

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 154
5632052

BETWEEN ECOMMBI LIMITED
Applicant

A N D AMARJEET DANGI
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Parvez Akbar, Representative for Applicant
Blair Edwards & Anna Jackman, Counsel for
Respondent

Investigation Meeting: 28 and 29 March 2017 at Auckland

Submissions Received: 21 March and 5 April 2017 from Applicant
23 March and 11 April 2017 from Respondent

Date of Determination: 25 May 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Mr Dangi did not breach his obligations of good faith under s.4 of the Employment Relations Act 2000 (the Act) and implied duty of fidelity to Ecommbi Limited (Ecommbi).**
- B. Mr Dangi did not breach his ongoing obligations under clause 11.1, the confidentiality of information clause, clause 11.2, the copyright and intellectual property clause, in his employment agreement, and the provisions in his non-disclosure agreement.**
- C. The restraints of trade in clauses 11.6 and 11.7 in the employment agreement are unreasonable and unenforceable.**
- D. The Authority declines to exercise its discretion to modify clauses 11.6 and 11.7 under s.8 of the Illegal Contracts Act 1970.**
- E. Ecommbi is to pay Mr Dangi outstanding expenses of \$250 within 28 days of the date of this determination.**

F. Ecommbi breached Mr Dangi's employment agreement by failing to pay him his expenses. Ecommbi breached the Holidays Act 2003 by delaying payment of Mr Dangi's final pay. In respect of these breaches Ecommbi is to pay a penalty totalling \$4,000 into the Authority within 28 days of the date of this determination. The entire penalty will be paid by the Authority to Mr Dangi under s.136(2) of the Act.

G. Costs are reserved.

Employment relationship problem

Ecommbi Limited – applicant

[1] The applicant, Ecommbi Limited (Ecommbi) is a SAP¹ partner in New Zealand. Ecommbi undertakes e-commerce work and specialises in SAP Hybris e-commerce implementation. The bulk of Ecommbi's business comes from SAP Hybris implementations in organisations.

Soltius New Zealand Limited

[2] Soltius New Zealand Limited (Soltius) is also a SAP partner in New Zealand and undertakes e-commerce work for organisations in New Zealand that use SAP (including Hybris) software. Ecommbi and Soltius worked together on a Hybris project for Auckland Council during 2015.

Mr Amarjeet Dangi – respondent

[3] The respondent, Mr Amarjeet Dangi, has approximately nine years' experience in the software industry, including in India and Sweden. Mr Dangi has experience in the design and implementation of web-based enterprise applications using Hybris, Java/J2EE technologies.

Mr Dangi's employment by Ecommbi

[4] From 10 March 2015 until 30 March 2016, Mr Dangi was employed by Ecommbi in the position of Software Developer pursuant to an individual

¹ SAP SE “*Systems, Applications and Products in Data Processing*” is a German multinational software corporation that makes enterprise software to manage business operations and customer relations. https://en.wikipedia.org/wiki/SAP_SE

employment agreement (the employment agreement). Mr Dangi primarily worked on the Hybris project at Auckland Council. Ecommbi supplied Soltius with the Hybris expertise for the project.

[5] Mr Dangi's employment agreement contained various restrictive covenants stating that Mr Dangi was not to compete with Ecommbi, and was not to solicit its clients or employees for a period of time after his employment with Ecommbi ended. Other restrictive clauses prohibited the disclosure of confidential information and reserved Ecommbi's rights in respect of copyright and intellectual property developed during Mr Dangi's employment by it.

Mr Dangi's resignation from Ecommbi

[6] During his employment by Ecommbi, Mr Dangi became disenchanted. Mr Dangi felt Ecommbi failed to support his application for permanent residency in New Zealand to the degree he expected. Mr Dangi says when he began the process for permanent residency himself and asked Ecommbi for supporting documents, it attempted to vary the terms of his employment agreement. Mr Dangi was also of the view his salary was too low. Mr Dangi resigned from Ecommbi with effect from 30 March 2016.

Mr Dangi's employment by Soltius

[7] Mr Dangi accepted employment with Soltius as a Hybris solution architect and on 31 March 2016 started his new role with it.

Ecommbi's claims against Mr Dangi

[8] Ecommbi says it invested heavily in finding, employing and relocating Mr Dangi from India to New Zealand to work for it. It expected Mr Dangi to work for it for a minimum of 2 years.

[9] Ecommbi says Soltius is its direct competitor and was also its client when Mr Dangi resigned and began working for it. Ecommbi says Mr Dangi was aware of this.

[10] Ecommbi says by accepting employment with, and by working for Soltius immediately following his resignation, Mr Dangi breached the restrictive covenants contained in his employment agreement with it.

[11] Ecommbi claims that contrary to instructions by it, Mr Dangi sent emails to his personal email address containing confidential information. Ecommbi also claims Mr Dangi provided Soltius with confidential information concerning its “man-day” estimation process, shortly before his resignation. Ecommbi says that this conduct was a breach by Mr Dangi of his obligations to it under his employment agreement and non-disclosure agreement.

[12] Further, Ecommbi says that at the time of his resignation, Mr Dangi acted in a deceitful and misleading manner by failing to inform it he was going to work for Soltius. Overall, Ecommbi says Mr Dangi’s conduct was in breach of his obligation of good faith to it, and of his obligation to act in its best interests.

Orders sought by Ecommbi

[13] Ecommbi seeks orders from the Authority that Mr Dangi comply with all provisions of his employment agreement that apply post his employment by it, including an order that Mr Dangi cease employment with Soltius. Ecommbi seeks penalties against Mr Dangi for alleged breaches of his employment agreement and damages for losses it says it has suffered as a result.

Mr Dangi’s response and counterclaim

[14] Mr Dangi disputes the claims by Ecommbi and says the restrictive covenants contained in his employment agreement were unreasonable and therefore unenforceable against him.

[15] Mr Dangi says Ecommbi is attempting to claim a proprietary interest in Hybris technology which it is not entitled to do. Mr Dangi says Ecommbi is attempting, by way of the restrictive covenants, to prevent him from using the skills and experience he had developed in Hybris over a number of years, prior to his employment by it.

[16] Mr Dangi says that when he resigned from his employment with Ecommbi, it failed to pay his final pay, for a period of time, and refused to pay his parking expenses. Mr Dangi seeks payment of his parking expenses, interest on the delayed payment of his final pay and a penalty for breach of his employment agreement.

[17] Mr Dangi says Ecommbi, in attempting to enforce the restrictive covenants against him and in withholding payments due to him, is acting in a retaliatory manner because he resigned.

Investigation Meeting

[18] As permitted under s.174E of the Employment Relations Act 2000 (the Act), this determination has not set out all the evidence required. The determination states findings and relevant facts and legal issues and makes conclusions in order to efficiently dispose of the matter.

[19] The investigation in the Authority took two full days. For Ecommbi, Mr Jason Sadler, director, Mr Glen Moody, Chief Operations Manager, Mr Garth Morton Technical Lead and Ms Maxine Corbett, Human Resources consultant, all filed witness statements. Mr Matthew Cowie, director, attended the investigation meeting and answered questions.

[20] The respondent, Mr Amarjeet Dangi filed a witness statement and Mr Nick Mulcahy, director of Soltius, provided the Authority with a letter and connected with the investigation meeting by phone to answer questions.

[21] Each witness confirmed by affirmation or on oath that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

Issues

[22] The issues for the Authority to determine are as follows:

- a. Has Mr Dangi breached his obligations of good faith under s.4 of the Act and his implied duty of fidelity to Ecommbi?
- b. Has Mr Dangi complied with his ongoing obligations under clause 11.1, the confidentiality of information clause, clause 11.2, the copyright and intellectual property clause, in his employment agreement and the provisions in his non-disclosure agreement?
- c. The reasonableness of clause 11.6, the non-competition restraint of trade provision in Mr Dangi's employment agreement.

- d. Whether the Authority should exercise its discretion and modify clause 11.6 under s.8 of the Illegal Contracts Act 1970.
- e. If the clause is held to be reasonable and is not modified by the Authority, can the Authority order that Mr Dangi cease continued employment by Soltius?
- f. The reasonableness of the restraint of trade provision set out in 11.7 of the employment agreement relating to the non-solicitation of clients.
- g. Whether the Authority should exercise its discretion and modify the clause under s.8 of the Illegal Contracts Act 1970.
- h. In the event it is determined that Mr Dangi has breached his obligations and clauses in his employment agreement, has Ecommbi suffered any damage to its business and if so the extent of such damage?
- i. If the Authority determines that Mr Dangi is in breach of his obligations to Ecommbi and of clauses in his employment agreement, is he liable to penalties?
- j. Has Ecommbi failed to pay Mr Dangi expenses reasonably incurred by him during his employment by it? If so, is Ecommbi liable to a penalty for breach of Mr Dangi's employment agreement and for delaying payment of his final pay?

Background

SAP and Hybris

[23] Hybris is a software company. It sells “enterprise multichannel e-commerce and product content management software”². In 2003, Hybris joined SAP. And on 1 January 2016, Hybris became SAP-Hybris and “is responsible for all of SAP’s customer engagement and commerce business”³.

