

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 15
5362355

BETWEEN	MANIOTOTO GROUP INC Applicant	YOUTH
A N D	KERIANNE BURROUGHS Respondent	LEE

Member of Authority: Helen Doyle

Representatives: Don Rhodes, Advocate for Applicant
Robert Thompson, Advocate for Respondent

Respondent application to 16 January 2012
strike out proceeding:

Submission in response: 18 January 2012

Telephone Conference: 18 January 2012

Date of Determination: 20 January 2012

DETERMINATION OF THE AUTHORITY ON PRELIMINARY ISSUE

Application to strike out

[1] In his memorandum dated 16 January 2012 Mr Thompson asks that the applicant's proceedings be struck out. He relies on the Authority power in clause 12A of schedule 2 of the Employment Relations Act 2000 to dismiss frivolous or vexatious proceedings:

(1) The Authority may, at any time in any proceedings before it, dismiss a matter or defence that the Authority considers to be frivolous or vexatious.

(2) In any such case, the order of the Authority may include an order for payment of costs and expenses against the party bringing the matter or defence.

[2] Mr Thompson confirmed during a telephone conference with the Authority and Mr Rhodes that as set out in the statement in reply he did not believe the Authority had jurisdiction to make the non-contact order sought.

[3] Mr Rhodes does not accept in his submissions that the application is either frivolous or vexatious and/or that it does not fall within the jurisdiction of the Authority. He submits that the applicant is asking for a term and condition of the employment agreement to be complied with after the relationship has ended.

[4] Both parties were happy for the Authority to determine this matter on the papers.

Nature of the problem before the Authority

[5] The applicant says in its amended statement of problem that the respondent breached clause 12 of her employment agreement and seeks compliance and an award of damages in the sum of \$5000.

[6] Clause 12 provides:

Non-Solicitation of Clients

*The Employee agrees that for a period of **6 months** following the termination of their employment for whatever reason, they will 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 has had any contact or dealings whilst employed by the Employer.*

Permission may be granted by the Employer for such an undertaking (see Clause 5.5).

[7] On Friday 21 October 2011 the respondent resigned in an email sent to committee members of the applicant. She expressed in her email that it was tendered *as per requirement of Employment contract.*

[8] The employment agreement required the employee to give two weeks notice in writing.

[9] On Saturday 22 October 2011 Mr Rhodes wrote to the respondent advising that he was instructed by the Committee of the Youth Group to accept her resignation,

without notice, effective Saturday 22 October 2011. He advised the following amongst other matters:

I am further instructed to remind you that under the terms of your employment agreement, at clause 12, you are not to contact any client or customer of the Employer for a period of 6 months from today, October 22nd 2011. That means the youth of the Maniototo. This provision therefore remains in place until April 22nd 2012. Be aware that if you breach this provision the Youth Group Committee have the right to take an action against you in the Employment Relations Authority for breach of contract. We are aware that you have already breached the previous instruction given that you were not to contact any of the youth, and are disappointed you have not realized that any communication under the circumstances may well have a detrimental effect on the very people you were employed to help.

[10] The documents support that there had been concerns regarding the respondent's contact with youth prior to her resignation and she had been asked to attend a disciplinary meeting to answer a number of matters but resigned before that meeting could take place.

[11] On 26 October 2011 after her employment had ended the respondent met with some youth outside a diary in Ranfurly; the applicant says this was prearranged. The respondent was photographed meeting with the Youth and this is described in the amended statement of problem as *the most blatant breach of the employment agreement provision to date*. There was also reference to face book entries particularly in regard to a tragic event involving a youth that both parties will be aware of and does not therefore need to be set out.

[12] The respondent accepts in the statement in reply being present at a gathering of individuals on 26 October 2011 but denies soliciting and denies persuading or inducing any individual to stop using the services of the applicant. It is not alleged that the respondent was at that time a Youth Worker or that she has since become one.

[13] In his submission Mr Rhodes submits that in the context of the Youth Group the solicitation (clause 12) does not relate to financial concerns and that the interpretation of the clause covers what occurred - *solicit support for a cause*. The nub of Mr Rhodes' submission is that clause 12, a clause surviving termination prohibits contact with the youth of Maniototo who are clients of the applicant. Mr Rhodes refers to case law that if the words on their face in an interpretation matter

are not clear then the law permits a wider examination of the context in which the contract was entered into, the nature of the business and the nature of the duties.

[14] When this application was initially lodged it was accompanied with a request for urgency. In the circumstances the Authority held a telephone conference promptly and received a statement in reply. The parties attended mediation but the matter did not resolve.

Determination

[15] Clause 12A was inserted on 1 April 2011 and the commentary to the clause in Brookers Employment Law provides amongst other matters:

According to the Employment Relations Amendment Bill (No 2) 2010 (196-1) (explanatory note) at 9, the clause “allows the Authority to dismiss cases with little or no merit without them needing to be fully investigated by the Authority, which will reduce costs and avoid stress for parties.

[16] The words frivolous and vexatious in the sense of proceedings can be misunderstood. I accept that on the face of the documentation before me the applicant’s motives in wanting to prevent contact between the respondent and the youth are due to genuine concern that such contact would be negative.

[17] Notwithstanding the motivation in bringing the proceeding the issue is whether there is a tenable employment relationship problem that clause 12 prevents the respondent after the end of her relationship with the applicant making any contact with Maniototo Youth, clients of the applicant or whether the application is a misconceived one and lacks reasonable grounds.

[17] There are provisions of the respondent’s employment agreement that survive termination. Clause 12 is one. The applicant wishes to enforce that clause and stop any contact between their clients and the respondent. It is agreed that there was such contact on 26 October 2011. It is that contact that the applicant says most fundamentally breached clause 12.

[18] Clause 12 is designed to prevent the employee seeking to solicit or carry out work for any client or customer. The relevant meanings of *solicit* as defined in the New Zealand Oxford Dictionary are as follows:

- *Ask repeatedly or earnestly for or seek or invite [business etc]*
- *Make a request or petition to (a person)*

The relevant meanings of *contact* also defined in the New Zealand Oxford Dictionary are as follows:

- *The state or condition of touching, meeting, or communicating.*
- *A person who is or may be communicated with for information, supplies, assistance etc*

[19] I do not find a tenable employment relationship problem or argument that clause 12 prevents the respondent making **any contact** with the Youth of Maniototo after her employment has ended. The clear words of clause 12 do not provide for non-contact with clients or customers after termination of employment but non-solicitation of clients or customers. I find therefore that the application is untenable and lacks reasonable grounds. It is a vexatious application.

Determination

[20] Under clause 12A of schedule 2 the claim by the applicant is dismissed.

Costs

[21] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority