

**NOTE: This determination
contains an order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 213
3079552

BETWEEN	BLACKBURN TRANSPORT LIMITED T/A URBAN CARRIERS Applicant
AND	SAMUEL SMITH Respondent

Member of Authority:	Marija Urlich
Representatives:	S Laphorne and M Chen, counsel for the Applicant, No appearance for the Respondent
Investigation Meeting:	3 August 2020 and 18 February 2021
Submissions and further information received:	18 February 2021, from the Applicant 19 February 2021, from the Respondent
Determination:	20 May 2021

DETERMINATION OF THE AUTHORITY

Non publication order

[1] Blackburn Transport Limited (Urban Carriers) seeks non-publication orders under clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) for paragraphs [48] – [53] of the witness statement of Scott Blackburn dated 22 October 2020 on grounds that the material contained therein is of a highly personal nature and there is no public interest in the publication of the information.

[2] It is accepted the identified information is personally sensitive and that there is no public interest in the material being published. It is clear to the Authority that this is an appropriate matter in which to issue a non-publication order.

[3] The Authority orders that the identified paragraphs in Mr Blackburn's witness statement of 22 October 2020 be subject to a non-publication order issued under clause 10(1) of the Second Schedule of the Act.

Employment Relationship Problem

[4] Urban Carriers employed Samuel Smith from July 2015 until his resignation effective 30 August 2019. Urban Carriers says Mr Smith set up in competition with its business and in so doing breached express and implied terms of his employment agreement and the duty of good faith during his employment and after his employment ended breached surviving express terms. Urban Carriers denies any bonus is owed to Mr Smith. Mr Smith denies the claims made against him and says he is owed \$15,000 in bonus.

The Authority's investigation

[5] Mr Smith was represented at the 3 August 2020 investigation meeting but he did not attend nor was he represented at the 18 February 2021 investigation meeting. At 1.26pm on 19 February, the day after the conclusion of the investigation meeting, Mr Smith's representative, Mr Chambers emailed the Authority seeking an adjournment on medical grounds. The attached medical certificate is dated 10 February 2021 and states Mr Chambers is unfit for work from 16 February 2021 to 15 May 2021. Mr Chambers was advised the investigation had concluded and the Authority would move to determine the matter. Mr Chambers then emailed at 2.25pm by reply his view this was unacceptable and his inaction should not prejudice Mr Smith. The Authority emailed the parties confirming it would move to determine the employment relationship problem.

[6] For completeness on the afternoon of 18 February, after the completion of the investigation meeting an electronic version of Urban Carriers' closing submissions was filed. Mr Chambers was copied in on this email. No further information has been provided by Mr Smith and he has not sought to file any further information.

[7] This situation is very unfortunate and necessitates a narration of the lengthy procedural history of this matter:

- Urban Carriers filed its statement of problem on 25 October 2019;
- Mr Smith filed a statement in reply on 7 November 2019 and raised a claim for bonus payment of \$15,000;
- the parties attended mediation on 11 December 2019;
- on 30 January 2020 the Authority convened a case management conference at which timetabling directions were agreed including that Mr Smith would file a statement of problem with respect to the bonus claim and the parties would file memoranda clarifying documents to be provided;
- Mr Smith did not file a statement of problem in accordance with the agreed timetable;
- on 13 February, and in accordance with the 30 January timetable, Urban Carriers filed a memorandum seeking provision of relevant documents from Mr Smith;
- on 14 February the Authority requested Mr Smith advise by 19 February what documents he consented to providing and if there were any he declined to provide the reason why;
- Mr Smith provided no reply and did not reply to Urban Carrier's request for directions made on 25 February;
- on 25 February the Authority directed Mr Smith provide the documents by 3 March. The documents were not provided and no reason for the non-compliance was provided;
- on 9 April a scheduled case management conference with the parties to progress the matter was unable to proceed¹. By minute dated that day (Second Minute) the Authority proposed dealing with the matter on the papers with the parties to comment by 16 April;
- on 17 April unsigned witness statements were filed for Mr Smith and two other witnesses. The directed documents were not provided;
- on 14 May a case management conference was held with the parties. Mr Smith's failure to comply with the directions for the provision of relevant documents was discussed. Mr Chambers said he expected to file further

¹ This occurred during the first Covid-19 lockdown.

witness statements along with relevant documents the following week and this would go some way to satisfying the direction. A minute dated 14 May was issued (Third Minute);

- Mr Smith did not file the further witness statements and documents as indicated;
- by minute dated 21 May (Fourth Minute) the Authority directed the parties to file by 28 May names and contact details of persons in possession and control of relevant documents and an investigation meeting would be held at which relevant documents would be provided;
- Urban Carriers filed a memorandum providing the information sought in the Fourth Minute. Mr Smith did not provide a response;
- on 29 June and 5 July the Authority wrote to the parties offering dates for an investigation meeting. By minute dated 13 July (Fifth Minute) the parties were advised the Authority would schedule an investigation meeting on 3 August for the identified persons to provide relevant documents to the Authority;
- on 3 August the investigation meeting proceeded with Urban Carriers and Mr Smith represented. Relevant evidence was given and the parties were provided an opportunity to examine the witness. Mr Chambers is located off shore. He attended remotely via Zoom;
- by minute dated 5 August (Sixth Minute) identified persons were directed to file further relevant information;
- by minute dated 7 September (Seventh Minute) the Authority directed the information received from the identified persons be copied to the parties, the parties' view on resuming mediation was sought, directed any further evidence should be filed and served by 22 October and a two-day investigation meeting would then be scheduled;
- Urban Carriers filed further information within the timetable. Mr Smith did not and did not seek leave to file outside the timetable;
- on 29 October Mr Chambers advised the Authority Mr Smith was neutral on the non-publication orders sought;
- on 11 December the Authority made inquiry of the parties' availability to attend an investigation meeting in the first week of February;
- the same day Mr Chambers confirmed his availability by AVL and a new contact email address;

- on 15 December the Authority made inquiry of the parties' availability to attend an investigation meeting in the week beginning 15 February. On 21 December Mr Chambers emailed he would "try to get hold of Mr Smith and get back to you.";
- on 19 January 2021 the Authority convened a case management conference. A reminder was emailed to the parties the day before. There was no appearance for Mr Smith. An attempt was made to contact Mr Chambers on the telephone number he had provided without success. A minute (Eighth Minute) was issued recording the directions made including that an investigation meeting would be held on 18 and 19 February 2021 and that Mr Chambers had leave to attend by zoom;
- on 21 January the notice of hearing, dated that same day, was emailed to the representatives along with zoom link details;
- on 17 February the Authority emailed the representatives confirming the scheduled investigation meeting was to commence the following day². An order of witnesses was emailed to the representatives later that day;
- when Mr Chambers and Mr Smith were not in attendance at the scheduled start time of the investigation meeting the Authority emailed Mr Chambers at the email addresses he had provided advising the investigation meeting would proceed at 10 minutes after the scheduled start time. The zoom portal remained open throughout the investigation meeting.

[8] As stated above the investigation meeting proceeded in the absence of Mr Smith and his representative. The Authority is satisfied Mr Smith was served, through counsel, with the notice of investigation meeting on 21 January 2021 and reasonable efforts were made with the parties to confirm the investigation was to proceed. On the day of the investigation meeting the start time was delayed to accommodate any lateness on the part of Mr Chambers or Mr Smith, an email was sent to this effect to Mr Chambers and the zoom portal remained open throughout.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and information received.

² The third day of the third Auckland COVID-19 lockdown.

Issues

[10] The issues identified for investigation and determination are:

- (a) did Mr Smith, whilst employed by Urban Carriers engage in actions in breach of the following express terms of his individual employment agreement:
 - (i) clause 1 (duties);
 - (ii) clause 4.2 (obligations);
 - (iii) clause 9 (confidentiality)?
- (b) Did Mr Smith breach his implied obligations of loyalty and fidelity?
- (c) Did Mr Smith breach his duty of good faith to Urban Carrier?
- (d) Since ending his employment with Urban Carrier, did Mr Smith breach the following terms of his employment agreement:
 - (i) clause 24 (post-employment restraints)?
 - (ii) clause 4.2 (return of company property)?
- (e) Does Urban Carrier owe Mr Smith bonus payment/s and if so, what amount?

Parties' employment agreement

[11] Mr Smith worked for Urban Carriers as the operations manager/truck driver from 13 July 2015 until 30 August 2019. Prior to Mr Smith starting work, on 3 July 2015 Urban Carriers and Mr Smith signed an individual employment agreement the terms of which included during his employment Mr Smith would:

- diligently and faithfully serve Urban Carriers and promote and protect its interest and reputation at all times (cl 1(a));
- conduct his duties in the best interests of Urban Carriers and the employment relationship (cl 4.2(iii));

- deal with the employer in good faith in all aspects of the employment relationship (cl 4.2(iv));
- not use or divulge, or use to the detriment of the employer any information which may come to his knowledge as a result of his employment including after termination (cl 9);
- seek prior approval for any secondary employment (cl 16);
- within 12 months of date of termination, not make any statement or take any action intended or likely to adversely affect Urban Carriers' business or reputation (cl 24(A));
- within 12 months of date of termination, not reveal to any party any confidential knowledge of Urban Carriers' (cl 24(B));
- within 12 months of date of termination, not unfairly solicit any relevant business from any client, current or former, of Urban Carriers (cl 24(C));
- on termination the employee is to immediately return all Urban Carriers' property in his/her possession (cl 11.5).

[12] There is a suggestion in Mr Smith's documents that the terms of the employment agreement are not binding on the parties because he never signed an employment agreement.³ This suggestion is not developed further in subsequent correspondence or information he filed in the Authority.

[13] For the sake of completeness, the information before the Authority includes an employment agreement signed by the parties dated 3 July 2015. The employment agreement is binding and enforceable.

Background

[14] Urban Carriers operates a general cartage and transportation business delivering mostly freight, including pre-hung doors, building supplies and pallets of tiles, and house furniture in the greater Auckland area. Mr Blackburn is the sole director of Urban Carriers and has owned and operated the business since 2009.

[15] The business offers short notice deliveries and has a small but stable customer base. Home delivery prices are on the business' website while commercial rates are

³ Email 1 September 2019 Mr Smith to Mr Blackburn.

not published. Urban Carriers' website includes "...unlike many of our competitors our rates are not set in stone, as an advantage to our customers, we make an assessment on your needs then will provide you with a competitive quote...". The Authority accepts these rates are commercially sensitive and were known only to Mr Blackburn and Mr Smith.

[16] As the operations manager Mr Smith was the primary point of contact for customers and staff and in that role he was able to develop relationships with customer contacts and learn customer pricing information and delivery requirements. He booked jobs, allocated work to drivers and wrote up daily run sheets for drivers. He oversaw all new work and was the only person, along with Mr Blackburn, who had access to the general email address into which new jobs were received.

[17] Mr Blackburn said customers had been very loyal and customer turnover low until Mr Smith left the business. Urban Carriers identified to the Authority the five key customers it says prior to Mr Smith leaving the business were regular customers.

[18] Sometime in April 2019 Mr Smith purchased a commercial truck suitable for carriage work. When Mr Blackburn became aware of this he asked to meet with Mr Smith on 29 April to ascertain this key employee's intentions. Mr Smith resigned at the meeting because, he told Mr Blackburn, he wanted to set up his own business. Mr Blackburn told Mr Smith he had no issues with this so long as he did no work for Urban Carriers customers. He reminded Mr Smith of his contractual obligations including the restraint of trade. Mr Smith said he was only interested in house moves, promised not to compete with Urban Carriers and that he would comply with his obligations. Mr Smith remained working for Urban Carriers.