² Hybris.com

³ Hybris.com

Relationship between Ecommbi and Soltius

[24] At the relevant time, Soltius had a commercial relationship with Auckland Council and a Master Services Agreement (MSA) with it. In 2013, Soltius prepared a statement of work (SOW) in relation to a Hybris project for Auckland Council (the Hybris project). During 2014, Ecommbi and Soltius discussed working together or partnering to deliver the Hybris project. A confidentiality agreement was signed by Ecommbi and Soltius on 24 November 2014. The introduction to the agreement states:

Each party is prepared to disclose to the other party information that it regards as confidential and which the other party may use for the purpose of exploring potential options for business dealings or arrangements between the parties (“Permitted Purpose”) on the terms and conditions of this Agreement. Nothing in this Agreement, however, commits either party to entering into such business dealings or arrangements.

[25] During 2015, Ecommbi and Soltius worked on the Hybris project together. Ecommbi invoiced Soltius for work undertaken by it on the project.

Employment negotiations between Mr Dangi and Ecommbi

[26] Mr Dangi is experienced in the software industry and with SAP and Hybris. In late 2014, Mr Dangi applied for the role of Software Developer with Ecommbi advertised on the Seek website. Mr Dangi was contacted to discuss his application by a consultant from Radius, a recruitment company used by Ecommbi to find suitable employees and consultants for its business.

[27] As a result, in late 2014, Mr Dangi and Mr Sadler, began discussing Ecommbi’s requirements and Mr Dangi’s possible employment by it as a software developer in New Zealand.

Arrangements for Mr Dangi to relocate from India to New Zealand

[28] At the time of the discussions with Mr Sadler, Mr Dangi was based in Delhi, India. On 24 December 2014, following discussions between Mr Dangi and Mr Sadler, Mr Sadler sent an email to Mr John Hunter, an immigration consultant with Compass Immigration Limited. Mr Sadler requested Mr Hunter to arrange a work permit for Mr Dangi to enable him to begin work as a software developer for Ecommbi in New Zealand in mid-January 2015. Mr Hunter was also requested to

initiate the process for a permanent resident visa for Mr Dangi and his family in New Zealand.

[29] Mr Dangi says he took from his discussions with Mr Sadler and the email from Mr Sadler to Mr Hunter, that Ecommbi was willing to support his application for permanent residency during the first few months of his employment.

Ecommbi's letter of offer – 1 February 2015

[30] On 1 February 2015, Mr Sadler wrote to Mr Dangi offering him employment. A copy of an individual employment agreement (the agreement) and a non-disclosure agreement were attached to the letter of offer.

[31] The letter of offer stated:

- Mr Dangi would be employed as a software developer, based in Albany, Auckland.
- Employment would commence on 16 February 2015, subject to Mr Dangi gaining a work visa for New Zealand.
- Employment was subject to a 90 day trial period clause.
- Mr Dangi had the right to seek advice about the attached employment agreement.
- The total remuneration package including a contribution to relocation costs and a breakdown of the relocation costs was attached to the letter as Schedule 1.

[32] Schedule 1 of the letter of offer stated:

Relocation Costs are offered on the basis that you remain in the employment of Ecommbi for a minimum term of 24 months. Should you choose to leave within that period you would be required to repay 50% of the total relocation package.

By signing this letter you confirm that you have read, understood and agree to the deduction taking place from your final pay should you leave within the specified period.

Relocation Package

Contribution to the costs of a one way flight to New Zealand	Up to \$1,000
Contribution to the costs of a one way flight to New Zealand	Up to \$1,000
Up to 14 nights in accommodation booked by Ecommbi from date of arrival	Up to a total value of \$1,680
Rental accommodation – Bond	Up to \$1000
Rental accommodation - Rent	Up to \$1000
Relocation of belongings	Up to \$1500
	Total Value \$6,180

I, **Armajeet Dangi**, confirm that I have read the terms of relocation set out in this Schedule, that I fully understand them and their implications and that I accept the offer.

Individual Employment Agreement

[33] Clause 11 of the employment agreement contained various restrictive covenants, concerning Ecommbi's confidential information, copyright, intellectual property, non-competition, and non-solicitation of clients or employees.

[34] On 2 February 2015, Mr Dangi signed the offer letter and confirmation of the relocation costs agreement in the attached Schedule, employment agreement and non-disclosure agreement.

