business and taking up employment with another;
 - 1.3 The purpose of the restrictive covenants are to allow the employer to protect their proprietary interests including but not limited to client lists, client contacts, terms of trade, operational systems and practices, strategic and financial information, and marketing strategies;
 - 1.4 Because of these covenants employees will need to enter into arrangements with a new employer that will allow them to comply with them;
 - 1.5 Such arrangements may include, for instance, delaying the start of employment, using the holiday pay and/or pay in lieu of notice they have received from their previous employer during any period between employment, taking on temporary employment outside the industry or working temporarily for the new employer outside the area covered by any geographical restriction on employment; and

1.6 Should they breach the covenants their previous employer may seek amongst other things an injunction preventing them from continuing to breach them and penalties.

2. You shall not at any time, during the term of this agreement or for a period of two (2) months after the termination of this agreement for any reason, carry on or be connected, engaged, or interested either directly or indirectly or alone or with any other person or persons and whether as principal, partner, agent, director, shareholder, employee or otherwise in any company which is in competition with us and is carried on within a radius of ten (10)kilometres of the office in which your position is located, without our express written consent.'
3. Further, where you are complying with the geographical restraint or we have consented to you working within the restraint area you will not for two (2) months after the date of termination of employment, on your own account or the account of a company which is in competition with us, either directly or indirectly, do any of the following for any clients of ours with whom or with which you had material dealings or personal contact on our behalf during such period twelve months preceding the termination of your employment:
 - Seek an agreement to provide services;
 - Offer to perform services or have services provided or solicit, procure, direct, entice their custom or otherwise be instrumental in the diversion of their business;
 - Perform services or have services provided; or
 - Use your name or permit your name to be used for the purpose of or with a view to obtaining their business.
4. Further, you will not solicit, endeavour to entice away from or discourage from being employed by us any of our employees or prospective employees.
5. For the purpose of these provisions, the following definitions apply:
 - Termination of employment: The date on which you ceased providing services for us as a result of us terminating your employment instantly; the expiry of a period of notice during which you were required to work; the expiry of a period of Garden Leave or the commencement date of a period of notice in respect to which you were paid in lieu.
 - Company: Any business which is in competition with us including but not limited to any incorporation, partnership, trust or individual.
 - Client: Includes any incorporation, partnership, trust or individual for whom we provide recruitment or payroll services.
6. You accept that the consideration for these provisions are the terms of this employment agreement and affirm that the consideration is reasonable.

7. If any of the above sub-clauses shall be, or shall be deemed to be, judged invalid for any reason whatsoever, such invalidity shall not affect the validity or operation of any other sub-clauses except only so far as may be necessary to give effect to the construction of such invalidity.

Confidentiality.

12.1 In this agreement “confidential information” means all confidential information which is not in the public domain. It includes:

- Information, knowledge or material which relates to the business or the financial affairs of the business; and
- The future plans of the business; and
- The general procedure of the business which has come to your knowledge or which might reasonably be understood to have been disclosed to you in confidence; and
- Any information that pertains to our clients or staff.

12.2 As part of your duties and responsibilities, you will have access to, obtain or come across confidential information.

12.3 You agree, as part of the duty of good faith, trust and confidence, that:

- You will not make use of confidential information for any purpose other than for those directly related to your work and for furthering our business; and
- You will not discuss confidential information in public places or with people unconnected with the workplace.

12.4 You accept that you require our express authority to reproduce or copy client names and addresses or other confidential information, either electronically or otherwise, except where the reproduction of this information is necessary for you to carry out your duties.

12.5 The above restrictions shall continue to apply after the termination of your employment.

Did Tradestaff have a legitimate proprietary interest to protect with the restrictive covenants?

[22] The purpose of the restrictive covenants is set out in clause 1.3 to allow Tradestaff to protect their proprietary interests including but not limited to client lists, client contacts, terms of trade, operational systems and practices, strategic and financial information and marketing strategies. It is also recorded in clause 1.1 that the recruitment industry is highly competitive requiring companies to protect their business from the misuse of confidential information by former employees.

[23] The evidence supported that the recruitment industry is competitive and that the role of recruitment consultants is to prospect for new business and develop and maintain relationships with existing clients. I am satisfied Ms Bailey had access to client lists, client contacts, terms of trade contract, operational systems and other conditional information. Ms McNab said in her evidence that some of Ms Bailey's clients would have been exclusive to Tradestaff and some were in common with competitors.

