

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 150
5375907**

BETWEEN KELLY SERVICES (NEW
ZEALAND) LIMITED
Applicant

AND JANET POTTINGER
First Respondent
NINE DOT CONSULTING
LIMITED
Second Respondent
KIRI CAREW
Third Respondent

Member of Authority: Eleanor Robinson

Representatives: Tim McGinn, Counsel for Applicant
Richard Harrison, Counsel for Respondents

Investigation Meeting: 26 April 2012 at Auckland

Determination: 4 May 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In a Statement of Problem filed in the Authority on 28 March 2012 the Applicant, Kelly Services (New Zealand) Limited (“Kelly Services”) sought an interim injunction in addition to a number of other orders against Ms Janet Pottinger and Ms Kiri Carew, former employees.

[2] The application for an interim injunction was accompanied by an undertaking as to damages, and affidavits in support of the application by Ms Karen Wallace, Human Resources Manager of Kelly Services, and Mr Lance McKinnon, Managing Director of JJ Richards and Sons Limited (“JJ Richards”), an active client company of Kelly Services.

[3] Kelly Services additionally sought a penalty against Nine Dot Consulting Limited (“Nine Dot”) for aiding and abetting various alleged breaches of contract by Ms Pottinger and Ms Carew.

[4] This determination addresses the application for an interim injunction, and the substantive matters which include alleged breaches of the terms of employment agreements and penalty claims will be investigated by the Authority at a later date as yet to be scheduled.

Background Facts

[5] Kelly Services is a recruitment consultancy with offices throughout New Zealand, recruiting staff for clients in the areas of permanent and temporary employment.

[6] Ms Pottinger was employed at the Greater South Auckland (“GSA”) branch of Kelly Services as Manager. Ms Pottinger signed an employment agreement with Kelly Services prior to commencing employment on 22 February 2010.

[7] Ms Pottinger in her affidavit stated that she had a background in recruitment, specifically that prior to commencing employment with Kelly Services, she, together with her husband, Mr Colin McLeod, had operated Nine Dot, a recruitment consultancy; and that prior to Nine Dot, she had been employed for 9 years as Regional Manager for the UK recruitment consultancy, Manpower.

[8] Upon employment with Kelly Services, Ms Pottinger represented to it that whilst she would retain an interest in Nine Dot, she would not be actively participating in its business operation.

[9] On 11 March 2012 Ms Pottinger resigned her employment with Kelly Services.

[10] Ms Carew stated in her affidavit that her career had been in recruitment, and that she had commenced employment with Kelly Services in October 2010 as a Consultant and had been provided with an Individual Employment Agreement. In August 2011 Ms Carew was appointed to the role of Business Development Manager and signed a new employment agreement at this time. This employment agreement had been signed by Ms Carew, and by Ms Pottinger on behalf of Kelly Services, on 7 July 2011.

[11] On 14 March 2012 Ms Carew resigned from her employment with Kelly Services, informing it that she intended to work for Nine Dot, having been offered a position with Nine Dot by Mr McLeod.

[12] On 20 March 2012 Mr McKinnon, Managing Director of JJ Richards and Sons Limited, a client of Kelly Services, reported to Kelly Services his concern that he had received a telephone call from Mr McLeod who had advised him that Ms Carew was with him, and had asked if Nine Dot could manage JJ Richards and Sons Limited's recruitment requirements.

[13] Mr McKinnon also informed Kelly Services that in an email sent to him by Ms Carew on 21 March 2012, Ms Carew had written: "*I'd like to come out with Janet Pottinger to discuss our idea?*"

[14] Kelly Services alleges that Ms Pottinger and Ms Carew have flagrantly breached the client non-solicitation, employee non-solicitation and confidentiality provisions in their employment agreements through the vehicle of Nine Dot.

[15] Kelly Services further allege that further breaches of the non-solicitation and confidentiality provisions of the employment agreement by Ms Pottinger and Ms Carew have the potential to do immeasurable damage to its business.