[35] Mr Dangi did not obtain legal advice before signing the employment agreement and attachments because he wanted the job. Following his relocation to New Zealand, Ms Maxine Corbett, Ecommbi's Human Resources consultant went through the employment agreement and the non-disclosure agreement with Mr Dangi. Mr Dangi was aware of the restrictive covenants which applied upon termination of his employment with Ecommbi.

[36] Mr Dangi was employed at a salary of \$85,000 which was later increased to \$87,000, to cover the costs of his flights from India to New Zealand.

Employment in New Zealand by Ecommbi

[37] Mr Dangi began working for Ecommbi on 10 March 2015. The employment agreement specified that Mr Dangi would report to Mr Sadler “*or to any other representative of the employer designated from time to time by the Employer*”. In reality, Mr Dangi reported to Mr Glen Moody, Chief Operations Manager, as his line manager and Mr Garth Morton, Technical Lead, as his direct technical line manager.

[38] The job description attached to the employment agreement stated that Mr Dangi was a software developer reporting to Mr Sadler and that his job purpose was to “*primarily perform the role of software developer, using Java technologies (e.g. Hybris, and Eclipse or Netbeans as the development environment)*”. The role involved building new projects (websites etc) and supporting existing projects and change requests. It also included “*providing project or job estimates for client quoting purposes, understanding and using new software development technologies in other areas of the business*”.

[39] Mr Dangi worked almost exclusively on the Hybris project while employed at Ecommbi and was located at Auckland Council’s offices. Mr Dangi worked on a day to day basis with the project manager on the Hybris project, Mr Conal Martin who was employed by Soltius.

Visa process

[40] Ecommbi supported Mr Dangi to settle in New Zealand and to bring his family to New Zealand. Mr Dangi was given the use of a car for a short period of time, rental accommodation and financial support including for his family to settle in New Zealand.

[41] Mr Dangi’s family arrived in New Zealand on 13 May 2015. Mr Dangi was keen to progress his and his family’s application for permanent residency in New Zealand. In approximately September 2015, Mr Dangi made contact with Mr Matthew Cowie, one of the directors of Ecommbi, about this. Mr Cowie informed him that Ecommbi’s investment in Mr Dangi was significant and that it wished to put his permanent residency on hold for the moment while the business was growing. Mr Dangi was extremely disappointed by this and spoke about it further with Ms Corbett. Ms Corbett explained that Ecommbi “*... was still willing to support him, but wanted to wait a few more months before beginning the next stage of that*

*process*⁴. Mr Dangi decided to progress his application for permanent residency himself.

[42] On 28 October 2015, Mr Dangi emailed Mr Sadler, Mr Cowie and Ms Corbett in relation to his application for permanent residency and asked for a letter to confirm:

- his continued employment by Ecommbi;
- that his profile came under the Absolute Skill Shortage category;

and requesting an updated version of his original offer of employment from Ecommbi. There were some dates that needed to be adjusted in the updated version of the offer of employment.

Proposed variations to employment agreement

[43] Mr Dangi says it was at this time that Ecommbi took the opportunity to try and vary the restraint of trade clauses in his employment agreement, namely clauses 11.6 to 11.8.

[44] In an email of 9 November 2015, Mr Sadler emailed Ms Corbett regarding the letter of continuing employment and copied Mr Moody, Mr Cowie and Mr Dangi.

[45] Mr Sadler stated:

- Clause 11.6 of the EA should be 24 months
- Clause 11.7 of the EA should also include a situation where we're a sub-contractor (e.g. we are a subcontractor to a company named Soltius, and the end client is the Auckland Council – we need to capture both of these)
- Clause 11.8 – I don't see why this should only be 24 months ... it should be forever shouldn't it?

[46] In response, Ms Corbett emailed Mr Sadler to tell him that she had added the words “any sub-contracting client of the Employer” to both clauses 11.6 and 11.7. With regard to Mr Sadler's comments regarding Clause 11.8, Ms Corbett stated:

... ethically, I agree, it possibly should be forever, but the extent to which the law will allow us to bind an employee is limited – and even with a time period written, the Employment Relations Authority considers breaches on a case by case basis.

⁴ Corbett witness statement

[47] Mr Dangi says he was disappointed that Ecommbi was trying to vary his employment agreement in response to his request for documentation to enable him to obtain permanent residency. Mr Dangi was not prepared to agree to the variations to his employment agreement that were being requested by Ecommbi.

[48] In the course of the email exchanges about the issue, Mr Sadler stated that the new clauses were being introduced for everyone at Ecommbi, as the company continued to grow.

Salary expectations

[49] Mr Dangi felt he was being underpaid in his role and in January 2016 asked for an increase in his salary to \$140,000 per annum. Ecommbi was not prepared to agree to such an increase in salary.

[50] Mr Dangi saw a position advertised at Soltius for a Hybris Solution Architect and on 29 January 2016, applied for it. Mr Conal Martin with whom Mr Dangi worked on the Auckland Council project responded to Mr Dangi's application and invited him to an interview at Soltius' offices in Ellerslie, Auckland on 12 February 2016. Mr Dangi attended the interview.

[51] In mid-February 2016, at a meeting at Smales Farm with Mr Sadler and Mr Moody, Ecommbi offered Mr Dangi an increase to \$100,000, subject to his signing a new employment agreement incorporating variations to the restraint of trade provisions which had been proposed in November 2015.

[52] Mr Dangi was not happy with the level of the proposed salary increase or with the conditions placed on it by Ecommbi and so refused to sign the new employment agreement.

Decision to resign

[53] Mr Dangi says it was Ecommbi's actions in attempting to vary his employment agreement when he sought employment documents from it to support his permanent residency application, the level of the proposed salary increase and that any increase was contingent on Mr Dangi agreeing to a variation to his employment agreement to incorporate changes to the restraint of trade provisions, that ultimately led to his resignation.

Employment by Soltius

[54] Mr Dangi was offered the role at Soltius on 29 February 2016 and decided to accept it.

[55] A formal letter of offer attaching an employment agreement was sent to Mr Dangi by Soltius on 1 March 2016. Mr Dangi accepted and signed the employment agreement on 2 March 2016. Mr Dangi resigned from Ecommbi on 3 March 2016.

Discussions prior to and at the time of resignation

[56] Ecommbi says that when Mr Dangi resigned he was asked by both Mr Moody and Ms Corbett whether he had another role to go to and he told them he did not. Ecommbi says Mr Dangi deliberately misled it. Mr Dangi denies this and says he decided against telling Mr Moody and Ms Corbett of his intentions following his resignation.

[57] Mr Cowie provided the Authority with a text message from Mr Dangi which he received at 10.30pm on 14 February 2016, which included a statement from Mr Dangi that, *“My goal is to grow with Ecommbi. Have a good time at Munich and ahead. Stay in touch”*. Mr Cowie provided that text in support of, what he and other members of Ecommbi say, is evidence that Mr Dangi deliberately misled them when in fact he had already decided to leave Ecommbi to work for Soltius.

[58] Mr Dangi said that he had not decided whether or not he was going to accept employment with Soltius if offered a role following his interview on 14 February 2016 and he had hoped to grow with Ecommbi. However, his frustrations with Ecommbi as a result of the attempt to change his employment agreement on two occasions and the failure to increase his salary to the level he wished were matters which swayed him to accept a role with Soltius. This he says was not until 29 February 2016.

Post-employment obligations

[59] On 2 April 2016, Mr Cowie sent a letter to Mr Dangi about his resignation from Ecommbi and his post-employment obligations to it. This was a letter that Mr Cowie says was drafted by Ms Corbett on Ecommbi's behalf. The letter sets out

Mr Dangi's main reasons for resigning and then reminds him of the restrictive covenants in his employment agreement concerning non-competition, and non-solicitation of clients or employees following his termination of employment at Ecommbi. The letter then goes on to state:

We now understand that you have accepted paid employment with a direct industry competitor, breaching clause 11.6 of your employment agreement, and running the risk of breaching the provisions in your employment agreement that apply post-employment. Based on your conversation with Maxine, we also view this as a breach of your good faith obligation not to mislead or deceive us.

In the circumstances, we seek the following in writing within seven days of receipt of this letter:

- (a) An undertaking that you will comply with all provisions of your employment agreement that apply post-employment, including clauses 11.6, 11.7 and 11.8.
- (b) An undertaking that you will comply with the provisions of the non-disclosure agreement signed by you.
- (c) Confirmation that you consent to the deduction of the sum of \$3,090, being fifty percent of the relocation package to Ecommbi Limited from your final pay.

Should you fail to respond to this letter as requested, we reserve our right to commence legal proceedings in the Employment Relations Authority to enforce our rights. This includes ensuring your new employer is not in breach of its obligations under the Employment Relations Act 2000, not to incite, instigate, aid, or abet any breach of an employment agreement. We trust this will not be necessary.

Yours sincerely

Matt Cowie
Ecommbi

[60] On 7 April 2016, Mr Dangi emailed Mr Cowie and copied Mr Sadler and Mr Moody. In the email, Mr Dangi agreed to Ecommbi's requests and asked for payment of expenses he said was owing to him. The email finished with Mr Dangi stating, "*Please let me know if this email is not sufficient and if I still need to write a letter*".

[61] On 13 April 2016, Ms Corbett responded to Mr Dangi that any final payments were on hold until "*our investigation into the potential breach of your continuing employment obligations is complete*".

[62] Ms Corbett says it was not until the first week of May 2016, that Mr Sadler told her that he had received confirmation that Mr Dangi was employed by Soltius. Mr Sadler says at a meeting with the CEO of Soltius, Mr Nick Mulcahy in late April 2016, he first found out that Mr Dangi had been employed by Soltius.

[63] However, Mr Cowie told the Authority that at the time he sent the letter to Mr Dangi on 7 April 2016, he was aware that Mr Dangi was starting at Soltius. Mr Cowie understood that both Mr Sadler and Ms Corbett also knew this.

[64] I conclude from the evidence that at about the time the letter was sent by Mr Cowie to Mr Dangi on 7 April 2016, or shortly thereafter, that he, Mr Sadler and others at Ecommbi were aware that Mr Dangi had been employed by Soltius.

Emails from Mr Dangi to Soltius in February 2016

[65] Ecommbi says that Mr Dangi provided Soltius with its confidential information, in particular about its estimation process, prior to leaving his employment with it. Ecommbi also says Mr Dangi emailed its information to himself during his employment by it. This conduct, it says, was a breach of his duties to it of good faith and fidelity.

Issuing and service of proceedings on Mr Dangi by Ecommbi

[66] On 28 July 2016, Ms Corbett served proceedings on Mr Dangi at McDonalds in Greenlane. Ms Corbett says that she had been attempting to make contact with Mr Dangi for a number of months since his resignation but was unable to make contact with him. Ms Corbett accepts that she did not notify Mr Dangi by email that she was going to serve proceedings on him, nor did she serve those proceedings by email.

[67] Mr Dangi says that he did travel to India for a short time, was contactable at his email address, but did not receive any communications from Ms Corbett or Ecommbi after he was paid his final pay on 24 June 2016. Mr Dangi says he was shocked at being served with proceedings at McDonalds in Greenlane, 5 months after his resignation and 4 months after his departure from Ecommbi.

[68] Ecommbi say that as a result of Mr Dangi's breaches of his employment agreement, it has sustained losses in the vicinity of \$950,000 worth of work. No details were provided to the Authority to support this claim for damages.

The Law

First Issue

Has Mr Dangi breached his obligations of good faith under s.4 of the Act and his implied duty of fidelity to Ecommbi?

Good faith and fidelity

[69] As a result of entering into an employment relationship, employers and employees owe each other certain duties and obligations. At the core of the employment relationship is the good faith requirement imposed on employers and employees by s.4 of the Act and an implied relationship of trust and confidence between them.

[70] In *Telecom South Ltd v Post Office Union (Inc)*⁵ Justice Richardson said:

The contract of employment cannot be equated with an ordinary commercial contract. It is a special relationship under which workers and employers have mutual obligations of confidence, trust and fair dealing.

[71] The duty of good faith in s.4 of the Act requires employers and employees to deal with each other in good faith and not to “*whether directly or indirectly do anything ... to mislead or deceive each other*”⁶.

Failure by Mr Dangi to tell Ecommbi his future employment plans

[72] I do not accept that by not telling Mr Moody or Ms Corbett his plans for future employment, in itself, amounted to misleading or deceptive conduct by Mr Dangi, which amounted to a breach of good faith. Mr Dangi was entitled to seek alternative employment whilst employed by Ecommbi and to leave its employ⁷.

[73] Mr Dangi’s text message to Mr Cowie on 14 February 2016, referred to in paragraph [57] of this determination, did not amount to a breach of good faith by him. Mr Dangi had taken steps to seek alternative employment as he was entitled to do and at that stage had not been offered employment by Soltius.

[74] There was no evidence of any loss of business or damage to Ecommbi as a result of his refusal to provide Ecommbi information regarding his new employment.

⁵ [1992] 1 ERNZ 711 at [277]

⁶ Section 4(1)(a) and (b) Employment Relations Act 2000

⁷ *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 at [142]

Second Issue

Has Mr Dangi complied with his ongoing obligations under clause 11.1, the confidentiality of information clause, clause 11.2, the copyright and intellectual property clause, in his employment agreement and the provisions in his non-disclosure agreement?

[75] Clause 11.1 of the employment agreement states;

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 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.