[24] I am satisfied that there was a proprietary interest for Tradestaff to protect with respect to its business and the information Ms Bailey had about clients, operational systems and practices and other information associated with Tradestaff's recruitment business.

Are the restrictive covenants reasonable and enforceable?

[25] There are principles in the employment area about contractual provisions that restrict the activities of employees after their employment has been terminated. One is that such provisions are as a matter of legal policy unenforceable unless they can be justified as reasonably necessary to protect the proprietary interests of the employer in the public interest. Another is that it is the employer who bears the onus to establish that the restrictive provision is reasonable. A restrictive provision should be no wider than is required to protect the employer. Relevant factors in assessing whether a restraint is reasonably necessary include, the nature of the employee's role and the employer's business, the geographical scope of the restraint, its nature and the duration of any covenant that seeks to restrain.¹

[26] Mr Shingleton submits that the restraint of trade is unclear and poses two possible interpretations. The first is that an employee cannot work for any competitor who is within 10 km of a Tradestaff office irrespective of where the employee will be working and based in New Zealand which he says is unreasonable. The second that he submits is more reasonable is that an ex-employee of Tradestaff cannot be employed by a competitor of Tradestaff for two months if they are going to be carrying on their employment within 10 km of where they used to work at Tradestaff.

[27] There was no dispute that Motion carried on business in Christchurch approximately 3.5 km away from the Tradestaff office. Ms Bailey's evidence was that she physically worked outside of the 10 km restraint area after 7 November 2018 at a café or in a car with a laptop and did not work from the office.

¹ *Pottinger & Ors v Kelly Services (NZ) Limited* [2012] NZEmpC 101 at [16] – [18] (footnotes are not set out)

[28] It is necessary to consider the meaning of the restraint of trade clause and that involves interpreting the clause.

[29] The interpretative exercise is “directed at establishing the meaning the parties to the agreement intended the words in dispute to bear.”² The starting point therefore is an assessment of the natural and ordinary meaning of the words in the restraint of trade clause. It has been recognised that the plainer the words the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say.³ The contractual context sometimes called a cross check is however a necessary ingredient in ascertaining meaning.⁴ Interpretation should be approached on an objective basis and the necessary inquiry concerns what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean.⁵ What a party subjectively intended or understood their words to mean is irrelevant.⁶

[30] The language used is generally given its natural and ordinary meaning but there may be a conclusion that something has gone wrong with the language and the law does not require the Authority to attribute to the parties an intention which they clearly could not have had. The natural and ordinary meaning should not lead to a conclusion that flouts business common sense.⁷

[31] With those principles in mind I consider the restraint of trade covenant in clause 2. The first part of the clause presents little difficulty. Its natural and ordinary meaning objectively considered is that an employee shall not for a period of 2 months after the termination of the agreement carry on or be connected, engaged, or interested either directly or indirectly or alone or with other person or persons in a variety of capacities but for present purposes as an employee in any company which is in competition with Tradestaff. It is the words that follow “in any company” Mr Shingleton submits are unclear. They are “...in any company which is in competition with us and is carried on within a radius of ten (10) kilometres of the offices in which your position is located, without our express written consent.”

² *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [19]

³ Above n 2 at [23]

⁴ Above n 2 at [24]

⁵ Above n 2 at [19]

⁶ Above n 2 at [14]

⁷ Above n 2 at [61]

[32] The issue is whether the words “carried on within a radius of 10 kilometres” refer to the competitor company or the employment. Mr Shingleton submits that the correct interpretation of the clause is that an employee cannot be employed by a competitor of Tradestaff for two months if they are going to be carrying out their employment within 10km of where they used to work at Tradestaff. Ms Oberndorfer submits that the correct interpretation is that an employee cannot be employed by a company that carried on “its business” within a radius of 10 kilometres from the Tradestaff office in Christchurch where Ms Bailey’s position was located.

[33] Mr Shingleton in support of the interpretation he advances says that it makes more sense when considered with the non-solicitation restraint at clause 3 where there is compliance with the geographical restraint or consent to the employee working within the restraint area.

[34] The restraint of trade covenant is intended to restrain employment of a former employee with a competitor for a period of two months. I have objectively considered what the parties intended by their words “... and is carried on within a radius of ten (10) kilometres of the offices in which your position is located, without our express written consent.”