[19] Over the next few weeks the parties entered negotiations. Urban Carriers wished to retain Mr Smith as an employee. By 15 May the parties had agreed Mr Smith would remain an employee on reduced hours and salary while he established his business. Other steps were taken to allow, Urban Carriers says, Mr Smith to develop his business including allowing him to work from home and Urban Carriers referring house moving business to him. From this point Mr Smith was no longer involved with pricing.

[20] It is accepted Urban Carriers made it clear to Mr Smith he was not to compete with it while he remained employed and that Mr Smith repeatedly assured Urban Carriers he would not compete with it and would abide the restraint provisions of the employment agreement. On 10 July Mr Smith in a text exchange with Mr Blackburn said “Don’t worry I haven’t been doing any urban work.”

[21] On 19 July an employee of one of the key customers told Mr Blackburn Mr Smith had approached her and offered a lower price to do their carriage work. Mr Blackburn started investigating whether Mr Smith was doing work for his customers. He asked staff to keep an eye out. During August staff reported seeing Mr Smith doing work for three of the identified Urban Carrier customers.

[22] On 30 August Mr Smith agreed to stop working for Urban Carriers:

Mr Blackburn: Hi Sam, effective today I’m going to be taking over what u have been covering for us temporarily. I’ll have to sort out getting phone & laptop etc.

Mr Smith: No worries.

Mr Smith: Will you be doing my job? Just thinking if I have work to pass to urban do I just let u know?

[23] Later that day Mr Blackburn emailed Mr Smith:

You are clearly doing work for multiple Urban carriers customers and have built your business off the back of them!!

I am sending you this email as a full and final warning to cease doing any work for any past and or present Urban carrier Customers. Any further work done by you /SS Movers from the 1st September 2019 will be deemed to be serious breach of contract and appropriate legal action will be taken against you.

Furthermore as I have been advised, I can clearly demonstrate a loss of business due to your actions and again any further work done after the 1/09/19 will result in separate action taken against you for costs associated with my losses.

Sam I’ve tried being nice and we have had this discussion before yet you continue to take work off me, its at a point now where I will be throwing absolutely everything I can at stopping it. It’s not personal and its not my wish to see any business go under which the costs of lengthy court battles could do to 1 or both of us. However the choice is yours to make, I simply cannot and will not stand by and watch this continue.

Cease and desist letter

[24] On 30 August 2019 Urban Carriers wrote to Mr Smith as “full and final warning to cease doing any work for any past and or present Urban Carriers customers. Any further work done by you/SS Movers from the 1st September 2019 will be deemed to be a serious breach of contract and appropriate legal action will be taken against you.” The letter continues that Urban Carriers has clear evidence it has suffered a loss of business due to Mr Smith’s actions and records Urban Carriers had raised these concerns previously.

[25] By way of response Mr Smith requested a copy of his employment agreement. Urban Carriers replied it would seek advice and reply the following week.

[26] On 1 September Mr Smith wrote to Urban Carriers by way of reply to the cease and desist letter including:

- the restraint of trade clause is not binding because he never signed the employment agreement;
- he did not solicit any customers, they approached him because they were dissatisfied with Urban Carriers service and price;
- he would seek unpaid bonus of \$18,500.00 if Urban Carriers filed proceedings.

[27] On 9 October Urban Carriers’ solicitors wrote to Mr Smith:

- setting out relevant obligations of the employment agreement including clauses 1 and 4.2 which set out duties of employees, clause 9 confidentiality, clause 24 restraint of trade and clause 11 which dealt with obligations to return company property on termination;
- setting out implied obligations of confidentiality and loyalty and statutory duty of good faith;
- setting out factual basis of Mr Smith’s alleged breaches of the restraint of trade, duty of confidentiality, fidelity and loyalty, his use of confidential information and solicitation of customers obligations to launch a competing business;
- asserting a failure to return company property including company laptop, mobile phone, printer and company debit and credit cards;

- denying any bonus claim;
- seeking undertakings, attached and with a timeframe.

[28] On 15 October Mr Smith through his lawyer replied:

- Mr Smith denied all alleged breaches;
- the undertakings sought went beyond the obligations owed under the employment agreement and would not be provided;
- he was instructed to prepare a claim for unpaid bonus payments of approximately \$18,500.

[29] On 18 October Mr Smith's representative replied:

- denying the undertakings sought were too wide and that they reflect Mr Smith's contractual and common law obligations;
- confirming company property had now been returned but with confidential Urban Carrier data removed;
- the notion Mr Smith had won business legitimately through advertising was rejected and no evidence of advertising had been provided;
- despite this, use of commercially sensitive pricing information had been used to undercut Urban Carriers' pricing in breach of obligations;
- denying the bonus claim;
- Mr Smith failing to confirm he would comply with obligations owed to Urban Carrier including failing to confirm his retention and deletion of confidential information is evidence of an intention to commit ongoing breaches;
- proceedings would be filed; and
- agreement to attend urgent mediation was sought.

Mr Smith's position

[30] In his statement in reply dated 7 November 2019 Mr Smith raised a cross application for a bonus payment of \$15,000, interest on that sum and costs. He relies on the terms of the parties' employment agreement and his email to Urban Carriers dated 1 September 2019. Also, in the statement of reply he denies Urban Carriers' claim and describes it as "to be vexatious, being an attempt to manipulate the facts or

allegations based on falsehoods, in order to cause loss to his business in a work environment of healthy competition.”

[31] Mr Smith says in the statement of reply and his unsworn witness statement filed on 17 April 2020 Urban Carriers asked him only once to return his work mobile telephone and laptop and was told they would organise the pickup. He denies deleting all the data from those devices and only deleted personal information from the mobile telephone. He denies using company information to contact Urban Carriers’ customers, that he is friends with some of them on Facebook where they saw him advertising and contacted him through his private Facebook page.

[32] With regard to pricing he accepts this was part of his job at Urban Carriers but that this information was publicly available, he did not use this information to undercut anyone and his prices are what they are because he does not have Urban Carriers’ overheads.

[33] He says Urban Carriers knew he was going out on his own and called customers to tell them. Mr Smith shifted the start date for ending with Urban Carriers at its request by which time he had a new work telephone which he did not use during this period and at this time any customer calls were referred to Urban Carriers.

[34] He says he turned down Urban Carriers customers wishing to transfer to his business. When he first left Urban Carriers he undertook work performed by house movers and two other trucking companies. Urban Carriers’ customers called him because they saw his red truck on the road with contact details written on it or they saw his advertising on Facebook.

[35] Further in his unsworn witness statement Mr Smith includes he:

- operates SS Movers as a sole trader;
- has never spoken ill of Urban Carriers and does not believe his actions have resulted in significant losses for Urban Carriers;
- has not used Urban Carriers’ information to conduct his business;
- accepts he was aware of Urban Carriers’ prices but they are not useful in constructing pricing for a sole trader because he doesn’t employ

- anyone and so, does not have wage expenses, he operates one truck, he does not operate a website or 0800 number with the associated costs;
- is able to offer a competitive price because his overheads are lower;
 - has no intention to undercut Urban Carriers;
 - on 29 April he told Mr Blackburn he wanted to resign and start a transport business;
 - in accordance with the restraint of trade he agreed not to unfairly solicit any business from Urban clients;
 - agreed to stay on at Urban's request;
 - received a text message from Mr Blackburn on 30 August that he no longer needed him to work for him. An email later that day from Urban accused me of building my business off Urban. He asked for a copy of the employment agreement;
 - had good relationships with clients. Some had become friends;
 - he advertised on his personal Facebook page and set up a business page linked to his personal page. That is likely how they would have heard about my business not because he was actively advertising to them while employed by Urban; and
 - he returned all Urban Carrier property in early October to Riki Wilson. He has no other property Urban Carrier in his possession.

