



New Zealand Employment Relations Authority Decisions

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Crimson Consulting Limited v Berry (Auckland) [2017] NZERA 83; [2017] NZERA Auckland 83 (24 March 2017)

Last Updated: 29 March 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 83
5646122

BETWEEN CRIMSON CONSULTING LIMITED and UNITUTOR LIMITED

Applicants

A N D SAMANTHA BERRY First Respondent

A N D TALENT WIRE LIMITED Second Respondent

Member of Authority: T G Tetitaha

Representatives: R J Bryant, Counsel for the Applicants

B O'Callaghan/D J Yan, Counsel for Respondent

R Milne, for 2nd Respondent

Investigation Meeting: 8 February, and 17 March 2017

Submissions Received: 17 March 2017 from Applicant

17 March 2017 from Respondent

Date of Determination: 24 March 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The joint applicants, Crimson Consulting Limited and Unitutor Limited, have made several interim applications as follows:

(a) Application for non-publication of party names, witnesses, the parties'

employees and certain confidential information; (b) Closure of the investigation meeting;

(c) Redaction/removal of certain evidence from affidavits sworn by the first named respondent, Samantha Berry; and

(d) Interim injunction against Ms Berry preventing her from continuing in her employment with the second named respondent, Talent Wire Limited (TWL).

Non-publication order

[2] By consent I make an order for non-publication of the attachment BT8 to the affidavit of Benjamin Luke Thomas sworn 20 October 2016. The remainder of the non-publication application is disputed by the respondents.

[3] The starting point in determining whether an order for non-publication should be made is the principle of open justice with a broad discretion to do justice on a case-by-case basis.¹ Non-publication of names and other identifying particulars employment cases will be “exceptional”. Such orders are and will be made in a very small minority of cases. An applicant must make out to a high standard that there are exceptional circumstances warranting a non-publication order.²

[4] Open justice considerations are always extremely important and the reality is that those who litigate necessarily put themselves and their affairs in the public domain.³

[5] Commercially sensitive information that may be used by a competitor if published is the most common example of non-publication orders in this jurisdiction. Others have included information about the security arrangements of prisons which might endanger prison staff; the identities of persons who have been subjected to criticism in evidence but have had no opportunity to challenge or refute that criticism; and the identities of hospital patients whose care and treatment are the subject of

proceedings involving professional health staff.⁴

[6] With the exception of the above order in paragraph [2], the evidence here does not fall within any of the usual boundaries for granting of a non-publication order. All of the employees names sought to be suppressed are appearing before me as witnesses. There is nothing in the nature of the applicants work or the student

tutoring industry that requires that detail to be suppressed. There may be business

¹ *H v A Ltd* [2014] NZEmpC 92 at [76].

² *H v A Ltd* at [78].

³ *H v A Ltd* at [69] citing with approval *White v Auckland District Health Board*[2007] NZCA

227[2007] NZCA 227; , [2007] ERNZ 441 at [16].

⁴ *H v A Ltd* at [80].

information of the applicants where non-publication is required, but these need to be properly identified.

[7] I also have some doubt this application would meet the threshold for a non- publication order at all. If published, there is little or no evidence a competitor could or would use the information at all. The deed of agreement between the parties alleging confidentiality over all details of Ms Berry’s employment does not of itself create a binding obligation upon the Authority to grant a non-publication order. It must meet the legal tests for a non-publication order to issue.

[8] I also note these parties are currently before the High Court. I am advised no non-publication orders have been sought or issued. Given that the same witnesses and evidence shall be publically aired in that forum, I see no utility in issuing a non-publication in this forum.

[9] As noted to the parties I am directing that the Authority file is not inspected by any person without the leave of a Member after the parties have had an opportunity to be heard on such an application. This should serve the interests of justice in ensuring that confidential information (if any) on file is dealt with appropriately.

[10] The non-publication order application is declined. Costs are reserved. [11] The previous non-publication order is set aside.⁵

Closure of meeting

[12] There is no evidential basis given for the closure of the meeting other than the possible making of the above non-publication order that has been declined. Therefore the application for closure of the investigation meeting is also declined. Costs are reserved.

Redaction/removal of evidence

[13] By consent I make an order for the redaction of part of paragraph 90 of Ms Berry’s affidavit sworn 15 December 2015. The redaction is to be from “*Apart from above ... to act*”. The remainder of the application for redaction/removal is in dispute.

⁵ Member’s Minute of 09/02/17

[14] There is no specific power to redact or remove evidence on the basis it is vexatious or irrelevant as sought by the applicants. However the Authority may, in investigating any matter, follow whatever procedure it considers appropriate .⁶ This includes determining the admissibility of evidence. The touchstone for admissibility of evidence is relevance.

[15] The evidence sought to be removed is relevant because it relates to matters at issue between the parties. Some of the evidence provides more context than being directly on point. For example the history of how Ms Berry created her business then came to sell to the applicants gives valuable context. Her motives and feelings about the later employment relationship are relevant because she is criticised by the applicants in terms of her dealings with them. Her credibility shall be at issue. To remove evidence from her affidavit at this stage before hearing and cross-examination is premature. It may also lead to an error in law or fact.

[16] The application for redaction/removal of evidence is declined. Costs are reserved.

Application for injunction

[17] This is the principle matter at issue between the parties. The injunction seeks to prevent Ms Berry from continuing to work for TWL for the remaining period of the restraint of 12 months. It is alleged she has contacted lecturers and students to promote the second respondent's business. Ms Berry denies doing so.

[18] The relevant legal principles are well established.⁷ The Authority must be satisfied:

(a) Whether there is there a serious question to be determined?

(b) Where does the balance of convenience lie between the parties until the substantive proceeding can be heard and decided?