[76] Ecommbi claims that email chains on 21 and 22 December 2015 and in February 2016 constitute breaches by Mr Dangi of his obligations of confidentiality to it. The email chains concerned relate to estimates for licensing products. The evidence in respect of these email chains was confusing. However, it is my view that the emails, more likely than not, contained information related to the Hybris project. Mr Martin from Soltius was the project manager of the Hybris project. In order to perform his role for Ecommbi in respect of the Hybris project, Mr Dangi provided Mr Martin with information concerning the estimates for the products.

[77] I accept the submission made on behalf of Mr Dangi that Mr Dangi would exchange numerous emails on a daily basis with Mr Martin regarding scoping and technical issues and it is my view that these email exchanges in December 2015 fell within this category and were necessary for the Hybris project. Mr Dangi was acting in accordance with his duties and responsibilities to Ecommbi and in accordance with his job description. I am not satisfied that Ecommbi has produced any evidence to suggest that the December 2015 email exchanges were anything other than Mr Dangi performing his job.

[78] Similarly, Ecommbi complained about an email on 25 February 2016. Again, the information was specific information relevant to the Hybris project that Mr Dangi was working on with Soltius. Through his previous Hybris experience, Mr Dangi had an understanding of estimates and "*man-day estimates*". The evidence provided at the investigation meeting on behalf of Ecommbi was confusing. It was very difficult

to obtain clear evidence about what Ecommbi considered to be a “*man-day estimate*”. In the absence of clarity, it is difficult to understand how Ecommbi could suggest that Mr Dangi was providing Soltius with confidential estimates.

[79] In my view, the evidence of information provided by Mr Dangi to Soltius was not confidential information in breach of clause 11.1 of his employment agreement as it was necessary for the proper performance of his duties. I do not accept that there was evidence that Mr Dangi breached clauses 11.1 and 11.2 of his employment agreement or the provisions contained in the non-disclosure agreement.

[80] Similarly, in my view, the information did not fall into one of the categories of confidential information referred to in *Faccenda Chicken Ltd v Fowler*⁸. Mr Dangi was performing his duties as an employee of Ecommbi. Ecommbi was in partnership with Soltius in respect of the Hybris project. Mr Dangi was working almost exclusively on the Hybris project and as such was required to exchange information with Soltius.

Third Issue

The reasonableness of clause 11.6, the non-competition restraint of trade provision in Mr Dangi’s employment agreement

[81] In my view, the relationship between Ecommbi and Soltius with respect to the Hybris project was a strategic partnership to provide services to Auckland Council, and was for their mutual benefit. The parties were not competitors at the time Mr Dangi began employment with Ecommbi. Nor was Soltius a client of Ecommbi in respect of the project, they were partners.

[82] Mr Sadler says Auckland Council approached Ecommbi to work on the Hybris project. However, that would require it to partner with a company such as Soltius which had an MSA with Auckland Council. Rather than go through the arduous process of obtaining an MSA, Soltius and Ecommbi decided to work together on the project. No written contract was entered into because the parties were not able to agree on the terms of their relationship. On an objective view of the evidence, a strategic partnership was what the parties intended⁹.

⁸ [1987] CH 117 (CA) at 731,732

⁹ *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 44 at [19]

[83] In any event, in considering the restraints of trade, it is my view they are unreasonable and unenforceable.

Restraints of trade

[84] Clause 11.6 of the employment agreement states:

11.6 Non-competition

The Employee agrees that for a period of **12 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 *direct* competition with the Employer (in the areas of business intelligence and e-commerce) within a radius of 25 kilometres from the Employer's premises.

The Employee agrees that [sic] attached Non-Disclosure Agreement in its entirety is considered as terms and conditions of this employment agreement.

[85] A covenant in restraint of trade is *prima facie* unlawful as contrary to public interest and therefore is unenforceable unless it is reasonable as between the parties to the employment agreement and in the public interest¹⁰. "*The reasonableness of a restraint clause is to be assessed in the circumstances of each case according to the legitimate interests of the parties to the restraint. This involves a balancing of the respective positions between the employer and the employee*"¹¹.

[86] Restraints are enforced only to the extent required to protect the proprietary interests of the employer. The nature of the employee's role and the employer's business, the geographical scope of the restraint, and its nature and duration are relevant factors in assessing whether a restraint is reasonably necessary¹².

[87] The onus of establishing that a restrictive provision is reasonable is on the employer¹³. Such a provision should be no wider than is required to protect the party in whose favour it is given¹⁴. The reasonableness of a restraint must be assessed at the time it was entered into, not the time it is sought to be enforced¹⁵.