Information from the key customers

[36] Relevant information was provided to the Authority from key customers of Urban Carriers:

- Confirming they were customers of Urban Carriers and that Mr Smith was their contact, that it knew from May 2019 Mr Smith was leaving to start a freight business and from mid-May 2019 it used Mr Smith's carrier business. It had received no contact from Urban Carriers to secure its business.⁴
- During March/April 2019 Urban Carriers advised of a price increase of 10 – 20%. In May they started using Mr Smith's carrier business having

⁴ Letter 4 September 2019.

asked him to price a job. They continued to use Urban Carriers until 13 September when Urban Carriers said it would not do work further for them.⁵

- They had used a variety of carrier companies. They heard via Urban Carrier drivers Mr Smith was setting up his own company and moved their business to him because we liked dealing with Mr Smith and smaller company has more flexibility.⁶
- Confirming they approached Mr Smith and had always used other companies. Stopped using Urban after received a threatening email from them.⁷

[37] The information, though not given under oath, is consistent with invoices provided by these third parties for carrier work they contracted with Mr Smith to perform. It is also consistent with the evidence of Colin Flood of Upstyle Interiors Limited who gave evidence at the 3 August investigation meeting that he stopped using Urban Carriers services and started using SS Movers after he became dissatisfied with Urban Carriers' service due to the conduct of some drivers which was raised directly with Mr Smith while he was employed by Urban Carriers.

Discussion

Breaches of the employment agreement

[38] Urban Carriers says Mr Smith has breached express terms of the parties' employment agreement. In addition, Urban Carriers says Mr Smith has breached implied obligations of loyalty and fidelity and the statutory duty of good faith, which includes the obligation not to directly or indirectly do anything to, or is likely to mislead or deceive that other party to the employment relationship. The asserted terms, both express and implied, are accepted as binding and enforceable.

⁵ Letter 11 October 2019.

⁶ Letter 16 October 2019.

⁷ Letter 16 October 2019.

[39] Mr Smith said he did not contact any customers. He got on well with them and he was able to offer a better and more cost effective service because of his business set up.

[40] As the operations manager Mr Smith was the primary contact for customers and staff and through this role he developed relationships with key customers which it is accepted allowed him to acquire knowledge of customer pricing and delivery needs. Mr Smith did not deny forming relationships with key customer representatives or being aware of pricing and customer jobs. Urban Carriers says and it is accepted Mr Smith was responsible for booking and pricing jobs and dealing with customer complaints. Again, Mr Smith appears to accept these were key parts of his job. It is accepted this was confidential information belonging to Urban Carriers which Mr Smith was obliged to use only in the diligent execution of his duties.

[41] The information before the Authority establishes Mr Smith discussed his new business with Urban Carriers' customers, including key customers. Further, the evidence establishes Mr Smith's carrier business SS Movers undertook work for Urban Carrier customers from May 2019 until his employment ended on 30 August. Mr Smith did not tell Urban Carriers that SS Movers was doing jobs for these customers, Urban Carriers did not authorise the work and performing this work was contrary to the assurances Mr Smith had given Mr Blackburn that this would not occur. The invoices show Mr Smith has priced jobs for these competing jobs using pricing identical or near identical to that of Urban Carriers. It also likely on the evidence Mr Smith has relayed information about possible price increases by Urban Carriers to key customers which has sown dissatisfaction. In addition, Mr Smith has failed to deal with client complaints and did not tell Urban Carriers about these complaints. I am satisfied Mr Smith has breached express obligations owed to Urban Carriers under the terms of his employment agreement. He has competed with his employer during his employment using confidential information and has undermined customers' confidence in Urban Carriers.

[42] By his own admission he has discussed with Urban Carriers' key customers his intention to set up his own business and in so doing has, I find aroused their interest in

retaining his services during and after his employment with Urban Carriers.⁸ Even if he was not the initiator of these discussions he was bound, whilst employed by Urban Carriers to act in its best interests.⁹ Mr Smith's actions in undertaking work for Urban Carriers' customers whilst still in its employ breached implied duties owed under the employment agreement.

[43] In undertaking this work when he had told his employer he would not was misleading and deceptive and has breached the statutory duty of good faith.

Post-employment breaches?

(i) *Restraints of trade*

[44] Restraints of trade are prima facie unenforceable and invalid. Urban Carrier must establish the restraints are enforceable and reasonable at the time the agreement was entered into, in the interests of the parties and the public interest.¹⁰

Proprietary interest or trade secret to be protected?

[45] It is not sufficient that the former employee operates in competition. What must be established is some proprietary interest or trade secret to be protected.¹¹ Proprietary interests include trade connections and confidential information. Urban Carriers says Mr Smith was introduced to key customers and established close relationships with those customers. He obtained knowledge of sensitive information including sales practices and pricing and knowledge about Urban Carriers client base which it had built up over its years of operation.

[46] It is clear on the evidence before the Authority Mr Smith has used his knowledge of Urban Carriers' key customers and pricing to establish his business in Auckland. He gained this knowledge while he was employed by Urban Carriers.

[47] Urban Carriers provided evidence of the key customers and it is accepted Mr Smith had access to information about these customers in the course of his duties. It is

⁸ *Walden v Barrance* [1996] 2 ERNZ 598 at 617.

⁹ *Ibid* at 617.

¹⁰ *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97 [37] – [41].

¹¹ *Ibid* [20].

also accepted this information had been built up by Urban Carriers over a period of time and that it was confidential. It was reasonable for Urban Carriers to seek to restrain that information.

[48] Mr Smith had access to Urban Carriers' pricing system. It is accepted the pricing information not set out on Urban Carriers' website is confidential and it is accepted some customers may have had particular pricing negotiated to meet their needs. It is reasonable for Urban Carriers to seek to restrain the use of that information.

Is the period of restraint reasonable?

[49] The restraints are for a period of twelve months after employment ends.¹² Factors relevant to assessing the reasonableness of such a duration include adequate time to provide the employer an opportunity to meet the competition¹³ and how long it might take to train a replacement employee.¹⁴ There is insufficient evidence before the Authority to assess the reasonableness of the period of restraint. Directions will be made for further evidence to be filed and consideration will then be given to the reasonableness of duration and, if required, any modification.¹⁵

(ii) Return of property

[50] Mr Smith has failed to comply with the express obligation contained in the parties' employment agreement to immediately return Urban Carriers property in his possession on termination of his employment. His employment ended on 30 August and the property was not returned until after 9 October when Urban Carriers' wrote to him requiring its return. It is accepted that prior to 9 October Urban Carriers had made repeated requests to Mr Smith to return the property. Mr Smith has not provided any reason for the delay. It is accepted Urban Carriers has incurred costs in enforcing this term of the employment agreement.

¹² Clause 24 IEA.

¹³ *Stenhouse (Australia) Ltd v Phillips* [1974] AC391 at 402.

¹⁴ *Debtor Management (NZ) Ltd v Quail* [1993] 2 ERNZ 498 at 508.

¹⁵ Contract and Commercial Law Act 2017, s 83.

Is a bonus due and owing?

[51] Mr Smith did not file a statement of problem or evidence in support on this claim. The requisite threshold had not been met to establish either the terms of any bonus or that a bonus is owed. The bonus claim does not succeed.

Outcome

[52] Mr Smith has breached the terms of his employment both during and after his employment with Urban Carriers.

[53] Urban Carrier's damages consequent to Mr Smith's breaches to be determined later.

[54] Penalties against Mr Smith for breach of contract are to be determined later.

[55] Mr Smith's claim for unpaid bonus is unsuccessful.

[56] A case management conference will be convened shortly to timetable next steps.

Costs

[57] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority