

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 32
5603378

**This determination is subject
to an order prohibiting
publication of some evidence.**

BETWEEN EROAD LIMITED
Applicant

A N D VERONICA VERRY
Respondent

Member of Authority: T G Tetitaha

Representatives: S Langton, Counsel for Applicant
D McKinnon, Counsel for Respondent

Investigation Meeting: 22 January 2016 at Auckland

Submissions Received: 21 January 2016 from Applicant
21 January 2016 from Respondent

Date of Determination: 28 January 2016

DETERMINATION OF THE AUTHORITY

- A. The application for interim injunction is dismissed.**
- B. Costs are reserved.**

Employment relationship problem

[1] EROAD Limited (EROAD) applies for an interim injunction against a former employer, Veronica Verry, preventing her from continuing employment with a competitor, Coretex Limited. It alleges Ms Verry is in breach of an enforceable restraint of trade by working for a competitor and may continue to breach the restraint by inadvertent disclosure of EROAD's confidential information whilst employed.

Non-Publication Order

[2] By consent the following non-publication order is made pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act):

[3] The following exhibits are not to be published to anyone other than parties and their Counsel for use in these proceedings:

- a) “MH-A”, “MH-B” and “MH-C” to the affidavit of Mark Lee Heine;
- b) “EN-B”, “EN-C” and “EN-D” to the affidavit of Erwin Ludwig Cornelis Neumayr; and
- c) “AW-A” to the affidavit of Antony Ross Warwood and “AWB”, “AW-C” and “AW-D” to his Reply affidavit.

[4] No one other than the parties and their representatives may have access to the above exhibits on the file. Any request to view the file shall be referred to a Member of the Authority to determine.

Facts leading to dispute

[5] EROAD is a specialist vehicle technology and compliance company. It produces secure electronic device recorders installed in heavy vehicle fleets. The recorders allow customers to track their vehicles, pay road user charges and monitor regulatory compliance.

[6] The parties signed an employment agreement on or about 17 July 2012. The employment agreement included restraints of trade covenants (the restraints). One of the restraints prevented the respondent from being employed or contracting with a “restricted business” operating or involved in the activities of a “restricted business” for a period of one year.¹

[7] A “restricted business” meant Automatic Vehicle Location and Telemetric Applications, Products and Services carried on by the company at the date of termination. This restraint applied to companies carrying on “restricted business”

¹ Schedule 3 clauses 2.1-2.2, Individual employment agreement

throughout New Zealand, Australia, USA and the countries affiliated with the European Union.²

[8] On 23 July 2012, Veronica Verry began her employment with EROAD as its installation coordinator. Her job description required her to co-ordinate the installation of EROAD technology into fleet vehicles. It is accepted Ms Verry's primarily serviced clients in New Zealand. She did no work for clients in EU countries. There is a dispute whether she worked with clients and/or projects in Australia and the USA.

[9] Due to health issues, Ms Verry was required to take unpaid sick leave from 17 August 2015. She verbally advised the respondent on 18 September 2015 she was resigning. She confirmed this again on 1 October 2015. At her request, her final pay was not paid until 14 December 2015. Sometime during this period EROAD replaced her with another employee.

[10] On 15 December Ms Verry returned to work to drop off a key. She advised the Human Resources Manager, Rebecca McKaskell she had been offered a position with Coretex Limited. Coretex Limited is a competitor of EROAD.

[11] Ms Verry started a new role as service delivery manager on 12 January 2016.

[12] EROAD filed an application for interim injunction, urgency and confidentiality on 15 January 2016. It seeks an interim injunction enforcing the restraints of trade covenants against Ms Verry until the substantive hearing of this matter by the Authority.

[13] This matter has been set down for a substantive two day hearing date on 8-9 March 2016.

Interim Injunctions

[14] The principles applicable to interim injunction applications are well established:³

a) Is there a serious question to be determined?

² See above n1.

³ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); *Port of Wellington Ltd v Longworth* [1995] 1 ERNZ 87 (CA) at 91; *Hally Labels Ltd v Powell* [2011] NZEmpC 43, (2011) 8 NZELR 532 at [21].

- b) Where does the balance of convenience lie between the parties until the substantive proceeding can be heard and decided? and
- c) The overall justice of the case?

Is there a serious question to be determined?

[15] Restraint of trade covenants are void, unless they are reasonably necessary to protect a proprietary interest of the former employer.⁴ The law does not extend to prohibiting competition alone.⁵

[16] The onus of establishing that a restrictive provision is reasonable is on the employer.⁶ Such a provision should be no wider than is required to protect the party in whose favour it is given.⁷

[17] The nature of the employee's role and the employer's business, the geographical scope of the restraint, and its nature and duration are relevant factors in assessing whether a restraint is reasonably necessary.⁸ The reasonableness of the restraint is to be determined at the time the agreement was entered into.⁹

[18] The issue in the context of an application for interim orders, is whether a seriously arguable question arises as to the likely enforceability of the covenants at issue in relation to Ms Verry.

Proprietary Interest

[19] EROAD submits it has "protectable interests" in the confidential information and trade connections below which the respondent was exposed to through her job:

- a) Information provided to the respondent as a member of EROAD's AFAM Group;
- b) Customer information and trade connections including customers' preferences (what they do and don't like and want); EROAD's commercial terms with them, including the term of their contracts; EROAD's information about them

⁴ *Transpacific Industries Group (NZ) Limited v Harris & Ors* [2013] ERNZ 267.

⁵ *Green v Transpacific Industries Group Limited* [2011] NZEmpC 6 at [27].

⁶ *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 (CA) at [28].

⁷ *Fletcher Aluminium Ltd v O'Sullivan* [2001] NZCA 92; [2001] 2 NZLR 731, [2001] ERNZ 46 (CA) at [28].

⁸ *Pottinger v Kelly Services (New Zealand) Limited* [2012] NZEmpC 101 at [18].

⁹ See above n6 at [20].

and their fleet; what issues the customer had with EROAD and EROAD had with it; what installer to pair the customer with and why;

- c) Installer information and trade connections including EROAD's knowledge of which installers are paired with which customers; the details of EROAD's relationships with those installers; EROAD's internal knowledge of each installer; EROAD's knowledge of the customer's preference for and knowledge of the installer;
- d) EROAD's systems and processes involving:
 - i. how EROAD goes about ensuring the recorder unit is installed in a customer's vehicle
 - ii. how it ensures the vehicle switches from its old distance recording device to EROAD's electronic one, and completes the registration process, so that the customer complies with its regulatory obligations of recording and paying its RUCs to NZTA.

Nature of role and the employer's business

[20] It is common ground that Coretex Limited is EROAD's main competitor. Ms Verry was not involved in developing or selling EROAD's technology or products.

[21] Ms Verry's role was primarily to liaise between the sales team, the customer and the installer to ensure the EROAD product was installed correctly and promptly. She was paid a salary of \$50,000 per annum. She did not manage any staff. She did not hold any senior role within EROAD. She held no tertiary qualifications. Her role was at a junior to intermediate level.

[22] Her role did not require her to contact client personnel whom made the decisions to purchase EROAD products. She worked with operational staff only such as vehicle fleet managers. She did have contact with installers but was not required to train or had any oversight of their work. She was not involved in the contractual negotiations with clients or installers. These were undertaken by others.

[23] Her manager, Edwin Neumayr, had the primary relationship with the installers. He had developed EROAD's installer accreditation programme. He

oversaw accreditation and presumably dealt with the contracting arrangements. Any installer relationship would have remained with Mr Neumayr when she left. EROAD also published the names of client's and accredited installers on its website.

[24] She accepted she had seen and read various AFAM emails. These may have contained confidential information in the form of client details about trialling product. She had access to a digital customer relationship management system called Salesforce. Salesforce held confidential information such as pricing, terms of installation, billing and discounting arrangements.

[25] Ms Verry disputes the information she was exposed to on a daily basis was truly confidential. There is some merit in this submission. Her role made it unlikely she would have had any reason to access any confidential information about pricing and terms of sale. The only information she would have accessed was that affecting the installation of the product.

[26] She also disputes the allegedly unique installation system insofar as she was involved with it. This is a matter for hearing.

Geographical

[27] The evidence supports Ms Verry having worked primarily within New Zealand. There is little to suggest she undertook any work elsewhere. At the very least the restraint shall be modified to delete any reference to EU countries.

Duration

[28] There is an issue about when the proposed restraint (if any) should start from. Ms Verry stopped working at EROAD on 17 August 2015 although she arranged to have her final pay paid in December 2015.

[29] There is no justification given for the period of the restraint peculiar to Ms Verry or her role. Cases with enforceable restraints of trade preventing employees working in competition or for competitors¹⁰ have involved employees in sales or with significant seniority. This is not the case here. Cases involving employees without sales or seniority have resulted in the Court indicating a reasonable restraint period

¹⁰ *Pottinger v Kelly Services (New Zealand) Limited* [2012] NZEmpC 101; *Warmington v O'Neill* [2012] NZEmpC 19 (14 February 2012); *Credit Consultants Debt Services NZ Limited v Wilson and anor WC 12B/07* [2007] NZEmpC 43 (1 May 2007);

would have been three months then declining to enforce the restraint having regard to the period of garden leave taken and time that had elapsed since then.¹¹

[30] It is likely having regard to Ms Verry's role, the nature of this business and her absence from work prior to termination, that if enforceable the duration of the restraints shall be reduced to a period of 3 months. It is also probable the Authority may decline to enforce the restraint given the period of time that has elapsed.

Where does the balance of convenience lie?

[31] The balance of convenience requires me to balance the potential injustice that will be caused to Ms Verry if the injunction is granted against the potential injustice to EROAD if the injunction is not granted. Factors that are relevant to an assessment of where the balance of convenience lies include the adequacy of damages for both parties, the relative strength of each party's case, and the conduct of the litigants. The position of the parties pending substantive determination of the claim is also relevant.¹²In this regard Ms Verry says that the ongoing restraint is impacting on her job security and income.

[32] There is no quantification of EROAD's damages. Ms Verry's damages are quantifiable being her salary up to and including the substantive hearing. Ms Verry shall be unable to meet any award of damages if she is prevented from working. EROAD is willing and able to meet damages and has given an undertaking to do so. It has also offered to pay her salary up to and including the substantive hearing.

[33] EROAD's case for a permanent injunction for a twelve month period is not strong. There is also the possibility any interim relief shall give EROAD greater protection than it is likely to receive at substantive hearing. The likely duration of three months lapsed on 17 November 2015. To award any further interim injunctive relief shall have the effect of possibly awarding a further period of time than is warranted in the circumstances.

[34] The balance of convenience favours Ms Verry.

¹¹ *Asiaciti Trust New Zealand Ltd v Harris* [2013] NZEmpC 238.

¹² Above n 9 at [76]-[77].

The overall interests of justice

[35] There is no evidence Ms Verry has taken or disclosed confidential information in breach of the restraints.

[36] Ms Verry and Coretex have given undertakings she will work with existing clients only and will not entice away or solicit their new clients until 21 August 2016. This undertaking is likely to be greater than the period for which the restraint is likely to be upheld.

[37] The overall justice weighs against granting the application. The application for interim injunction is dismissed.

[38] Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority