

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 88
5462562

BETWEEN NELSON WEEKLY LIMITED
Applicant

A N D SINEAD OGILVIE
Respondent

Member of Authority: Helen Doyle
Representatives: Tony Stallard, Counsel for Applicant
Sinead Ogilvie, Respondent
Submissions Received: 10 and 12 June 2014 from Applicant
12 June 2014 from Respondent
Date of Determination: 18 June 2014

DETERMINATION OF THE AUTHORITY

A. The application for an interim injunction is dismissed.

Employment relationship problem

[1] Nelson Weekly Limited (Nelson Weekly) seeks an interim injunction to restrain Sinead Ogilvie from acting in a way inconsistent with the restraint of trade provisions in clauses 19.1 and 19.2 of her individual employment agreement signed in October 2013. Ms Ogilvie was employed by the *Nelson Weekly* as a reporter from 7 September 2012. She gave notice of her intention to resign from her employment on 27 January 2014 with her final day being 13 February 2014.

[2] The clauses which *Nelson Weekly* wish to enforce are as follows:

19.1 *Non-Competition*

The Employee agrees that for a period of 6 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, carry on business in competition with the Employer in the media business within a radius of 100 kilometers from the Employer's premises.

19.2 *Non-Solicitation of Clients*

The Employee agrees that for a period of 6 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.

[3] Ms Ogilvie in her statement in reply does not accept that the above provisions could be enforceable and says she was employed as a junior reporter on the minimum wage at the *Nelson Weekly*. Further she says that in her new employment with the *Nelson Mail* she is working in a completely different role to the one she had with *Nelson Weekly*.

[4] It was agreed on a telephone conference with the Authority on 29 May 2014 by Mr Stallard and Ms Ogilvie that the application would be given urgency and that it would be dealt with on the papers on the basis of affidavit evidence and submissions. An undertaking as to damages was provided.

[5] The parties attended mediation but the matter was not able to be resolved.

[6] In an affidavit in reply dated 10 June 2014 the Director of *Nelson Weekly*, Steven Page says that he has no desire to stop the respondent working as a reporter although that was not apparent from the earlier application or affidavit. Ms Ogilvie had therefore responded on the basis that she could be restrained from working.

[7] Mr Page said that there should be modification to the non-competition clause with the non-solicitation clause remaining in effect which would enable Ms Ogilvie to continue with her work. He asked that the Authority make an order in accordance with a proposal contained in a letter headed *without prejudice save as to costs*. Mr Page attached the letter on the basis that privilege was waived.

[8] The Authority advised Mr Stallard and Ms Ogilvie that for privilege to be waived all parties to the communication had to waive that privilege and there had been no waiver from Ms Ogilvie. The Authority advised it would not take into account the contents of the letter.

[9] Mr Page then provided a further affidavit dated 13 June 2014 with an unsigned copy of an individual employment agreement which he said was the first employment agreement Ms Ogilvie signed and the letter which had been provided as an attachment to his affidavit sworn on 10 June 2014 with a changed date of 13 June 2014 and removal of the words *without prejudice save as to costs*.

[10] Before the Authority could consider any issue of modification under the Illegal Contracts Act 1970 it would first need to determine whether it is arguable the covenants were reasonable as between the parties and in the public interest. The Authority can only in very limited circumstances under the Employment Relations Act 2000 (the Act) vary an individual employment agreement.

The Issues

[11] An interim injunction involves the exercise of a discretion. It is recognised that the answer to an interim injunction is not in the rigid application of a formula but there are two broad questions; whether there is a serious issue to be tried and where the balance of convenience lies. The final question requires the Authority to stand back and ascertain where the overall justice lies: *Klissers Farmhouse Bakeries Limited v. Harvest Bakeries Limited* [1985] 2 NZLR 129 (Court of Appeal).

[12] The issues that are required to be determined by the Authority are as follows:

- (i) Is there an arguable case?
- (ii) If so, is there an adequate alternative remedy available to *Nelson Weekly*?
- (iii) If not, where does the balance of convenience lie?
- (iv) What is the overall justice of the case?

Background facts against which the tests are to be applied

[13] The Authority is not required at this time to resolve any disputes of evidence. I will simply record when setting out the background facts from the affidavit evidence any areas of dispute.

[14] I'll start with the employment agreements. The second individual employment agreement entered into between the parties was annexed to the first affidavit of Steven Page dated 26 May 2014. It was agreed during a telephone conference with the Authority that Mr Stallard would provide a copy of the earlier employment agreement to Ms Ogilvie.

[15] Mr Page in his affidavit sworn on 13 June 2014 produced an unsigned individual employment agreement but stated that he does not have the signed agreement. The unsigned employment agreement attached to Mr Page's affidavit of 13 June 2014 contained the same restraint of trade provisions and there is an email from Ms Ogilvie dated 10 August 2012 to the editor at the Nelson Weekly stating that she would drop in the signed contract. That was before her start date on 7 September 2012.

[16] Mr Page in his first affidavit refers to the business the *Nelson Weekly* owns and operates. It publishes specific publications named as the *Nelson Weekly* and *Waimea Weekly*. The publications go to householders in both the Nelson and Richmond area. The publications are free and therefore dependent upon advertising for revenue.

[17] Mr Page states that the business model is based upon the need to obtain advertising and that the paper runs a number of advertorials where various employees go out to clients in the community seeking advertising, and writing up articles. Mr Page says that the particular work carried out by employees is sensitive and they have access to important clientele and data. He says it was very important that there were non-competition and non-solicitation covenants and had Ms Ogilvie not signed her employment agreement then she would not have got the job.

[18] There is a dispute from the affidavit evidence whether it was ever explained to Ms Ogilvie that there was a non-competition clause in her agreement to the effect that she would not for a period of 6 months after the termination of her employment be

able to be employed with an entity that carried on business in competition with the Nelson Weekly within a radius of 100 kilometres from the Nelson Weekly premises.

[19] Mr Page annexed a job description for the position which Ms Ogilvie undertook which is titled Advertorial Writer/Cadet Reporter. The purpose of Ms Ogilvie's job was expressed to be as follows:

To write advertising editorial and take photographs for clients with the purpose of promoting their business in the pages of Nelson Weekly and Waimea Weekly. To write and photograph news stories and features for Nelson Weekly and Waimea Weekly newspapers.

[20] Her key responsibilities included liaising with *Weekly* advertising representatives and their clients to organise times and locations of interviews and to arrange copy for their editorial and photos. Ms Ogilvie was also required to liaise with the editor of news stories and to complete tasks given to her by the editor.

[21] Ms Ogilvie provided two affidavits in opposition to the application for an interim injunction. The first was sworn on 6 June 2014 and the second on 12 June 2014. Ms Ogilvie states that she was not a sales person but a reporter and was paid the minimum wage which was at the time she started \$14.00 per hour. She said that she was not required to sell advertising, had no access to a client database at the Nelson Weekly and her interaction with clients was minimal. She usually tried to deal with any clients over the telephone or by email as it was time consuming and took her away from her work as a reporter writing news stories.

[22] Mr Page in his first affidavit said Ms Ogilvie did have access to the database of clients and said that she was paid \$14.50 per hour when she commenced. He said that Ms Ogilvie was very good at her job and had an excellent relationship with the clients of the business.

[23] Mr Page said amongst other matters in his first affidavit in paragraph 20 that the restraint was put into the employment agreement *to protect the relationship we have with our own customers for a limited period of time and so that the customers are not faced with a competitor coming in through the same person.*

[24] Ms Ogilvie gave notice of her intention to resign from the Nelson Weekly on 27 January 2014. Her last day at the Nelson Weekly was 13 February 2014. The parting was on good terms. Ms Ogilvie went to work for Haldeman LLC on 14 February 2014 which is a local publishing company. Mr Page said that whilst it

regarded Ms Ogilvie working for that business as a breach of her obligations no steps were taken.

[25] Ms Ogilvie commenced employment with the Nelson Mail on 8 May 2014. She was written to by the Nelson Weekly as was her employer about the restrictive covenants. Ms Ogilvie says that she is employed in a completely different role to that of reporter with the Nelson Mail being that of advertising features co-ordinator.

Arguable case

[26] There is a general principle that covenants of restraint of trade are prima facie unlawful and are unenforceable unless they can be justified as reasonably necessary to protect the proprietary interest of the employer and are in the public interest.

[27] The reasonableness of the restraint is to be assessed at the time the contract was entered into – *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 (CA). A restraint provision should be enforced only to the extent required to protect a proprietary interest of the employer, and relevant to this is the nature of the employee's position within the business, the business of the employer, the geographical scope of the restraint and its nature and duration.