[16] Orders sought by Kelly Services against Ms Pottinger and Ms Carew include:

- i An interim injunction preventing them until further order of the Authority or for a period of six months from the date of the termination of their employment, whichever is the sooner, from not personally or as a shareholder, director, partner, employee or in any other capacity, directly or indirectly:
 - Canvassing, soliciting, enticing or otherwise dealing with any employees, agents, officers or consultants of the employer, any of whom had been met as a result of Ms Pottinger's and Ms Carew's employment with Kelly Services, to end their employment or other relationship, or employ or engage them;
 - Canvassing or soliciting any of Kelly Service's customers with whom Ms Pottinger and Ms Carew had dealings in the twelve month period prior to terminating their employment;

- Accepting business or work from any customers of Kelly Services with whom they had dealings in the twelve month period prior to terminating their employment;
 - Procuring or assisting anyone else and in particular Nine Dot or Mr McLeod or any other employee of Nine Dot to breach any of the covenants contained within this paragraph.
- ii A compliance order requiring Ms Pottinger and Ms Carew to comply in all respects with the non-solicitation covenants in their employment agreements, either in their original form or as modified by the Authority;
 - iii A compliance order requiring Ms Pottinger and Ms Carew to comply with their contractual duty of confidentiality and refrain from sharing confidential information in the nature of Kelly Service's proprietary information concerning its clients with third parties and in particular with Nine Dot.
 - iv An enquiry into, and an award of damages for, losses alleged to have been suffered by Kelly Services as a result of the Respondents' breaches of confidence, fidelity and good faith and breaches of non-solicitation covenants;
 - v Penalties against Ms Pottinger and Ms Carew for the breaches of their employment agreements relating to confidentiality and fidelity and non-solicitation covenant and breaches of good faith;
 - vi A penalty against Nine Dot for aiding and abetting the various breaches of contract by Ms Pottinger and Ms Carew; and
 - vii That all penalties be applied in favour of Kelly Services in recognition of the breaches of personal contract covenants.

Interim injunctive application: investigation

[17] I granted Kelly Services' application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim injunction and because of the level of losses Kelly Services said it could incur due to the alleged breaches by Ms Pottinger and Ms Carew.

[18] A case management conference was held by telephone on 3 April 2012 when the Authority heard from counsel for the parties and made directions for the parties to attend mediation. The matter did not resolve at mediation and a further telephone case management conference was held on 18 April 2012 to schedule an investigation meeting date and the lodging of documents, including further affidavits from the applicant and affidavits in opposition by Ms Pottinger, Ms Carew and Mr McLeod.

[19] At the investigation meeting on 26 April 2012 I heard submissions from counsel in relation to the interim injunction application and tested these by questioning how the available evidence related to the relevant principles for determining an interim injunction application. Those principles fall to be addressed by the answers to the following questions:

- i Is there an arguable case that Kelly Services will succeed at the Authority's substantive investigation in establishing that Ms Pottinger and Mr Carew have breached and are continuing to breach the terms of employment agreements binding upon them and that the non-solicitation clause in those agreements is reasonable and enforceable against them;
- ii If not, where does the balance of convenience lie between the parties, this question to encompass the associated question of whether there an adequate alternative remedy available to Kelly Services, specifically an award of damages to be paid by Ms Pottinger and Ms Carew, such that an interim injunction is not necessary at this stage; and
- iii Thirdly, where does the overall justice of the case require that an interim injunction be granted?

[20] I have relied on the submissions of counsel and on the, as yet, untested evidence in the affidavits which have been lodged by the parties in answering these questions. Consequently the conclusions which have been drawn are tentative and not necessarily what will be decided at the substantive investigation after a full examination of all the evidence which will then be available has been undertaken.

[21] Apart from affidavits lodged by Ms Pottinger, Ms Carew and Mr McLeod, affidavits were also lodged by the following people:

- i Ms Jackie Randell, Business Service Manager of Kelly Services;

- ii Mr James Nutt, National Sales Manager of Kelly Services;
- iii Ms Karen Wallace, Human Resources Director of Kelly Services; and
- iv Mr Lance McKinnon, Managing Director of JJ Richards and Sons Limited, a client of Kelly Services who had been approached by the Respondents.

[22] Pursuant to s 162 of the Employment Relations Act 2000 (“the Act”), the Authority has power to grant an interim injunction regarding a restraint of trade or a non-solicitation clause, being an order that the High Court or the District Court may make under particular enactments and rules of law¹

Is there an arguable case?

Binding Terms of Employment

[23] Ms Pottinger had entered into employment with Kelly Services subject to an Individual Employment Agreement (“the employment agreement”). The employment agreement had been signed and dated 10 February 2010 by Ms Pottinger and Ms Randell.

[24] Ms Pottinger in her affidavit evidence states that at the time of signing the employment agreement there had been no discussion about a restraint of trade or non-solicitation of business provision, although she did acknowledge that there had been discussion about Nine Dot and the fact that she would not be actively participating in its business operation.

[25] Ms Randell stated in her untested affidavit evidence that she had emailed the employment agreement to Ms Pottinger on 26 January 2010, and that when Ms Pottinger had met with her to return the signed agreement on 10 February 2010, she had followed her normal practice of discussing each heading section of the employment agreement.

[26] I find that Ms Rendell’s untested affidavit evidence in this respect to be supported by the fact that each page of the employment agreement has been initialled by Ms Pottinger, including the page containing the non-solicitation clause.

¹ *Credit Consultants Debt Services NZ Ltd v Wilson (No 2)* [2007] ERNZ 205

[27] I further consider that given Ms Pottinger's experience in the recruitment industry she would have been familiar with the incorporation of such non-solicitation clauses into employment agreements.

[28] Ms Carew's employment agreement is virtually identical to Ms Pottinger's employment agreement apart from the inclusion of a clause relating to the non-applicability of a probationary period and a difference in annual leave entitlement.

[29] Ms Carew, a person experienced in the recruitment industry, had initialled each page, including that containing the non-solicitation clauses.

[30] The relevant clauses which are found at clauses 68 and 69 in Ms Pottinger's employment agreement and at clauses 70 and 71 in Ms Carew's employment agreement, and which are headed "*NON-SOLICITATION OF THE EMPLOYER'S BUSINESS*" states:

68. In consideration of Kelly Services (NZ) Limited entering into this Agreement of employment, you agree to enter into the restraints as specified below.

69. In the event of the termination of your employment by either party, you agree that you will, for a period of six (6) months from the date of termination, not personally or as a shareholder, director, partner, employee or in any other capacity, directly or indirectly:

- Canvass, solicit, entice or otherwise deal with any employees, agents, officers or consultants of the employer any of whom you have met as a result of your employment with the employer to end their employment or other relationship, or employ or engage them;*
- Canvass or solicit any of the employer's customers with whom you had dealings in the twelve (12) months prior to terminating your employment;*
- Accept business or work from any customers of the employer with whom you had dealings in the twelve (12) months prior to terminating your employment;*
- Procure or assist anyone else to breach any of the covenants contained within this paragraph.*

Consideration

[31] Ms Pottinger argued that there had been no additional consideration for the non-solicitation clause. Ms Carew argued that she had been given no additional consideration for the non-solicitation clause when her contract was varied.

[32] A principle relating to restrictive covenants referred to in *Gallagher Group Ltd v Walley*² is that consideration is necessary, but may be satisfied the mutual promises intrinsic in the offer and acceptance of employment.

[33] The Court of Appeal considered the issue of adequacy of consideration for a restraint in *Fuel Espresso Ltd v Hsieh*³. The Court observed⁴:

What we are dealing with here is the initial (and only) agreement of the parties. The traditional definition of consideration requires that there be something of value which must be given, and that consideration is either some detriment to the promiisee or some other benefit to the promisor. But the law does nor inquire into the adequacy of the consideration, nor, as the Judge seems to have thought, does it require an extra “premium” for a restraint of trade clause. It is also a very well settled principle of contract law that even mutual promises can be consideration for each other. As Treitel G.H, Law of Contracts (9th Ed), London, Sweet & Maxwell, 21995, al p 66 puts it:

“A person who makes a commercial promise expects to have to perform it ... correspondingly, one who receives such a promises expects it to be kept. These expectations can properly be called a detriment and a benefit and they satisfy the requirement of consideration in the case of mutual promises.”

[34] Consideration is necessary, but may be satisfied the mutual promises intrinsic in the offer and acceptance of employment as expressly stated in an employment agreement. In the employment agreements signed and initialled by Ms Pottinger and Ms Carew it states at clause 70 (Ms Pottinger’s employment agreement) and at clause 72 (Ms Carew’s employment agreement) that :

The employee acknowledges that these non-solicitation covenants are reasonable for the protection of the employer’s business. The employee also acknowledges that the employee has received reasonable consideration for these covenants by the salary and other benefits provided by the employer.

[35] I find that Kelly Services have an arguable case that Ms Pottinger and Ms Carew entered into an employment relationship with it knowing that the employment agreements contained the non-solicitation clauses.

² [1999] 1 ERNZ 490 (CA)

³ [2007] 60

⁴ Ibid at para 18

Was the restraint reasonable and enforceable?

[36] Ms Pottinger and Ms Carew will not have breached the terms of the non-solicitation clause if it is found to have been an unreasonable and consequently unenforceable term.

[37] The law in this area has been summarised by the Employment Court in *The Broadcasting Corporation of New Zealand v Nielsen*⁵:

Such a covenant is prima facie unlawful, but will be upheld to the extent that the employer is able to establish that it is reasonably necessary for the protection of the proprietary interest which the law recognises he has in what may be called his trade secrets and his trade connections: and provided further that the covenant is not unreasonable from the point of view of the employee and that it is not in conflict with appropriate considerations of public interest.

[38] I find that Kelly Services has established an arguable case that during the course of their employment Ms Pottinger and Ms Carew had access to client information in the form of the client base, client business needs, key contacts within clients and candidate databases which are essential to the development of client relationships and subsequent recruitment business, and which constituted its proprietary property.

[39] Kelly Services states that the duration of the non-solicitation period is linked to the 6 month period it takes for a replacement consultant to establish an equivalent relationship.

[40] Whilst neither Ms Pottinger or Ms Carew were working as consultants at the time of their resignations, I consider that Ms Pottinger in her position as Branch Manager for the Greater South Auckland area would have had significant client information, and I note that Ms Carew had worked as a consultant prior to her promotion to Business Development Manager, and maintained some existing client interactions even after her promotion.

[41] Ms Pottinger and Ms Carew argue that the business of Nine Dot is primarily concerned with permanent recruitment whilst that of Kelly Services is primarily concerned with temporary recruitment. Kelly Services disputes that the boundary between permanent and temporary recruitment is clear cut as there is frequently an overlap. Moreover Kelly Services argues that its business encompasses both forms of recruitment.

[42] I observe that there is no geographic restraint in the non-solicitation clause, other than as it relates only to those Kelly Services customers with whom Ms Pottinger and Ms Carew had dealings in the previous 12 months prior to the termination of their employment.

⁵ (1988) 2 NZELC 96,040

[43] I find that Kelly Services has an arguable case for the reasonableness and enforceability of the non-solicitation clauses for the period of six months.

Immediate Termination of Employment: a fundamental breach of agreement?

[44] Ms Pottinger and Ms Carew argue that the immediate termination of their employment by Kelly Services upon their resignations is a fundamental breach which affects the reasonableness of enforcing the non-solicitation clauses.

[45] I find that Kelly Services terminated Ms Pottinger's and Ms Carew's employment in reliance on clauses 54 and 55 and 55 and 56 respectively of their employment agreements which state:

54/55 When Employee has Given Notice and Next Employer will be a competitor: The employer has elected not to enter into a restraint of trade restricting the employee from working for a competitor when this agreement ends.

55/56 In the event that the employee gives notice that he or she is ending the agreement, and the employee will be working for a competitor, the employer may terminate the agreement immediately, without requiring the employee to serve out the period of notice and without making any payment in lieu of notice.

[46] I find that there was no restriction on Ms Pottinger and Ms Carew being able to earn a living during this period, or any detriment to them as a result of Kelly Services implementing this mutually agreed provision in the employment agreements, because they could, and did, enter immediately into their new employment with Nine Dot, a competitor, and there is no restraint on their entering into fair competition at that point.

Where does the balance of Convenience Lie?

[47] The balance of convenience considers the relative hardship resulting to each party from whether or not an interim injunction were to be imposed on Ms Pottinger or Ms Carew. I find it lies with Kelly Services.

Have the terms been breached with resulting losses to Kelly Services?

[48] The affidavit of Ms Randell establishes an arguable case that:

- i Ms Carew breached the non-solicitation clause of her employment agreement by approaching Mr McKinnon and JJ Richards and Sons Limited, Brinks, and Independent Liquor, all clients of Kelly Services;
- ii Ms Carew did so with the full knowledge and assistance of Nine Dot, of which Ms Pottinger is the sole director
- iii Ms Carew had visited Brinks the day after she and Ms Pottinger had been made aware of the claims filed in the Authority by the electronic serving of copies;
- iv The National Sales Manager of Brinks had advised Kelly Services that he would continue to do business with Ms Carew irrespective of any restraint of trade clause.

[49] Ms Randell's affidavit evidence is supported by that contained in the affidavits of Ms Wallace, Mr Nutt and Mr McKinnon of JJ Richards and Sons Limited.

[50] Kelly Services contends that it is unable to determine the amount of client contact made by the Respondents to its clients but that it may be considerable, and further that the response from Brinks indicates that some of its clients will not have scruples about entering into a business arrangement with persons subject to non-solicitation clauses.

[51] Kelly Services further argues that the extent of the relief sought is relatively narrow and will not prevent the respondents from carrying on business in fair competition.

[52] I find that this is the case given that the non-solicitation restriction is limited to Kelly Service's customers with whom Ms Pottinger and Ms Carew had dealings in the previous 12 month period.

Is there an alternative remedy available?

[53] There is no evidence that the respondents would be able to meet any award of damages Kelly Services might gain when its claim was fully investigated, quantified and determined. There has been no information provided by Ms Pottinger, Nine Dot or Ms Carew as to their assets, savings or income that suggested that an award would be an adequate alternative to an interim injunction.

[54] I conclude that an award of damages would not be an adequate alternative remedy to the issuing of an interim injunction.

Overall Justice of the case

[55] The overall justice consideration requires me to stand back from the detail and consider the case from a more global view. Having done so, I consider that the overall justice supports an interim injunction on those activities of Ms Pottinger and Ms Carew (either personally or through Nine Dot) that appear to breach their surviving obligations to Kelly Services.

[56] I consider that the contractual non-solicitation clause keeps the restriction to a minimum necessary to protect Kelly Services' legitimate proprietary rights while providing Ms Pottinger and Ms Carew with the opportunity to use their recruitment skills and experience to earn a living until the Authority can determine the substantive matters.

[57] In reaching this conclusion I have balanced the respective public interest considerations regarding Kelly Services' property rights and the parties' adherence to contractual terms freely entered into against the freedom of Ms Pottinger and Ms Carew to earn a living⁶.

Orders

[58] Accordingly the following orders are made on the conditions as set out below:

- i In reliance on the undertakings as to damages lodged by Kelly Services, Ms Pottinger and Ms Carew are enjoined from not personally or as a shareholder, director, partner, employee or in any other capacity, directly or indirectly:
 - Canvassing, soliciting, enticing or otherwise dealing with any employees, agents, officers or consultants of the employer, any of whom had been met as a result of Ms Pottinger's and Ms Carew's employment with Kelly Services, to end their employment or other relationship, or employ or engage them;

⁶ *Fuel Espresso Limited v Hsieh* [2007] ERNZ 60 at [21] (CA)

- Canvassing or soliciting any of Kelly Service’s customers with whom Ms Pottinger and Ms Carew had dealings in the twelve month period prior to terminating their employment;
 - Accepting business or work from any customers of Kelly Services with whom they had dealings in the twelve month period prior to terminating their employment;
 - Procuring or assisting anyone else and in particular Nine Dot or Mr McLeod or any other employee of Nine Dot to breach any of the covenants contained within this paragraph.
- ii The term of this order is from the date of this determination until 14 September 2012 (unless varied before that date by further order of the Authority or the Employment Court).

Note

[59] If Ms Pottinger or Ms Carew is approached by a potential customer who asks them to do work in breach of the terms of the interim injunction or their employment agreements, they will need to explain that they are legally bound for the moment not to accept or do such work.

[60] Such a potential customer should also be aware of a risk of legal action against them for a penalty under the Act if Ms Pottinger or Ms Carew did such work. Section 134 of the Act allows for a penalty for “*every person who incites, instigates, aids or abets any breach of an employment agreement*”. The present penalties are up to \$10,000.00 for a person and \$20,000.00 for a company.

Next Steps

[61] The Authority will shortly convene a case management conference to set timetable directions for the investigation of Kelly Services’ substantive claims.

Costs

[62] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

Eleanor Robinson
Member of the Employment Relations Authority