

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 615
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 First and Second Respondents Michael McDonald, advocate for the Third and Fourth Respondents
Investigation Meeting:	21 and 22 July 2021 in person in Christchurch and 2 November 2021 by AVL
Submissions Received:	2 November 2021, orally and in writing, from both parties
Date of Determination:	22 November 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Tradies Ladies (2016) Limited (referred to as Tradies Ladies or the company) claims its former employees Michelle McKay and Dinelle Gerard each breached express terms of their

respective employment agreements and their express and implied duties of fidelity whilst employed by Tradies Ladies. The company claims Lisa Harland and Royale Couriers Limited (Royale Couriers) incited, instigated, aided or abetted Ms McKay and Ms Gerard's breaches of their employment agreements.

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

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

[4] This matter came to the Authority on an application for interim relief by Tradies Ladies. I issued a determination on 11 November 2019 making orders to restrain Ms McKay and Ms Gerard respectively from personally, or as an employee, consultant or agent for any other entity or employer, seeking to solicit or carry out any work of the same nature for any client or customer of Tradies Ladies with which they had any contact or dealings whilst employed by Tradies Ladies.

[5] The restraint was in place for the balance of the 12 month period since each of the employees left their employment with Tradies Ladies, pending the determination of the substantive proceedings. In the event, those restraints had expired by the time the substantive hearing of the matter occurred. They had been in effect for less than a year when the company's owner, Mr Michael Allred, sold the business in March 2020, thereby bringing the former employees' restraints to an end.

[6] Tradies Ladies seeks remedies including special damages for loss of profits and loss of executive time, and penalties.

Background

[7] Mr Allred had purchased a courier business trading as Tradies Ladies Limited in July 2016. The first respondent, Ms McKay, was a director and shareholder of that company. One of the terms of the sale and purchase agreement was that Ms McKay accepted a restraint of trade provision that curtailed her ability to set up and operate a competing business for a period of three years.

[8] Tradies Ladies employed Ms McKay on an individual employment agreement (IEA) from the time Mr Allred purchased the company on 1 July 2016. Her role was that of Courier Driver/Dispatcher. Ms McKay's IEA included provisions concerning confidential information; non-competition; non-solicitation of clients; and non-solicitation of employees. Ms McKay resigned from her employment on two weeks' notice on 7 July 2019 and her employment ended on 21 July 2019 at which time her three years' restraint of trade under the August 2016 sale and purchase agreement had expired.

[9] Ms Gerard was employed as a driver by Tradies Ladies from November 2017. Her IEA contained similar restraints to Ms McKay's. Ms Gerard resigned from Tradies Ladies on two weeks' notice on 21 July 2019 and her employment ended on 2 August 2019. Within days of leaving Tradies Ladies, Ms Gerard began working for Royale Couriers.

[10] Royale Couriers was registered with the New Zealand Companies Office on 25 July 2019. Ms McKay's sister, Ms Harland, is Royale Courier's sole director and shareholder. Mr Allred alleges Ms McKay and Ms Gerard made the decision to establish and operate Royale Couriers and Ms Harland has enabled them to use her name to do so.

Issues

[11] The issues for determination are:

- (a) Whether the restraints of trade provisions of Ms McKay and Ms Gerard's IEAs were reasonable and enforceable;
- (b) Whether Ms McKay and/or Ms Gerard breached the restraint provisions of their respective IEAs;
- (c) Whether Ms McKay and/or Ms Gerard breached their respective duties of fidelity;
- (d) If breaches occurred, whether and, if so, what harm was caused to Tradies Ladies and, if harm was caused,
- (e) Whether damages are due and, if so, in what amount.
- (f) Whether Ms Harland and/or Royale Couriers incited, instigated aided or abetted Ms McKay and/or Ms Gerard's breaches of their employment agreements and, if so,

- (g) Whether penalties should be imposed.
- (h) If successful, whether there is a case for payment of special damages, being for executive costs incurred by Mr Allred.

The relevant IEA provisions

[12] Ms McKay and Ms Gerard's IEAs included the following provisions:

5.2 Obligations of the Employee

The Employee shall:

...

(iii) Conduct their duties in the best interests of the Employer and the employment relationship

(iv) Deal with the Employer in good faith in all aspects of the employment relationship

...

vii Keep anything to do with the business and its customers confidential.

11.1 Confidential Information

The Employee shall not, whether during the currency of this agreement or after its termination for whatever reason, use, disclose or distribute to any person or entity, otherwise than as necessary for the proper performance of their duties and responsibilities under this agreement, or as required by law, any confidential information, messages, data or trade secrets acquired by the Employee in the course of performing their services under this agreement. This includes, but is not limited to information about the Employer's business.

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.

Were the restraints reasonable?

[13] In my determination of the application for injunctive relief, in which the evidence was by affidavit and therefore untested, I found Tradies Ladies had a proprietary interest to protect the business relationships/customer connections it had retained and developed over the years it had been trading.

[14] I considered the reasonableness of the restraints in the context of whether Tradies Ladies had an arguable case for relief. I concluded it did have an arguable case after weighing the company's proprietary interest in its customer relationships and the issue of the reasonableness of the restraints. I noted my view, however, that it was not a strongly arguable case. I found the scope of the restraint provisions to be arguably reasonable but I was not as confident over the 12 month term applicable to clauses 11.5 and 11.6.

[15] The non-competition clause had a six month time restriction, but the clauses relating to the non-solicitation of clients and employees were operative for 12 months. The matter is partly academic as Tradies Ladies was sold within the 12 month period of the restraints, which brought them to an end at that point. However, it is relevant to the damages claimed by Tradies Ladies. If I find damages are payable, time frame covered by the restraints will be a pertinent factor.

[16] In looking at the length of the restraints, one of the factors I considered was the type of work they covered. I found it difficult to view courier driving or dispatching to be work that warranted the 12 month non-solicitation restraints of clauses 11.5 and 11.6 of Ms McKay and Ms Gerard's IEAs or the six month restraint period contained in clause 11.4. I say that with no intention of devaluing the skills couriers have, or of the contribution they undoubtedly make to businesses and their customers.

[17] Mr Allred in evidence given at the investigation meeting into his application for interim relief had deposed it was necessary to enforce the 12 month restraints to allow Tradies Ladies to consolidate its relationships with clients before Ms McKay and Ms Gerard began competing with it.

[18] In my view a three month period of restraint would have been adequate to protect Tradies Ladies in all three of those IEA restraint provisions. I find a modification of the six month duration in clause 11.4 and of the 12 month duration in clauses 11.5 and 11.6 to three months to be appropriate and I order that modification under s.162 of the Act and s.83 of the Contract and Commercial Law Act 2017. The modified clauses take effect as of the commencement of Ms McKay and Ms Gerard's employment with Tradies Ladies.

[19] In any consideration of damages against Ms McKay, the restraint provisions will be considered to have expired on 21 October 2019 and Ms Gerard's will be considered to have expired on 2 November 2019.

Ms McKay

[20] I will consider each of the claims made against Ms McKay, starting with the claim that she breached her duty of fidelity in July 2019 by strongly encouraging a staff member to leave her employment with Tradies Ladies. Ms McKay denies the claim. As no evidence was produced to support the claim, I dismiss it.

[21] Ms McKay was next accused of breaching her post-termination obligations to Tradies Ladies by setting up a business in competition with Tradies Ladies. As noted earlier, Tradies Ladies asserts that Ms McKay is one of the two true owners of Royale Couriers, which it says she set up under the guise of ownership by her sister, Ms Harland.

[22] Mr Allred's legal representative wrote to Ms McKay on 9 Aug 2019 advising its understanding that she had recently "set up a competing business, Royale Couriers Limited under the guise of the ownership of your sister." The letter reminded Ms McKay of her obligations under her employment agreement. It was a cease and desist letter which notified Ms McKay of Tradies Ladies' concerns over her actions and its intention to commence injunction and compliance proceedings unless it received written undertakings from her.

[23] The letter provided Ms McKay four days to provide those written undertakings, which were that she would immediately cease the operation of Royale Couriers; cease soliciting Tradies Ladies' customers; cease the employment of any Tradies Ladies' employees, and abide by the obligations of confidentiality that survived the termination of her employment. If Ms McKay did not provide the undertakings legal proceedings would be commenced and costs and damages sought against her.

[24] No undertakings were provided at that time and Mr Allred commenced proceedings in the Authority. He claimed Tradies Ladies was suffering ongoing damage to its business as a result of Ms McKay's unlawful actions. It was suffering a loss of business and profit. By the time the application for interim relief was heard, both Ms McKay and Ms Gerard had offered through their advocate to provide undertakings but these did not go far enough to satisfy Tradies Ladies.

[25] Ms McKay denied the claim that she had set up a business in competition with her employer. In her original affidavit she said her sister, Ms Harland, had asked for her help in setting up a courier business. Ms McKay said she had given only general advice and information to her sister, but that essentially Ms Harland had undertaken this on her own. She further said that she had assisted with Royale Couriers on "the very rare occasion" and on an unpaid basis. In a supplementary affidavit, Ms McKay conceded that she helped out Ms Harland "from time to time" on an unpaid basis.

[26] During the Authority's investigation meeting in July 2021, Ms McKay acknowledged that she worked perhaps once a week for Royale Couriers but not necessarily every week. She said she was always mindful of her obligations to Tradies Ladies under her IEA and was careful not to do anything other than drop off parcels to customers.

[27] Ms McKay's evidence was inconsistent, however, as she acknowledged she sometimes covered for Ms Gerard and another Royale Couriers employee if they were unavailable for deliveries and she also sometimes undertook dispatching duties. She confirmed that Ms Harland did not undertake any deliveries or dispatch duties. Ms McKay was unsure whether she had contact with, or had picked up from or delivered to, customers of Tradies Ladies in undertaking these duties. When questioned about evidence of her having six telephone contacts in August 2019 with a business she knew to be a Tradies Ladies' customer, Ms McKay said she ordered that company's product, which was tyres, for herself, her mother and for her husband's business.

[28] Ms McKay also acknowledged that she had set up meetings with the bank and with an accountant for Ms Harland. It also emerged in the course of Ms McKay's evidence that she had registered Royale Couriers with the Companies Office, and paid for the registration from her joint account with her partner. She had also arranged a landline for the business and paid for it to be diverted to her mobile phone. Her mobile phone number was the sole number noted

as the Royale Couriers' phone number on the company's first invoice from Spark New Zealand, which was for August 2019. The second and subsequent Spark invoices had both Ms McKay and Ms Gerard's mobile phone numbers noted as the Royale Couriers' phone numbers.

[29] Ms McKay accepted the landline was diverted to her mobile phone from the outset of Royale Courier's commencing business but said she diverted it to someone else's phone.

[30] Ms McKay denied being involved in the operation of Royale Couriers on a daily basis and said she sometimes diverted the phone for three days at a time. She also denied having providing significant financial assistance to Royale Couriers and said it was her partner who had provided start-up assistance to Ms Harland, using their joint accounts.

[31] Under cross-examination Ms McKay acknowledged she had full signing rights to the Royale Couriers bank account but said that did not mean she exercised that control. She also acknowledged she had taken on the role of Dispatcher but said that happened after February 2020.

[32] When asked if she had a Royale Couriers eft-pos card from August 2019, Ms McKay said she could not remember but acknowledged she had used such a card. When directed to documents in the bundle of documents before the Authority, Ms McKay said she did not know which of three eft-pos cards for Royale Couriers was hers. When asked about a purchase of uniforms on an eft-pos card, she agreed the company that was named was a uniform supply company but said she could not recall who had bought what in August 2019. Ms McKay then acknowledged, when directed to her own bank statements, that she had paid for uniforms for Royale Couriers.

[33] Further acknowledgements were made under cross-examination regarding the selection and purchase of a van, although Ms McKay insisted it was her partner who did this and she simply accompanied him to a car yard to look at a vehicle. When asked if she had paid a deposit on the vehicle Ms McKay denied it. She said her partner may have made a deposit on a van at the time, although she had "no idea" if he did. Ms McKay had also arranged insurance, finance and registration for the vehicle.