Proprietary Interest

[28] The main proprietary interest relied on by *Nelson Weekly* is the relationship between Ms Ogilvie and its clients.

[29] Nelson Weekly have clients that are understandably very important to them. A company can have safeguards against unfair competition but not protection against every employee who has any dealings with its customers.

[30] It was recognised in *Broadcasting Corp. of New Zealand v. Nielsen* (1988) 2 NZERLC 96, 049 that the employer's interests in maintaining trade connections does not entitle protection against every employee who deals with customers but only against those who because of the nature of the employee are likely to have personal knowledge or influence over customers and hence where they place their custom to an extent that is within their power to entice them away.

[31] I do not find that when Ms Ogilvie was employed it was within the contemplation of Nelson Weekly or indeed Ms Ogilvie that her influence or power in

her role would be such over its clients that she could if employed by a competitor entice clients and their advertising business away from the Nelson Weekly. Even if Ms Ogilvie was considered very good at her role she was still employed in a junior role and paid the minimum wage. She did have some contact with clients of Nelson Weekly but she was not involved in sales for advertisements or otherwise. She was employed to write advertising editorial and to report on news. It is clear from the various documents provided that the Nelson Weekly employs, as well as reporters, advertising representatives and sales staff.

[32] I do not conclude there is an arguable case of any strength on the untested affidavit evidence that *Nelson Weekly* has a proprietary interest in terms of Ms Ogilvie's relationship with its clients. It is not strongly arguable that Ms Ogilvie had any significant access to client contact details and/or other confidential information that would give rise to a proprietary interest.

Geographical ambit and scope

[33] Both the non-competition and the non-solicitation clauses are for a period of six months and would effectively prevent Ms Ogilvie from being employed in the media business within a radius of 100 kilometres from the premises of the Nelson Weekly as a reporter and from carrying out work of the same nature for any client or customer of the employer with which she had had any contact for that same period.

[34] I do not find it strongly arguable that the restraint of trade covenants are reasonable in duration or scope or that they would be reasonable even if for a modified period such as three months.

[35] I find it strongly arguable that the restraint of trade provisions in Ms Ogilvie's employment agreement were designed to prevent competition rather than unfair competition. Public interest favours competition.

[36] Modification of the non-competition clause is suggested but I am not satisfied that it is arguable it could be modified in a satisfactory way which would have been reasonable at the time the parties entered into their employment agreement.

Balance of convenience

[37] The Authority is required in considering the balance of convenience to assess the relevant detriment or injury the parties will incur as a result of the interim injunction being granted or not.

[38] The affidavit evidence does not satisfy me of any real risk to Nelson Weekly if the injunction is not granted. Mr Page seems to accept that the role Ms Ogilvie is now undertaking is different to that at Nelson Weekly and there is nothing to suggest that Ms Ogilvie has inappropriately engaged with its clients. Nelson Weekly does have other protection by virtue of its confidentiality provision in clause 19.5 of its employment agreement with Ms Ogilvie.

[39] Ms Ogilvie has said in her affidavit that she is 24 years old and needs an income for rent and outgoings and the impact on her would be significant if she could not work. The alternative course proposed by Mr Page would require her agreement and it is apparent from her second affidavit that this is not forthcoming.

[40] In terms of adequacy of payment of damages, there would probably be difficulty in Ms Ogilvie meeting any award but there is no evidence that there has been any damage other than the breach relied on.

[41] I find the balance of convenience favours Ms Ogilvie.

Overall justice

[42] I now stand back and consider where the overall justice lies. I have not found an arguable case of any strength that Nelson Weekly has a proprietary interest that required the protection of non-competition and non-solicitation clauses. Modification as proposed is arguably not satisfactory against that. I have found that the balance of convenience favours Ms Ogilvie.

[43] I find that the overall justice of the case requires that the injunction not be granted.

Determination

[44] The application for an interim injunction is dismissed.

Costs

[44] I reserve the issue of costs but as Ms Ogilvie has not been represented it may well be that costs are not an issue.

Next Steps

[45] Mr Stallard is to advise the Authority whether the applicant wishes to proceed to a substantive investigation as soon as possible.

Helen Doyle
Member of the Employment Relations Authority