(c) The overall justice of the case?

⁶ Section 160(1)(a) and (f) of the Act.

⁷ *Klissers Farmhouse Bakery Ltd v Harvest Bakeries* [1985] 2NZLR 129(CA); *Port of*

Wellington v Longworth [1995] 1ERNZ 87(CA) at 91; *Helly Labels Ltd v Powell* [2011] NZEmpC 43, (2011) 8 NZELR 532 at [21]

A serious question to be tried

[19] Restraint of trade covenants are void unless they are reasonably necessary to protect a proprietary interest of the former employer.⁸ The law does not extend to prohibiting competition alone.⁹

[20] The onus of establishing that a restrictive provision is reasonable is on the employer.¹⁰ Such a provision should be no wider than is required to protect the party in whose favour it is given.¹¹

[21] Whether there is an arguable question to be tried will turn on whether of the causes of action relied on by plaintiff have a real prospect of success in obtaining a permanent injunction.¹²

[22] If an applicants interim injunction application will effectively dispose of the respondents substantive rights then something more than a barely arguable case is required. The Authority must be satisfied that there is a strongly arguable case.¹³

[23] The onus is on the applicant to adduce sufficiently precise factual evidence to satisfy the Authority that he or she has a real prospect of succeeding in this claim for a permanent injunction at trial.¹⁴

[24] Having considered the affidavit evidence and counsel submissions I am not so satisfied that the applicant would be successful in obtaining a permanent injunction. This is for the following reasons:

(a) The applicant seeks an interim injunction that shall effectively dispose

of the first respondent's substantive rights to work;

(b) The evidence about the Ms Berry's alleged breaches does not strongly favour the applicants;

(c) Ms Berry has provided corroborative evidence and a logical explanation for the alleged breaches. She has yet to consider and

⁸ *Transpacific Industries Group (NZM) Ltd v Harris & Others* [2013] ERNZ267

⁹ *Green v Transpacific Industries Group Ltd* [2011] NZEmpC 6 [27].

¹⁰ *Gallagher Group Ltd v Walley* [1999] NZCA 333; [1999] 1 ERNZ 490 [CA] at [28]

11. *Fletcher Aluminium Ltd v O'Sullivan* [2001] NZCA 92; [2001] 2 NZLR731; [2001] NZCA 92; [2001] ERNZ 46 (CA) at [28].

¹² *Lyttleton Port Company Ltd v Maritime Union of NZ Inc* [2017] NZEmpC 6 at [32].

¹³ Ibid at [33]

¹⁴ Ibid at [34].

answer a further allegation of breach raised one day prior to the interim hearing;

(d) There is evidence the nature of the applicant's business and Ms Berry's role strongly indicates the restraint is likely to be modified as to geographical area and duration;

(e) There is a lack of precise factual evidence about the damage that may result from Ms Berry continuing to work for the second respondent. At best the evidence shows the applicants profits have steadily risen since Ms Berry's departure.

[25] This factor does not favour the granting of an interim injunction.

Balance of convenience

[26] The balance of convenience requires me to balance the potential injustice that will be caused to Ms Berry if the injunction is granted against the potential injustice to the applicants if the injunction is not granted.

[27] Factors that are relevant 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.¹⁵

[28] Ms Berry shall suffer the greatest inconvenience. Ms Berry has been on unpaid leave since 10 October 2016. Any ongoing restraint will continue to impact upon her job security and income. It may also give rise to employment issues between the respondents given the protracted leave situation. The applicants have provided an undertaking as to damages and there seems no doubt it would be able pay damages if unsuccessful.

[29] Given the nature of the applicant's Unitutor business it is unlikely to incur significant damage at this time of the year. The business was tutoring in a limited number of first year papers at Otago University. Most of the student clientele have already signed up for tutoring services in those papers. There would be little (if any)

damage caused between March and May if Ms Berry were to continue working.

¹⁵ *Pottinger v Kelly Services (New Zealand) Limited* [2012] NZEmpC 101at [76]-[77]

[30] There also has been an unreasonable rejection of offer to limit interim damages. In December 2016 the respondents offered to limit Ms Berry's work to administrative duties. She would not be involved in the promotion of the second respondent's business if she was allowed to continue working. They provided

undertakings and a job description.¹⁶ This was rejected because it did not include any

restriction to her working for the second respondent only. This appears unreasonable. It would be highly unlikely any other competitor would employ Ms Berry given these proceedings.

[31] The balance of convenience does not favour the granting of an interim injunction.

Interests of justice

[32] This requires an assessment of the overall justice of the case. Relevant matters include:

Hearing: Both parties have been advised that there is a Member now available to determine this substantive matter in May 2017. The delay between hearings would be two months at most.

Delay to date: The injunction was set down for submissions only hearing in February 2017 at the respondent's request. However, because of the late filing of a non-publication order, order for closure of meeting and an order seeking redaction/removal of evidence, the injunction had to be delayed to allow the

filing of further evidence and particulars.¹⁷ Nine months of the 12 month

restraint period have since elapsed.

• **High Court proceedings:** There are proceedings before the High Court regarding repudiation of the contract for sale and purchase of UniTutor Limited. These proceedings go to the heart of the enforceability of the restraint of trade. It is premature to grant an interim injunction in this jurisdiction before that proceeding has been resolved. It may also indicate the

appropriate forum for hearing is the High Court.

¹⁶ Attachment Exhibit FF affidavit of Samantha Marie Berry sworn 15 December 2016

¹⁷ *CCL & UTL v SB & TWL* [2017] NZERA Auckland 34

[33] Standing back and considering the above, I decline the interim injunction application. Costs are reserved.

T G Tetitaha

Member of the Employment Relations Authority

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