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Rangiora Couriers Limited v Brace (Christchurch) [2017] NZERA 1225; [2017] NZERA Christchurch 225 (21 December 2017)

Last Updated: 15 January 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 225
3023298

BETWEEN RANGIORA COURIERS LIMITED

Applicant

A N D BRONYA BRACE Respondent

Member of Authority: Helen Doyle

Representatives: Adam Gallagher and Cherry Mo, Counsel and Advocate for Applicant

Robert Thompson and Michael McDonald, Advocates for Respondent

Investigation Meeting: 20 December 2017 at Christchurch

Submissions Received: On the day from Applicant

On the day from Respondent

Date of Determination: 21 December 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A The Authority has made the following order:

Pending the determination of this proceeding or earlier order, or for a period of three months from 17 November 2017 being the date of termination Bronya Brace shall not, either personally, or as an employee, consultant or agent seek to solicit any client or customer of Rangiora Couriers Limited with which she had any contact or dealings with whilst employed by Rangiora Couriers Limited.

B Costs are reserved until after the substantive matter.

C. A telephone conference will be arranged in the New Year to progress the matter.

Employment relationship problem

[1] Rangiora Couriers Limited (Rangiora Couriers) was incorporated on 19 May

2017 and has its registered office in Christchurch. It carries on business as a courier by way of specific courier runs throughout Canterbury. Its main run is between Rangiora to Christchurch and back twice a day. It purchased its courier business on

11 August 2017 and agreed as part of commercial negotiations with the vendor that the vendor would terminate the employment of all staff it employed and pay out entitlements. Bronya Brace was one of those employees.

[2] On 22 July 2017 Rangiora Couriers, through its officials, met with the vendor's employees and provided individual offers of employment. Ms Brace signed her employment agreement with Rangiora Couriers on 14 August 2017 the day she commenced working for it as a courier driver. Ms Brace was employed to carry out a courier run from Rangiora to Christchurch via Kaiapoi and then Central Christchurch, Christchurch West and back to Kaiapoi and Rangiora.

[3] Ms Brace's employment with Rangiora Couriers ended on 17 November 2017 and she commenced employment she says in her affidavit on 27 November 2017 with a competitor iDeliver Freight Limited (iDeliver), working on a new courier run that Rangiora Couriers say is almost identical to the courier run operated by Rangiora Couriers. The identical nature of the run is not accepted by Ms Brace in her affidavit or in affidavits provided by the directors of iDeliver.

[4] Rangiora Couriers seek an interim injunction restraining Ms Brace from breaching clauses within her employment agreement which survive termination of her employment. Her employment agreement contains an express prohibition on the use or disclosure of confidential information, a non-competition restraint, a non-solicitation of clients and a non-dealing restraint all with a duration of 3 months.

[5] An order is further sought restraining Ms Brace from using Rangiora Couriers' confidential information. The order for delivery up of confidential information is no longer sought because of reassurances that Ms Brace has to her knowledge no confidential information in her possession. Alternatively the above orders are sought with modification to apply to work on the new iDeliver courier run Rangiora to Christchurch.

[6] The investigation meeting proceeded on the basis of the affidavit evidence and submissions. The Authority is in receipt of an affidavit from James Burnard who is a shareholder and director of Rangiora Couriers and is authorised to provide a sworn affidavit on its behalf and an affidavit from Ms Brace. Two affidavits have also been provided from Paul Love and Stephen Carr who are both directors of iDeliver.

[7] Mr Burnard has provided an undertaking as to damages and in his affidavit states that Rangiora Couriers is in a financial position to meet any award for damages.

[8] Given the proximity to the holiday period the parties have not attended mediation. There have however been discussions between the representatives about undertakings that may be appropriate however agreement has not been reached and the matter has therefore proceeded.

The clauses that survive termination of employment

[9] I will set out below the material clauses in the individual employment agreement (the employment agreement).

Clause 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 is 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.

Clause 11.6 Non-competition

The employee agrees that for a period of three 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 in the same nature of business

Clause 11.7 Non-solicitation of clients

The employee agrees that for a period of three 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.

[10] The employment agreement records that Ms Brace was advised of the right to seek independent advice in respect of the agreement and had reasonable time to do so.

[11] Clause 11.2 of the employment agreement is headed privacy obligations and has some relevance to confidential information as it set out a non-exhaustive list of what confidential information includes.