[34] Ms McKay was evasive in many of her answers and I did not find her responses regarding her involvement in the establishment of Royale Couriers or her ongoing role in the business to be credible. Her evidence changed from, at the outset, providing only advice to her

sister as any family member would, to acknowledging that she had undertaken most if not all of the administrative tasks necessary to set up and register the courier company, including paying the Companies Office registration fees, paying for clothing and equipment for Royale Couriers employees and providing a guarantee to the bank that provided a loan to the new company.

[35] It was clear Ms McKay had undertaken all the administrative steps necessary for setting up Royale Couriers, and had paid the fees and charges for them. Ms McKay's attempt to attribute the financial assistance to Royale Couriers that was evident from her bank statements to her partner, who did not give evidence, was an unconvincing attempt to deflect from her own involvement.

[36] Ms Harland's evidence to the Authority was that Ms McKay had selected the van that she (Ms McKay) and her partner had paid the deposit on. She agreed Ms McKay had provided the start-up money for Royale Couriers; had paid for the windows of the van to be tinted; for Royale Couriers to be incorporated; and for purchasing uniforms for the company. She said she "believed" her sister had been reimbursed for the deposit for the van but did not state definitively that she had.

[37] Ms Harland told me she was employed part-time in the publishing industry working approximately 20 hours a week when, in or around March 2019, she began to think about setting up a business. She discussed it with her husband and they thought a courier business might be a good idea. Ms Harland acknowledged she had no personal experience with courier companies and that she had not provided any money of her own to set up Royale Couriers. She relied on the experience of her sister to help her.

[38] While she professed to be involved and interested in the company for which she was the sole director and shareholder, Ms Harland appeared to lack detailed knowledge of the company's operations or assets. She was unsure where Royale Couriers had obtained its clients from for its first day of operation on 5 August 2019, agreeing it was likely potential customers were contacted in the weeks leading up to that date but being uncertain who might have contacted them. Ms Harland denied that Ms McKay or Ms Gerard had done so.

[39] When asked about a statement in her affidavit to the Authority in October 2019,¹ that she was running the day to day operations of Royale Couriers and undertaking all the administration for the company, Ms Harland said she was involved in the company at that time but had a lot of help. When asked about her statement in the affidavit that she received any profits from the company's operation, Ms Harland said she did not know what the profits were, nor that there were no profits at that point.

[40] Ms Harland's evidence further convinced me that Ms McKay was a key person in the establishment and operation of Royale Couriers, during the period her obligations to Tradies Ladies remained in place following the termination of her employment with that company. While she was not a director or shareholder of Royale Couriers, I find Ms McKay was a driving force behind the establishment and operation of the company. That being so, I find she carried on business in competition with her former employer and breached clause 11.4 of her IEA. The breach took place over the period I have found the non-competition restraint to have been in place, which was from the date Royale Couriers commenced operating until 21 October 2019. As noted above, Royale Couriers commenced operating in the week starting 5 August 2019.

[41] I will address the question of remedies sought by Tradies Ladies for the breach shortly.

[42] Tradies Ladies claims Ms McKay also breached clause 11.5 of her IEA by soliciting its clients. Its statement of problem names five companies in particular as customers she solicited. Only one person from one of the named companies attended the Authority's investigation meeting.

[43] Mr Brett Kinley, a manager for Blair Tyres, appeared under summons from Mr Allred and gave evidence reluctantly. He said Blair Tyres had used Tradies Ladies for its courier work before Mr Allred bought the company in 2016. They were very happy with the service when Ms McKay and her business partner owned and operated the business. He said they continued to use Tradies Ladies after the change in ownership but was less satisfied with the service so changed to a different courier company.

[44] Mr Kinley said that courier company's service also deteriorated and Blair Tyres went back to using Tradies Ladies. He said a price list for Royale Couriers came across his desk at

¹ Ms Harland's affidavit of 2 October 2019 refers.

some stage and Blair Tyres began using that company for its some of its courier deliveries. For a while it split its business between two courier companies before deciding to give all its business to Royale Couriers. Mr Kinley could not recall when that occurred and did not know how the price list had come to be on his desk. He said he was not aware of dealing directly with Ms McKay but could have dealt with her over the phone without recognising her voice. He said he did not know who was doing the deliveries for Royale Couriers as he was mainly concerned with errors and complaints and there were none of those for a long time with that company. When referred to the invoice for Blair Tyres from Royale Couriers for August 2019, which was for 318 courier jobs, Mr Kinley agreed that number of jobs was probably correct.

[45] Overall, Mr Kinley's evidence was not very helpful to Tradies Ladies, as he attributed the decline in Blair Tyre's patronage of it to Mr Allred, with whom he clearly had difficulty.

[46] Witnesses Mr Allred had summonsed from two other former Tradies Ladies' customers failed to attend the Authority's investigation meeting.

[47] Ms McKay denied soliciting customers of Tradies Ladies and there is no direct evidence of her having done so. Spark records of incoming calls to Ms McKay and Ms Gerard's phones from 5 August 2019 indicate that Royale Couriers had customers from day one of its operations. While it is difficult not to suspect Ms McKay played a part in contacting Tradies Ladies' clients and promoting Royale Couriers' services as an alternative, I am unwilling to find she did so in the absence of any evidence of her having done so.

Ms Gerard

[48] The claims against Ms Gerard include that she breached her duty of fidelity in June and July 2019 when she, without authorisation from her employer, and without her employer's knowledge, told one of her employer's customers it would have to find a new courier provider as Tradies Ladies was too busy to do its work. Mr Allred asserts Tradies Ladies lost that customer as a result of Ms Gerard's actions.

[49] No evidence was provided to substantiate that claim and Ms Gerard denies ever having such a conversation with the client named by Mr Allred. It was her evidence that she noticed during her employment that the client was not using Tradies Ladies as much as it previously had. She says she raised this with Mr Allred and encouraged him to contact the client to ascertain why its use of Tradies Ladies had dropped.

[50] As there is no evidence to substantiate this claim I dismiss it.

[51] A further claim that Ms Gerard breached her duty of fidelity was that she had, in June and July 2019, treated an employee of Tradies Ladies badly, with the aim of persuading the employee to resign. The employee apparently left her employment on 9 July 2019. Tradies Ladies claims Ms Gerard undertook these activities in order to damage its business.

[52] Ms Gerard denies this claim as well and says the matter was not raised with her during her employment. She says the employee in question was known to have been seeking an opportunity outside the courier industry before she resigned.

[53] Mr Allred provided no evidence to substantiate this claim, which I accordingly dismiss.

[54] With respect to Ms Gerard's post-termination obligations, Tradies Ladies claims she breached clause 11.4 of her IEA in establishing, together with Ms McKay, Royale Couriers, a claim Ms Gerard denies.

[55] Tradies Ladies' legal representative sent Ms Gerard a similar letter to the one sent to Ms McKay on 9 August 2019. The letter referred to her having set up Royale Couriers in conjunction with Ms McKay. Ms Gerard was also asked to provide written undertakings that she would cease operating Royale Couriers, stop soliciting Tradies Ladies' customers, and abide by the surviving confidentiality obligations of her IEA.

[56] Ms Gerard did not provide the required undertakings within the specified timeframe. Both she and Ms McKay offered, through their advocate, to make certain undertakings after Tradies Ladies commenced proceedings. Mr Allred was not satisfied their undertakings provided the certainty he required and continued with his action against them.

[57] Tradies Ladies claims Ms Gerard caused it to lose business and profit by her unlawful actions and it seeks damages from her.

[58] Ms Gerard's evidence is that she resigned from Tradies Ladies to take up employment with Royale Couriers. She knew Ms Harland, and was aware that she intended to establish a courier company. Ms Gerard was keen to leave Tradies Ladies where she said the environment had become untenable and at times hostile.