[35] The clause read as a whole initially refers to the relationship with the employee and any company. It then moves to focus on “any company.” There is reference to any company has to be in competition and is carried on within a radius of 10 kilometres. The definition of company in clause 6 specifically for the purposes of the post-employment restrictive covenant provisions includes “any business which is in competition with us ...”.

[36] I find it less probable from the plain and natural words that the carrying out of employment within a radius of ten kilometres rather than the carrying on of the competitor’s business within a radius of ten kilometres was intended by the parties.

[37] I accept Ms Oberndorfer’s submission that Mr Shingleton’s interpretation could lead to a situation where a restraint was avoided because the employee conducted work for a competitor who carried on business within a geographical restraint from a café, car or from home just outside of where the competitor carried out its business. That would be an interpretation that could defeat this and other restraints and potentially flout business sense.

[38] I also need to cross check with the contractual context.

[39] Clause 1.5 which is part of the restrictive covenant clauses provides some arrangement that could be entered into with a new employer if the restrictions apply. These include delaying the start of employment, taking on temporary employment outside of the industry or working temporarily for the new employer outside of the area covered by any geographical restriction on employment. This clause needs to be read with the plain and natural meaning of the words in the restraint clause about the geographical restriction with a company in competition carrying on within a radius of 10 km from the office in which the previous employee was based in. A previous employee could be employed in a different branch of a competitor carrying on outside of the geographical restraint but I do not understand Motion to have another branch office in which Ms Bailey could have been placed.

[40] The other clause I have considered is that for non-solicitation. That is in clause 3 and provides further to the restraint of trade where there is compliance with the geographical restraint or Tradestaff has consented to an employee working within the restraint area there is a non-solicitation provision for clients with who the ex-employee had had material dealings or contact during the twelve months preceding termination.

[41] Mr Shingleton submitted that his interpretation sits more easily with this clause. The non-solicitation obligations in clause 3 apply where the previous employee is not employed with a competitor whose business is carried out within the geographical restraint or there has been consent to working within the restraint area. If the restraint of trade clause applies an employee is restrained from being employed by a company in competition with Tradestaff which carries on within a radius of 10 kilometres of the office in which the employee is located with Tradestaff unless there is express consent. In the absence of express consent the non-solicitation obligation does not additionally apply no doubt because if the restraint of trade was complied with the employee would not be working for a period of two months.

[42] Objectively assessed I find that the parties intended the words in the restraint of trade clause "...and is carried out within a radius of ten (10) kilometres of the office in which your position is located..." to be the carrying out of the company (business) and not the carrying out of employment within the radius of 10 kilometres. That is the plain and natural meaning of the words that they relate back to the company and the requirement that it be in competition and the employee relationship with that company. Motion carried out its

business in an office within 10 kilometres of Tradestaff. The cross check did not change my view that this was, objectively assessed, the parties intentions.

[43] The duration of the restrictive covenants is two months. Ms McNab explained that this was believed to be reasonable for the covenants because of the access the consulting staff have to confidential information particularly the terms and conditions between Tradestaff and its clients. She also said in her evidence this gives each business time to recruit, induct and train new employees. She explained that it is understood it takes a minimum of about two months to get a consultant up to speed and to allow a consultant to build a rapport with clients.

[44] Ms McNab referred to her experience of the industry and longer restraints in competitors' employment agreements. Whilst she said there was a view of Tradestaff a three to four-month restraint is probably desirable, two-month restraints are currently negotiated.

[45] I find that the duration, geographical limitations and nature of the restrictive covenants are reasonable.

[46] The restraint of trade covenant is enforceable.

Was there a breach of the non-solicitation clause?

[47] The obligation not to solicit in the employment agreement arises when there is compliance with the geographical restraint in the restraint of trade covenant or express consent to working within the restraint area. In short where there has not been a breach of the restraint of trade covenant. Tradestaff do not accept that there was compliance with the geographical restraint in the restraint of trade covenant but Ms Bailey says that there was.

[48] I need to therefore determine whether there was a breach of the restraint of trade covenant before determining a breach of the non-solicitation clause within the meaning of the clause.

Was there a breach of the restraint of trade covenant?

[49] Ms Bailey went to work for Motion on 29 October 2018 having resigned from Tradestaff on 24 October 2018. The restraint of trade covenant that I have found reasonable and enforceable commenced on 25 October 2018 and concluded on 23 December 2018.