How Ms Brace's relationship with Rangiora Couriers ended?

[12] In setting out background I note that this interim stage of proceedings is not the time to resolve any dispute that may be apparent from the untested affidavit evidence. I shall however, where there is a material dispute, set out the different accounts.

[13] The employment agreement contained a trial period for a period of 90 days commencing from the first day of work on 14 August 2017. Mr Burnard in his affidavit states that Rangiora Couriers concluded it was employing one full-time staff member too many and it would make sense for Andrew Burnard, who is Mr Burnard's son and a director and shareholder, to take on the Rangiora to Christchurch courier run that Ms Brace had previously been undertaking. Mr Burnard in his affidavit states that he met with Ms Brace to inform her that her employment would not be confirmed beyond the 90 day trial period and the reasons for this.

[14] Formal written notice was provided to Ms Brace in a letter dated 9 November

2017 from Mr Burnard and his son Andrew under clause 13.1 which refers to termination of the trial period. The letter included reference to Andrew as an owner taking over Ms Brace's run and the reason why. Although the employment agreement provided for 1 weeks' notice for termination within the trial period, 5 weeks' notice was offered to Ms Brace in the letter with the option for her to leave earlier at any time if she secured another position and gave 1 weeks' notice. 5 weeks' notice took the last day to 15 December 2017. A reference was attached to the letter. Ms Brace continued working after this date.

[15] On 16 November 2017 Rangiora Couriers received a call from a client on Ms Brace's courier run with concerns about what she had said about her employment ending. Further a concern was expressed that she had attempted to encourage a diversion of that client's business from Rangiora Couriers to her potential new employer.

[16] An email from that client to Rangiora Couriers dated 1 December 2017 setting out the nature of the conversation is annexed to the affidavit of Mr Burnard. The email refers to Ms Brace advising that "her Employer at the time had sacked her because the company was doing very well and was losing customers." On reading that sentence it may have omitted the word "not" before the words "doing very well". The email then records the following was said by Ms Brace "She then said that she was going to be working for another courier company and could offer us a much cheaper service and would we be interested and could she pop back in a few weeks to discuss it further."

[17] Ms Brace was suspended on pay so the matter could be investigated and was asked by Mr Burnard to secure the work vehicle and not to use it until the investigation could be progressed.

[18] Ms Brace responded on 17 November by saying that the keys to the vehicle were in her letterbox and the vehicle and equipment could be collected from her house. The vehicle was duly collected by Rangiora Couriers and they proceeded to seek advice from their solicitors as to how to proceed.

What happened after the relationship ended on 17 November 2017

[19] An email dated 22 November 2017 was sent from Rangiora Couriers to Ms Brace advising that the feedback received from the client was potentially a breach and there was a reminder that her employment was subject to terms that survived the termination of employment. Ms Brace was asked to clarify the situation, including whether the employment relationship was still ongoing by no later than the end of the day, 23 November 2017. The email provided that if Ms Brace was not heard from she would be deemed to have terminated the employment relationship earlier than the expiry of the notice period agreed. There was no response to the email and Rangiora Couriers deemed that Ms Brace had terminated her employment earlier than the expiry of the notice period and her final pay was prepared.

[20] On 27 November 2017 Mr Burnard says in his affidavit that Rangiora Couriers became aware from several clients that Ms Brace was distributing marketing material advising that from 29 November 2017 she would be operating a new courier run for iDeliver Freight Limited (iDeliver). He says that run was almost identical to the one that she worked while employed by Rangiora Couriers, and that it would run 15 to 30 minutes ahead of the Rangiora to Christchurch run. A copy of the iDeliver Freight Limited flyer was attached to the affidavit of Mr Burnard stating that 29 November 2017 was the date that Ms Brace would start her run with iDriver.

[21] Mr Love in his affidavit states that he has not received any information from Ms Brace about Rangiora Couriers business or operations. He says that the new run is one that he and the other director Mr Carr had discussed at length and that it was part of the business plan well before Ms Brace was employed and that when Ms Brace commenced employment there was a marketing decision to drop flyers off accompanied by Ms Brace to clients' iDeliver had done runs for in the past. He said in his affidavit that he was not aware of Ms Brace bringing any customers since she had commenced employment and that one of the significant clients referred to by Mr Burnard in his affidavit was a contract he had secured because of his relationship with the client and that Ms Brace provided nothing to enable that contract to be secured.

[22] Mr Carr in his affidavit says that the two runs are not identical. He states that iDeliver has always serviced the

Christchurch and Rangiora area and that Rangiora is one of its main client bases.

[23] On 28 November 2017 Rangiora Couriers were advised by more clients that Ms Brace had called on them, advising of her new employer, and the competing courier run. Mr Burnard understood that she was seen driving an iDeliver courier van from 29 November 2017 onwards, and had been seen at the odd client of theirs during the previous few days.

[24] At that point Rangiora Couriers instructed their solicitors to communicate directly with Ms Brace that her actions, as reported, were in breach of the express terms of her employment agreement and requesting that she immediately cease and desist acting in breach of her obligations and provide undertakings in a form provided. Ms Brace did not provide the undertakings within the timeframe requested, however, did indicate she was seeking legal advice.

[25] When Rangiora Couriers became aware that Ms Brace had instructed Mr McDonald, it instructed its lawyer to write directly to him although was unsatisfied by the response.

[26] There has also been correspondence between Mr Gallagher, and iDeliver. iDeliver did provide some limited undertakings, however, Mr Burnard said in his affidavit that he was not satisfied that they dealt with the concerns with Ms Brace continuing to operate a competing run in light of her actions before and after her employment terminated with Rangiora Couriers.

[27] Ms Brace says in her affidavit that when employed by Rangiora Couriers she had no access to client or price lists or other commercial information. Most of the items she delivered were ticketed items or items on charge and she had no knowledge or information relating to pricing of the deliveries. She denies soliciting or breaching any term of her employment agreement and says that she has taken no steps or actions to encourage customers or clients to leave Rangiora Couriers and join iDeliver.

Principles applicable to grant of interim relief

[28] An interim injunction involves exercise of a discretion and although there is not a rigid application of a formula the Authority needs to consider two main questions. The first is whether there is an arguable case for substantive relief which will involve in this matter consideration as to whether the restrictive covenants are

enforceable. The second question is where the balance of convenience lies. Finally the Authority stands back to ascertain where the overall justice lies.

The issues

[29] The Authority needs to consider the following issues in this case:

1. Is there an arguable case for substantive relief?
 - Are the restrictive covenants in the employment agreement enforceable by Rangiora Couriers?
 - Are the obligations of confidentiality under the employment agreement enforceable by Rangiora Couriers?
 - If so is it arguable that there was a breach of the obligations in the employment agreement that continue after the termination of employment?
2. Would damages be an adequate remedy?
3. If not, where does the balance of convenience lie; and
4. What does the overall justice of the case require?

Is there an arguable case?

[30] The general principle is that restraints of trade against a former employee are unlawful and unenforceable unless they can be justified as reasonably necessary to protect the proprietary interests of the employer and in the public interest. The reasonableness of the restraint is to be assessed at the time the contract was entered

into – *Gallagher Group Limited v Walley*.¹

[31] A restraint provision should be enforced only to the extent required to protect a proprietary interest for 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

[32] The primary proprietary interest that Rangiora Couriers wishes to protect is the customer relationships/trade connections that Ms Brace has developed over a period of time undertaking the courier run including with her previous employer whose business it purchased.

[33] I accept that part of the value of the business that was purchased included the established relationships with clients. Mr Burnard states in his affidavit this was the reason for the inclusion of the confidentially, non-competition and non-solicitation clauses in the employment agreements. An employee's influence over customers or suppliers can be capable of being protected through a restraint of trade although this will depend on the circumstances.

[34] It was recognised in *Broadcasting Corporation Of New Zealand v Nielson*²

that:

The employer's interest in maintaining his trade connections does not entitle him to obtain protection against every employee who deals with his customers, but only against those who because of the nature of their employment are likely to have personal knowledge of or influence over the customers and hence where they place their custom to such an extent that it is within their power to entice them away.

[35] The clients are important to Rangiora Couriers. I find that it is reasonably arguable that over a period of time Ms Brace, because of her interactions directly and personally with clients on a regular basis, had a degree of influence over them and may have been able to influence them away from the company if she left. That would, I accept, affect Rangiora Couriers goodwill.

[36] I conclude there is an arguable case that Rangiora Couriers has a proprietary interest in terms of trade connections on the Rangiora courier run with respect to Ms Brace's relationships with its clients.

Reasonableness of the restraints

Non-competition in clause 11.6

¹ *Gallagher Group Limited v Walley* [1999] 1ERNZ 490 (CA)

² *Broadcasting Corp. of New Zealand v Nielson* (1988) 2 NZERLC 96,040

[37] There is a significant difficulty with this clause. It is clear on reading that it is incomplete so as to have no real meaning at all because it does not set out what Ms Brace is restrained from doing. Further there is no geographical area of restraint and this type of restrictive covenant has to be considered in circumstances where even though there was a longer notice period offered, Ms Brace's employment with Rangiora Couriers was to be terminated. A non-competition clause that prevents Ms Brace working in her field of courier driving for three months arguably goes beyond what is reasonably necessary to protect the proprietary interest. Mr Gallagher submits that Rangiora Couriers is not seeking to prohibit Ms Brace from carrying out her job at iDeliver because it only seeks orders that apply to the Rangiora to Christchurch run.

[38] I do not find however to an arguable standard that the restraint in clause 11.6 is reasonable or capable of modification by the Authority to make it reasonable at the time the employment agreement was entered into. I conclude that clause 11.6 is arguably unenforceable.

Non solicitation and non- dealing in clause 11.7

[39] Although this clause is headed non-solicitation it is clear on reading it that it additionally contains a non-dealing restraint. It seeks to prevent Ms Brace not only from seeking to solicit but also from carrying out work of the same nature for any client or customer of Rangiora Couriers with which she has had any contact or dealing.

[40] Mr McDonald submits that the non-dealing part of this clause is too broad and therefore unenforceable and not capable of modification. Mr Gallagher does not accept that and submits that the clause is reasonable and therefore enforceable.

Non-dealing restraint

[41] I find it is reasonably arguable the non-dealing restrictive covenant goes beyond what is necessary to protect the proprietary interest of client relationships. That is not something that modification could address. The nature of Ms Braces's role is such that it could arguably prevent her from being able to work. Ms Brace picks up and delivers items in a van on a run for customers. Her hourly rate at Rangiora Couriers of \$18.50 reflects that. If there was an existing relationship between iDeliver and a client where Ms Brace had not initiated contact but she had

had contact or dealing with that client whilst employed by Rangiora Couriers this could mean there may be some items she could not pick up or deliver. That could impact on the viability of her being able to continue to undertake a run for a new employer.

[42] Other cases where non-dealing restraints have been upheld involve employees with more specialised areas of expertise. It is arguably easier and therefore more reasonable to identify and ring fence work in these circumstances without impacting on the ability to undertake work at all. For example *Cooney v Welsh*³ involved a solicitor and *Enterprise Staff Consultants NZ*

*Limited v Durno*⁴ a personnel consultant specialising in recruitment of chartered accountants.

Non solicitation

[43] I find that the non-solicitation restraint and its duration of three months is arguably reasonable.

[44] There may be modification of an unreasonable restraint of trade under [s 83](#) of the [Contract and Commercial Law Act 2017](#). I accept that [s 164](#) of the [Employment Relations Act 2000](#) is applicable and that the Authority may only make an order varying an individual employment agreement once the steps set out in [s 164](#) have been undertaken.

[45] Mr McDonald suggested in his submission that the Authority could not at this interim stage make any order because that would be in effect modifying clause 11.7 which also contains that non-dealing restraint. Clause 11.7 because of the way it is drafted contains two restrictive covenants that can and should arguably be considered separately as different considerations apply to them.

[46] In conclusion therefore I find that Rangiora Couriers has established to an arguable standard that the non-solicitation restraint could be enforceable but has not established to an arguable standard that the non-competition restraint of trade is enforceable. To the extent that it could be argued the non-dealing restraint of trade is

enforceable that argument is not a strong one for reasons set out above.

³ *Cooney v Welsh* [\[1993\] NZCA 374](#); [\[1993\] 1 ERNZ 407 \(CA\)](#)

⁴ *Enterprise Staff Consultants NZ Limited v Durno* [\[1998\] NZEmpC 187](#); [\[1998\] 3 ERNZ 547 \(EC\)](#)

Are the obligations of confidentiality enforceable by Rangiora Couriers?