[59] Ms Gerard said she was the primary bread winner for her family and had two young children. Her role at Royale Couriers was that of a courier driver/dispatcher and her evidence was that she did not have the skills or qualifications to be a business owner and neither did she have the means, having no money to put into a company and few assets.

[60] Ms Gerard referred to her employment agreement with Royale Couriers, an unsigned and undated copy of which was included in the bundle of documents provided to the Authority. The job description referred to in the employment agreement was not included in the bundle. The starting date for Ms Gerard's employment with Royale Couriers was stated in the employment agreement to be 2 September 2019 although Ms Gerard confirmed in oral evidence to the Authority that she started working for the company on 5 August 2019. The evidence from her bank statements was that wages from Royale Couriers were first paid into her account on 1 October 2019. Ms Gerard said she had lived off a loan she had taken out for the first few weeks of her employment "to help out a friend."

[61] Tradies Ladies submits Ms Gerard was a partner in the ownership of Royale Couriers as distinct from merely being an employee. Among the factors it cites in support of this, are her friendship with Ms McKay and the fact that she received no wages from 5 August to the beginning of October 2019, and did not ever seek to be compensated for this period when she was working full time for Royale Couriers.

[62] Tradies Ladies has also relied on a transcript of a meeting between Mr Allred, his sister, Shelley Page, and a person who had recently been through a relationship breakup with Ms Gerard. Mr Allred had recorded the meeting and provided both the recording and a typed transcript of it to the Authority. The person in question had been summonsed to appear and give evidence to the Authority but did not do so.

[63] In the absence of that person, I have decided not to take into account the transcript or recording, particularly in view of the circumstances of the person at the time the recording was made. Without the ability to question and cross-examine him, there was no opportunity to assess whether what he said was informed by knowledge or by hurt feelings and vindictiveness towards Ms Gerard for ending their relationship.

[64] I do not find Ms Gerard's friendship with Ms McKay to be an indicator that she was more than an employee of Royale Couriers. Nor is the issue of Ms Gerard's lack of wages for several weeks at the outset of her employment persuasive. Given the unhappiness she said she

had been experiencing in the latter stages of her employment with Tradies Ladies, I find Ms Gerard's explanation of being prepared to live off money borrowed from the bank until her new employer could pay her wages to be plausible.

[65] Further factors relied on by Tradies Ladies include its assertion that Ms Gerard purchased the van she used to carry out her courier duties for Royale Couriers and that she had a Royale Couriers eft-pos card that she used for personal expenses. The van in question is registered to a person who was employed by Royale Couriers. Ms Gerard denied owning it and I find there is insufficient evidence to find differently.

[66] With regards to the eft-pos card, Ms Gerard denies having one. Her evidence is that Royale Couriers has three eft-pos cards and her employer has permitted her to use one from time to time. I am not persuaded this indicates that Ms Gerard has any relationship other than one of employment with Royale Couriers.

[67] Overall I find little evidence to support the allegation that Ms Gerard was one of the true owners of Royale Couriers. I find it more likely than not she was an employee of that company. There is insufficient evidence to link her to the establishment and ongoing running of it. In that respect, her situation can be distinguished from that of Ms McKay who clearly was closely involved in the process of establishing Royale Couriers.

[68] I find Ms Gerard did not breach clause 11.4 of her IEA and I dismiss that claim.

[69] The evidence indicates, however, that Ms Gerard did breach the non-solicitation of clients provisions of clause 11.5 of her IEA. Ms Gerard's evidence was that it was not her job to source customers for Royale Couriers and she denied doing so. She acknowledged she had given a Royale Couriers' pricelist to two Tradies Ladies customers after they had requested it. Ms Gerard had also given another price list to a third company she professed not to know had been a customer of Tradies Ladies. Her evidence is that she did not give any further price lists to Tradies Ladies' customers after Ms Harland told her to stop doing so.

[70] I find Ms Gerard breached clause 11.5 of her IEA knowingly on two occasions and unwittingly on one other occasion. I will address return to the issue of remedies sought by Tradies Ladies shortly.

Ms Harland and Royale Couriers

[71] Tradies Ladies claims Ms Harland and Royale Couriers breached s 134 of the Act by inciting, instigating, aiding and abetting Ms McKay and Ms Gerard to breach their employment agreements. It goes further and submits Ms Harland conspired with Ms McKay and Ms Gerard to provide a front for their business to help them avoid their employment obligations. In Tradies Ladies' submission, Ms Harland was not the real owner and operator of Royale Couriers.

[72] Ms Harland's evidence was that she was unaware of Ms McKay or Ms Gerard's post-employment restraints when she started Royale Couriers. Neither had discussed those restraints with her. Ms Harland denied that she had set up the company for her sister and Ms Gerard when that was put to her in cross-examination.

[73] I have already found there was little evidence to support the proposition that Ms Gerard was in truth an owner of Royale Courier, and I have accepted her evidence of being an employee of that company. That is not the case with Ms McKay whom I have found to have been a driving force behind the establishment and operation of Royale Couriers.

[74] That does not necessarily entail Ms Harland's ownership of Royale Couriers being the sham or front that Tradies Ladies submits it is. I do not doubt Ms Harland has an interest and involvement with the company. Although she did not display a great depth of knowledge about aspects of it, I am not prepared to find she started Royale Couriers solely for the benefit of her sister. If, as she said in evidence, she wanted to start a business, then it was sensible to do so in an area of work where she could take advantage of the knowledge and experience of a family member.

[75] I reject the submission that regarding Royale Couriers being a front for Ms McKay and Ms Gerard.

[76] I also reject the claim that Ms Harland or Royale Couriers breached s 134 of the Act. In doing so I accept Ms Harland's evidence of being unaware of the post-employment restraints on Ms McKay and Ms Gerard. Inciting, instigating, aiding, or abetting a breach are all actions that imply knowledge of what is being breached. That knowledge is lacking in this instance.

[77] I dismiss the claims against Ms Harland and Royale Couriers.

Remedies

Special damages

[78] Mr Allred claimed that, after Royale Couriers started its operations, in September 2019 alone Tradies Ladies' revenue from 28 of its clients dropped by 30 percent and he was looking at making the roles of two employees redundant out of a total staff of 11 at that time. He said he would also need to look at further job losses if the company continued to sustain losses on that, thereby jeopardising the livelihoods of a number of the company's employees and the future of the company.

[79] In the event, the outcome was not as bad as Mr Allred speculated in 2019. In a brief of evidence filed in February 2020, Mr Allred noted that, following the non-solicitation orders made by the Authority on 11 November 2019, Tradies Ladies had managed to retain almost the same staffing and vehicle levels it had previously. He claimed however to have lost work from six significant customers, all of which he said had been solicited by Ms McKay and Ms Gerard.

[80] Mr Aaron Allred, an accountant and Mr Allred's cousin (Mr A Allred), gave evidence to the Authority of the losses incurred by Tradies Ladies, based on his analysis of sales and banking from May 2019 to January 2020. Mr A Allred took the monthly summary of sales to 36 customers over that period and estimated the annual drop in profit to be \$43,255. In submissions, Tradies Ladies seeks \$23,031 in special damages for the loss of profit it sustained from 1 August 2019 to the end of February 2020.

[81] I was not convinced by Mr A Allred's calculations which did not compare data on a year to year basis and did not consider whether there may have seasonal or other relevant factors in customers' use of couriers. Mr Michael Allred had stated in written evidence in February 2020² that "It appeared to me at the time that there was a downturn in the overall market from August to October 2019." That is not a factor Mr A Allred considered in his calculations.

[82] I have accepted that Ms McKay breached the non-competition restraint of her IEA with Tradies Ladies, as modified, from 5 August to 21 October 2019 but found insufficient evidence that she had solicited Tradies Ladies customers. I am not persuaded any dependable assessment

² As corrected orally in the Authority's investigation meeting on 21 July 2021.

of loss has been made. Had a penalty been sought I would have imposed a penalty of \$5,000 on Ms McKay for the breach of her IEA. As damages have been sought rather than a penalty, in the absence of reliable information as to loss, but accepting that losses were incurred by Ms McKay's actions in that time frame, I order her to pay \$5,000 in special damages to the Tradies Ladies.

[83] Ms Gerard acknowledged giving Royale Couriers pricelists to two businesses she knew to be customers of Tradies Ladies. In each case she said the customer requested the pricelist and in one of those cases the customer insisted when Ms Gerard demurred. I will not consider the customer Ms Gerard gave a pricelist to in the belief that it was not a Tradies Ladies customer.

[84] One of the customers she gave a pricelist to was NZ Coatings. It was Ms Gerard's evidence that client told her it was happy to stay with Tradies Ladies. The "monthly summary by clients" document prepared by Mr A Allred indicates that it did continue to use Tradies Ladies at the similar levels to those of June and July 2019 until their business dipped in December 2019 and January 2020. In the absence of data about that company's usage of Tradies Ladies in those months in previous years, I am unwilling to find any evidence of a loss being sustained by Tradies Ladies.

[85] The other customer Ms Gerard, unwillingly by her account, gave a pricelist to was identified as BM Parts. I was unable to find a match for that company on Mr A Allred's monthly summary document, although there was a "BMW & Mini Parts". I am unwilling to speculate whether that was the company referred to by Mr Allred in his evidence and decline to consider any losses in respect of it.

[86] I decline to award damages to Tradies Ladies in respect of Ms Gerard's breaches of her IEA as no loss of profit has been established in relation to those breaches.

Special damages- executive time

[87] Tradies Ladies submits Mr Allred should be awarded special damages for the time he spent in mitigating the losses the company incurred. Mr Allred kept a diary of the time, which he had typed and copied for the Authority and the parties. The July 2021 investigation meeting was reconvened in December 2021 to consider the matter.

[88] Mr Allred's claim is for \$5,205, based on \$30 for each hour he spent on this work. That time includes time spent talking and meeting with his lawyers and time spent talking with clients. In submissions for Tradies Ladies, legal expenses in the sum of \$13,382.50 are also sought in relation to the interim injunction hearing. A reference was made to a record of the time spent by Tradies Ladies' legal representatives which was supposedly attached to the submissions. It was not.

[89] Having considered the submissions on this matter I am not persuaded this is an appropriate case for the award of such damages. I regard the time spent talking with customers as part and parcel of what the director of a courier company would do in the normal course of events. The time Mr Allred spent with his legal representatives was not out of the ordinary where proceedings are concerned. The fact that those proceedings have had only limited success has also influenced my conclusion.

[90] I decline an award of special damages for executive time. I reserved costs in relation to the interim injunction proceedings until after the hearing of the substantive matter. They will be considered at that time.

Summary and orders

[91] The restraint clauses of Ms McKay and Ms Gerard's employment agreements with Tradies Ladies are modified with under s.162 of the Act and s.83 of the Contract and Commercial Law Act 2017. The terms of their respective agreements are modified as follows: clause 11.4 is modified from 6 months to 3 months; and clause 11.5 is modified from 12 months to 3 months.

[92] Ms McKay breached clause 11.4 of her employment agreement and is ordered to pay damages of \$5,000.00 to Tradies Ladies for the loss it incurred as a result of that breach.

[93] Ms McKay did not breach clause 11.5 of her employment agreement and nor did she breach her duty of fidelity to her employer in the manner Tradies Ladies asserted.

[94] Ms Gerard did not breach her duty of fidelity to Tradies Ladies. She breached clause 11.5 of her employment agreement but no loss of profit has been found from that breach.

[95] Ms Harland and/or Royale Couriers did not incite, instigate, aid or abet either Ms McKay or Ms Gerard to breach the surviving restraint provisions of their employment agreements.

Costs

[96] As noted above, I reserved the issue of costs related to the interim application for relief, pending the hearing of the substantive matter. I now also reserve costs in relation to the substantive matter.

[97] The parties are encouraged to resolve any issue of costs for both the interim and substantive matters between themselves. If they are not able to do so and an Authority determination is needed, the party seeking costs may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum the party served would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[98] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.³

Trish MacKinnon
Member of the Employment Relations Authority

³ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1