[50] After Tradestaff received Ms Bailey's letter of resignation the national people & capability manager for Tradestaff Sue Harrison wrote to Ms Bailey on 4 October 2018 to confirm acceptance of the resignation. There was also a reminder about the post-employment restrictive covenants from the employment agreement and these were set out in full in the letter.

[51] It was understood by Tradestaff that Ms Bailey was going to work at something new rather than in the recruitment industry because she wanted a change. Ms Bailey said in her evidence that she would have struggled to have had a conversation about where she was going to work with Ms McNab. The evidence supports that she answered questions and stated in written correspondence with Tradestaff that she wanted a change or to try something new. Ms McNab in her evidence said that on 23 October 2018 she went into the Christchurch branch to say farewell to Ms Bailey as she was not going to be in Christchurch the following day for the farewell morning tea. She asked Ms Bailey if she had anywhere to go to and Ms Bailey said no. Ms Bailey said that she did not want to tell Ms McNab in front of the whole team and did not want everyone to know she was staying in recruitment and that it was a very emotional day because no-one in her team wanted her to go.

[52] On 31 October 2018 Ms McNab was advised by one of Tradestaff's senior international recruitment consultants that Ms Bailey had contacted one of Tradestaff's clients and that she had told that client she had taken a position with Motion. Ms Oberndorfer wrote to Ms Bailey by email dated 31 October 2018 and advised that she was in breach of the restraint of trade covenant and required her to resign.

[53] Ms Bailey responded and advised that she did not agree with giving her resignation and referred to lawyer's correspondence.

[54] Attached to the statement in reply lodged on behalf of Ms Bailey dated 18 December 2018 was a copy of a variation document. It had not been provided to Tradestaff earlier. The variation provides that Ms Bailey is restricted from contacting any clients within a 10km radius from Tradestaff's office immediately until 23 December 2018. There was reference to work space at 150 Williams Street Kaiapoi. Ms Bailey was also requested to refrain from contacting any of Tradestaff's clients or candidates during this time. The variation provided with the statement in reply was signed by Ms Bailey and dated 7 November 2018.

[55] Ms Bailey accepted that she did not work from Williams Street which was Motion's company director Jason Seawards mother's retirement unit because she was not comfortable. The Authority because of Ms Oberndorfer's concerns about any retrospective creation of the variation asked for the properties of the variation document. When these were provided it was clear that the document was not created until 29 November 2018. That was inconsistent with Ms Bailey's evidence as to when the document was signed. I agree with Mr Shingleton that the result of that is the Authority cannot conclude the reliability of the document so as to place any weight on it whatsoever.

[56] Ms Bailey did keep and she produced diary extracts for 5 November 2018 to 26 November 2018 about contact made to emphasise these clients were outside of the 10 km area. Ms Bailey's home was also within 10 kilometres but she said in her evidence that from 7 November 2018 she worked in her car or from local cafes outside of the 10 km area

[57] I find that Ms Bailey breached the restraint of trade by commencing and continuing her employment with Motion who compete with Tradestaff and carry on business within a radius of 10 kilometres from Tradestaff for a period of two months after her employment terminated with Tradestaff. Attempts to mitigate the seriousness of the breach following 7 November 2018 and legal advice from Motion's lawyer can be weighed when it comes to an assessment of penalties.

[58] I am satisfied having found a breach of the restraint of trade that the non-solicitation obligations on a strict interpretation of clause 3 in the letter of offer under post-employment restrictive covenants did not apply. That is because Ms Bailey did not comply with the geographical restraint and there was no consent to her working within the restraint area. I do not find additionally a breach of the non-solicitation obligations.

Breach of the confidentiality obligations

[59] Ms Bailey accepted in her evidence that on her last day with Tradestaff she emailed from her work email to her personal email confidential information belonging to Tradestaff including information about clients, account applications, templates, reference form, matrix documents and contract for services. She said that she did that "in a moment of madness" and not for reasons related to her new position.

[60] Ms Bailey now accepts that she used the reference form and the drug collection form whilst employed by Motion. She put the logo for Motion over the logo for Tradestaff on the reference form and copied that to a co-worker and the general manager for Motion Amy Green. The drug collection form she said she intended to use as the basis of another document.

[61] In conclusion therefore Ms Bailey breached the restraint of trade and confidentiality obligations in her employment with Tradestaff .

Claim against Motion

[62] The claim against Motion is that Motion incited, instigated, aided and abetted the breaches of Ms Bailey and used the confidential information that she took.

[63] Section 134 (2) of the Act is relied on and that provides:

Every person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty imposed by the Authority.

Restraint of Trade

[64] Ms Oberndorfer refers the Authority to the Employment Court judgment in *Credit Consultants Debt Services NZ Limited v Wilson and EC Credit Control Limited*⁸ about the degree of knowledge required to be proven with such a claim. Judge Shaw stated that there is no direct authority which establishes the particular knowledge of intent that is required to be proven against an alleged party to a breach of contract to warrant the imposition of a penalty.⁹ Judge Shaw then referred to a submission by counsel that drew an analogy with the tort of interference with contractual relations which requires that the defendant must have known of the contract and deliberately intended to interfere with it,¹⁰ although that knowledge need not be of the exact terms of the contract. It was accepted in *Credit Consultants* as an appropriate standard of wilfulness for the purpose of evaluating whether a person is a party to a breach of an employment agreement that it is sufficient if the defendant knew of the general contractual situation or practice in a particular field.

⁸ *Credit Consultants Debt Services NZ Limited v Wilson and EC Credit Control Limited* [2007] ERNZ 26 and (2007) 4 NZELR 263

⁹ Above n 8 at [76]

¹⁰ Above n 8 at [76] with footnote reference to *McIntyre v Bianchi* [1992] 3 ERNZ 1057 at 1107

[65] The evidence was that Ms Bailey was interviewed by both Mr Seaward and Ms Green the General Manager of Motion. Ms Green had met with Ms Bailey earlier by herself.

[66] Ms Bailey says that she did not advise Motion of her restraint of trade covenant. Mr Seaward and Ms Green say that they had no knowledge until Mr Seaward received a call from Tradestaff on or about 31 October 2018 about the restraint of trade after employment had been offered and had commenced. Legal advice was then obtained resulting in an arrangement that Ms Bailey not work within the 10 kilometre area and that she not contact any of Tradestaff's clients.

[67] Ms Oberndorfer submits that Motion was aware of the restraint of trade provisions and had the required degree of knowledge from the general practice and the types of restraints on people in the field of recruitment. Ms Oberndorfer refers to Motion having been in the industry for 17 years and that Motion turned a "blind eye" rather than being unaware of the possibility of a restraint before employing Ms Bailey. She noted that Ms Green was subject to restrictive covenants herself before she went to Motion.

[68] Some weight was placed by Ms Oberndorfer about the variation agreement not being genuinely created.

[69] I find that the facts of this matter are distinguishable from those in *Credit Consultants*.¹¹ Judge Shaw on the facts of that matter was satisfied that the managing director of the new employer knew of the restraint of trade and made no proper inquiry about it. It was a matter discussed at the time of interview when the facts are considered in that judgment for a possible role for Mr Wilson. It was found the managing director in that case was reckless as to the consequences of a breach.

[70] The evidence does not enable me to conclude in this case that there was knowledge of the restraint of trade before employment so as to then conclude that Motion took active and wilful steps with that knowledge to employ Ms Bailey and advertise her position with the company.

[71] When Motion did become aware of the restraint of trade a few days after Ms Bailey commenced employment it took legal advice and acted for the most part on that advice. Mr Shingleton was authorised to partially waive privilege about an email dated 7 November

¹¹ Above n 8

2018. The part of the email disclosed about advice is consistent with the evidence as to how the restraint was viewed and for Ms Bailey to operate outside of the 10 km radius and not have dealings with Tradestaff clients/businesses. Motion had employer obligations towards Ms Bailey and I do not find it could be concluded there was recklessness of the type in the *Credit Consultants* case because legal advice was obtained promptly.

[72] Mr Seaward said that Ms Bailey did not get any new clients for Motion over the two month period when she was cold calling. In short he said her salary was carried so they could have the benefit of her experience after the restraint period had ended.

[73] I agree with Ms Oberndorfer that the variation document having been created some weeks after it was signed is of concern and does not reflect well because it was misleading to Tradestaff. That does not take matters much further under this head as I am not able to conclude with any certainty that after 7 November Ms Bailey was not instructed to work away from the office with focus on the work being undertaken outside of a range of 10km from Tradestaff's office. Further she was instructed not to deal with Tradestaff's clients. Ms Green said that whilst there were no diary entries after 26 November made by Ms Bailey there was not a lot happening after that time as Ms Bailey had exhausted areas that she could cold call in. Further that Ms Bailey was not expected to work from 9am to 5pm in the circumstances.

[74] I am not satisfied to the required standard that Motion aided and abetted a breach of the restraint of trade by Ms Bailey.

Use of confidential information

[75] I accept Tradestaff had very real concerns that Motion used documents Ms Bailey had taken. Whilst a statement of evidence was provided by a previous employee of Motion there was no appearance by that person at the Authority investigation and the Authority can therefore place no weight on the contents of that statement.

[76] Ms Green was copied into an email about the reference that had been removed from Tradestaff by Ms Bailey. Ms Bailey changed that document to put on the Motion logo. Ms Green said that she did not recall looking at the attached document. Even if she had done I accept that it would not have been apparent to her that it had been a Tradestaff document. She said that she did not see any of the Tradestaff documents on Ms Bailey's desk.

[77] Tradestaff says that it is not plausible that there was no knowledge of the information that Ms Bailey had removed. The size of the office and general chat were relied on. I do not find that is enough in these circumstances where there is knowledge required.

[78] Finally I record that when an employee removes confidential documents just prior to taking up employment with a competitor not surprisingly there is considerable suspicion that is difficult to allay or at least allay completely. Illustrative of this is that Tradestaff in late November 2018 obtained, somewhat improperly, disclosure from Motion of some of its confidential information. A person was used who told Motion he was potentially interested in using their services. That caused concern for Motion. From the information disclosed however Tradestaff was able to ascertain that it was not documentation based on confidential information removed by Ms Bailey.

[79] I am not satisfied that the evidence enables the Authority to conclude to the appropriate standard that Motion aided and abetted a breach of the confidentiality obligations by Ms Bailey.

[80] The claims against Motion do not succeed.

Consideration of Penalties

[81] Ms Oberndorfer and Mr Shingleton referred the Authority to the Employment Court judgment in *Nicholson v Ford*¹² which sets out the approach to imposing penalty and the quantum of penalties.

[82] I find that Ms Bailey breached post-employment obligations in her employment agreement for restraint of trade and confidentiality with Tradestaff in circumstances that would justify the imposition of a penalty. The primary purpose of a penalty is punishment of wrongdoing and deterrence of further breaches by Ms Bailey and others with respect to obligations of confidentiality and post-employment restrictive covenants.

[83] There are a number of matters that the Authority needs to have regards to in s 133A of the Act and additionally some other matters.

¹² *Nicholson v Ford* [2018] NZEmpC 132

Object of the Act

[84] The object of the Act is to promote good faith. This is not achieved by an employee downloading confidential information whilst employed and, not advising that they intend to work at a competitor when specifically asked. Had Ms Bailey done so potentially a solution could have been found and matters would not have progressed in the way they did.

Nature and extent of the breach and whether the breach was intentional or inadvertent or negligent.

[85] I start with the number of breaches. I have found Ms Bailey breached her restraint of trade obligations and her confidentiality obligations. I agree with Mr Shingleton that the use and the downloading of confidential information are indivisible and I do not understand Ms Oberndorfer to disagree. There are two breaches. Therefore the amount of penalty for each breach in the case of an individual is \$10,000. The maximum penalty therefore that could be awarded against Ms Bailey is \$20,000. They are separate breaches and should, I find, be treated as such.

[86] Both breaches arise from express obligations in the employment agreement. I accept that Ms Bailey was provided with the restraint of trade provisions after she advised her intention to resign and asked about her intentions before her employment with Tradestaff ended. She was not straightforward with Tradestaff. There were also clauses in post-employment restrictive covenants that would have assisted Ms Bailey in understanding the restraint of trade.

[87] I conclude a level of deliberate intention with both breaches. The downloading of confidential information and use of that information was the more serious. They were not inadvertent breaches.

[88] Ms Oberndorfer submits that the breaches of the restraint of trade should attract a penalty of 50% of the maximum. I accept that \$5000 is a suitable starting point for that.

[89] Ms Oberndorfer submits that the breach of confidentiality should not attract any reduction and should be assessed at 100%. I find an appropriate starting point for that breach is 80% of the maximum which is \$8000.

Loss or damage suffered

[90] Although there was no evidence of loss of clients I accept that Ms Bailey's actions caused a great deal of concern, shock and suspicion particularly about the confidential documents downloaded from Tradestaff. There is a very real concern about the lack of control over the confidential documents.

Mitigation of adverse effects and circumstances

[91] I accept that remorse was shown by Ms Bailey albeit belatedly in the statement of evidence and in oral evidence. I also weigh that she took some steps based on Motion's legal advice to work outside of the 10 kilometre range. The exact nature of her whereabouts over the two month period is not able to be established with certainty. I asked for some confirmation that the confidential information had been deleted and an IT review undertaken showed no record of the confidential information on Ms Bailey's accounts although that was insufficient to satisfy Tradestaff. The evidence of use of the confidential information was limited to template type documents.

[92] The circumstances were that Ms Bailey had been a well-respected and trusted employee at Tradestaff and that exacerbated the shock and dismay when the breaches were discovered. Tradestaff was vulnerable to the removal and potential subsequent misuse of its confidential information for the benefit of other businesses and individuals.

Previous breaches

[93] There is no information to support Ms Bailey has been found to have breached such post-employment obligations or confidentiality obligations by the Authority previously.

Financial circumstances

[94] I accept from the information Ms Bailey provided that her financial situation is not particularly healthy once she has paid her outgoings from her wages. The Chief Judge in *A Labour Inspector v Daleson Investment Limited*¹³ in considering financial issues noted that the financial circumstances are not referred to in s133A of the Act although the list is not exhaustive. It was stated in *Daleson* that ability to pay is one factor of many and ought not to be given "disproportionate weight." Payment by instalment was referred to.

¹³ *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12at [45] and [46]

Quantum

[95] From the starting point of \$5000 for the breach of the restraint of trade and \$8000 for the breach of the confidentiality provision I consider there should be a 30% reduction for mitigating factors bringing the provisional penalty to \$9,100.

[96] Taking the ability to pay into account I conclude there should be a further 35% reduction for financial ability to pay. I take into account that Ms Bailey is still employed and earning an income. That brings the provisional penalty to \$5,915.

[97] Mr Shingleton referred the Authority to another case where he said the breach was much more serious and an award was made of \$4000.¹⁴ In that case there was one breach of an implied term of fidelity. I accept it was serious. In this matter there are two breaches of express terms so it is not directly comparable. Further in that case there appeared evidence of unpaid wages and significant debt that resulted in significant reduction for ability to pay. It was unclear if the employee in that case had any income at all.

[98] I consider standing back and considering all matters a suitable award for a penalty is \$5,915. There will need to be discussion about payment by instalment.

Who should receive the penalty?

[99] Ms Oberndorfer asked that any amount ordered by way of penalty be paid to Tradestaff. I accept that would be appropriate in the circumstances of this case where the breaches are of post-employment obligations between Tradestaff and Ms Bailey to make such an order under s136 of the Act that the whole of the penalty recovered be paid to Tradestaff. That would compensate Tradestaff for the breaches of its employment agreement with Ms Bailey and the ongoing concern and upset the breaches caused.

[100] Cheryl Bailey is ordered to pay to Tradestaff Group Limited a penalty in the sum of \$5,915 within 28 days from the date of this determination. An instalment plan will have to be agreed if the full amount is not able to be paid within that time frame.

¹⁴ *Martin v Solar Bright Limited* [2019] NZERA 463

Should there be a compliance order?

[101] Ms Bailey says that she has deleted/destroyed the confidential information. Tradestaff remains concerned. I am not inclined to make an order for destruction or deliver up. That would seem to serve little purpose. She was not able to show when she deleted the information although a subsequent search of her device and the device of an ex-employee found no trace of the files removed.

[102] I acknowledge Tradestaff remain concerned. The obligation of confidentiality in the employment agreement is ongoing. Ms Bailey acted deliberately in breach of her employment agreement and took confidential information from Tradestaff on her last day of employment covertly.

[103] I find that a compliance order is necessary with the provisions of the employment agreement as they relate to confidential information.

[104] Cheryl Bailey is ordered to comply with clauses 12.3, 12.4 and 12.5 of her employment agreement with Tradestaff from the date that she receives a copy of this determination.

Costs

[105] I reserve the issue of costs. Both parties have had a measure of success. In the event costs cannot be agreed Ms Oberndorfer has until 29 November 2019 to lodge and serve submissions as to costs and Mr Shingleton has until 13 December 2019 to lodge and serve submissions as to costs in reply.

Helen Doyle
Member of the Employment Relations Authority