[47] There was no suggestion that the obligations of confidentiality are not enforceable. Mr Thompson advised that Ms Brace has signed a written undertaking that has been provided to Mr Gallagher as follows:

That I have, and shall continue to, abide by clause 11.1, 11.2 and 13.9 of my individual employment agreement with you insofar that I do not hold any confidential information belonging to Rangiora Couriers Limited, and should I discover that I do hold confidential information I will not use, disclose or distribute such information other than required by laws.

Is it arguable that there was a breach?

[48] I do not find on the untested affidavit evidence a strong arguable case that there was any breach of the obligations of confidentiality. It is strongly arguable, as Mr Thompson submits, that the detail of the Rangiora – Christchurch run that Rangiora Couriers operates is not confidential information. It is not strongly arguable on the untested affidavit evidence that Ms Brace had access to confidential information about contracts with customers, marketing or pricing. If there is information that iDeliver has, arguably it may not have come from Ms Brace. Mr Carr sets out in his affidavit that he was given the first opportunity to buy the business Rangiora Couriers now operates and to undertake due diligence full disclosure of financials and other information was provided.

[49] I turn now to the restrictive covenants. I have found that the non-competition restraint is arguably not capable of enforcement.

[50] I accept that several matters gave rise to concern for Rangiora Couriers that Ms Brace was soliciting their clients. These concerns started during the notice period when there was a concern that there was a breach of the obligations of fidelity when a client advised of a discussion with Ms Brace. There was a concern that there was no communication from Ms Brace in response to the concerns raised about that and her suspension other than to provide the means to pick up the van.

[51] There was then the attendance of Ms Brace with customers when a flyer was provided about the new iDeliver route that referred to her as the driver. It could be arguable that this amounts to solicitation. The untested affidavit evidence supports that two clients have left Rangiora Couriers and are now using iDeliver. One is a major client. There is a text message from that major client to the effect that it is now using iDeliver but not strongly arguable and somewhat speculative whether that was due to solicitation or an existing relationship with iDeliver. It is arguable because of what the other client said in an email attached to the affidavit of Mr Carr that he had an existing relationship with iDeliver directors that pre-dated Ms Brace commencing her employment.

Balance of convenience

[52] The Authority is required, in terms of this test, to assess the relevant detriment or injury that the parties will incur as a result of the interim injunction being granted or not.

[53] The findings about an arguable case will impact on the assessment of the balance of convenience. That is because Ms Brace will not be prevented because clause 11.6 is arguably unenforceable from working as a courier driver.

[54] I conclude in respect of the confidential information that because of her signed undertaking weighed with the findings about an arguable case and absence of evidence of a breach the balance of convenience favours Ms Brace. Mr Thompson should ensure the Authority is provided with a copy of that signed undertaking immediately on receipt of this determination.

[55] I recognise there is in assessing whether damages could be an adequate remedy the potential difficulty if a breach is ultimately established of assessing damages.

[56] I conclude in respect of the non-dealing restraint that the balance of convenience favours Ms Brace. I have found that it is not strongly arguable that the non-dealing clause is enforceable. Ms Brace says in her affidavit that she is a single parent of three children one of whom still lives at home. She supports that child as well as her father who has cancer and lives with her. She says that she has no other way to earn a living other than being a courier driver and she would not be able to pay her rent.

[57] I conclude in respect of the non-solicitation restraint that the balance of convenience favours Rangiora Couriers.

[58] The justice of the case favours a limited interim injunction to protect Rangiora Couriers from solicitation of its clients. An undertaking by Ms Brace was signed about non solicitation however the order I intend to make is not in the same form.

[59] I therefore make the following order taking into account in doing so James

Burnard's undertaking as to damages:

Pending the determination of this proceeding or earlier order, or for a period of three months from 17 November 2017 being the date of termination Bronya Brace shall not, either personally, or as an employee, consultant or agent seek to solicit any client or customer of Rangiora Couriers Limited with which she had any contact or dealings with whilst employed by Rangiora Couriers Limited.

Costs

[60] I reserve the issue of costs and these will be dealt with after the substantive matter has been determined.

Further steps

[61] An authority officer will arrange a telephone conference early in the New Year with Mr Thompson and Mr Gallagher.

Helen Doyle

Member of the Employment Relations Authority