¹⁰ *Gallagher Group Ltd v Walley* [1999] 1ERNZ 490 (CA) at [20]

¹¹ *Asiaciti Trust New Zealand Ltd v Harris* [2013] NZEmpC238 at [33]

¹² *Janet Pottinger v Nine Dot Consulting Ltd & Ors* [2012] NZEmpC 101 paras.[16]-[19]

¹³ *Gallagher ibid*[28]

¹⁴ *Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 NZLR 731, [2001] ERNZ46 (CA) at [28]

¹⁵ 24 at [23]

Bargaining power between the parties

[88] At the time of entering into his employment agreement, Mr Dangi lived in Delhi, India. In addition to the restraints, the employment agreement contained a 90 day trial period. It was possible therefore, for Mr Dangi and his family to move to New Zealand and for Mr Dangi's employment to be terminated within the 90 day trial period. This would have had serious consequences for Mr Dangi and his family.

[89] I agree with Counsel that Mr Dangi did not have ready access to New Zealand employment law advice at that time. Mr Dangi was keen to gain employment in New Zealand and to relocate with his family. Inequality in employment relationships is a key provision of the Act.

[90] Section 3 of the Act states:

The object of the Act is –

(a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship –

...

(ii) by acknowledging and addressing the inherent inequality of power in employment relationships;

...

[91] There was a significant inequality of bargaining power at the time the employment agreement was entered into, in my view.

Proprietary interest

[92] An employer is entitled to impose a restraint to protect legitimate proprietary interests which require protection¹⁶. Ecommbi argues that it had a legitimate proprietary interest to protect and that the covenants at issue were reasonably necessary to protect those interests. Ecommbi says Mr Dangi was a senior employee and the restraints were necessary to protect its confidential information and related business and trade connections.

[93] The restraint seeks to restrain Mr Dangi, in any capacity, from carrying on business in direct competition with Ecommbi in the areas of business intelligence and e-commerce. This is an extremely broad category of work. Ecommbi has not

¹⁶ *H & R Block Ltd v Sanott* [1976] 1 NZLR 213 at [218]

attempted to narrow the scope of the restraint to that necessary to protect its proprietary interests.

[94] Ecommbi does not and did not have a proprietary interest in Hybris technology. An employer is not entitled to protection from mere competition by a former employee. An employee is entitled to use skills and experience gained while employed by a former employer¹⁷.

[95] Mr Dangi had already acquired skills in Hybris technology before his employment by Ecommbi and he further developed those skills while employed by Ecommbi.

[96] Ecommbi says Mr Dangi's role had a high level of responsibility and he had access to its confidential and sensitive information. This in my view is not consistent with the evidence. Mr Dangi worked on the Hybris project at Auckland Council's offices, for the entire period of his employment by Ecommbi. Mr Dangi was employed as a software developer on a salary of \$87,000. According to his job description, Mr Dangi's role was supportive in nature. The role was subject to a high level of control and instruction from his managers. For example, Mr Dangi was not authorised to provide estimates to Ecommbi's clients and was instructed not to do so.

[97] Mr Dangi's employment agreement included a confidentiality clause and Mr Dangi signed a non-disclosure agreement. These agreements gave Ecommbi protection of its client relationships and confidential information. The non-competition clause did not seek to protect Ecommbi's proprietary interests, rather it sought to prevent mere competition with it, in my view.

The length of the restraint

[98] In assessing the reasonableness of a restraint, its duration is relevant. A restraint of 12 months is at the upper end¹⁸.

[99] Mr Dangi was employed by Ecommbi to work on the Hybris project, in partnership with Soltius. Mr Dangi was a software developer and continued to develop those skills when employed by Ecommbi. In my view, to prevent Mr Dangi

¹⁷ *Cooney v Welsh* [1993] 1 ERNZ 407 (CA)

¹⁸ *Walley* at [1189]

pursuing a career in the industry within which he had developed skills by subjecting him to a 12 month non-competition restraint was not reasonable in the circumstances.

Geographical restraint

[100] The geographical scope of the restraint of trade clause must be restricted to an area that is necessary to protect Ecommbi's proprietary interests. The restraint covers a 25km radius from Ecommbi's premises in Albany. Mr Dangi is employed by Soltius, the head office of which is based in Ellerslie. Despite argument to the contrary, according to Google maps¹⁹ the premises are 23.6kms apart, so within the 25km radius.

[101] As counsel for Mr Dangi submitted, this covers a very large area of Auckland. Even so, the evidence before the Authority was that Mr Dangi works in Tauranga most of each working week for one of Soltius' Tauranga based clients. He has not undertaken any work for Auckland Council. So, even if the geographical scope of the restraint is reasonable, Mr Dangi does not work within the restricted area.

Conclusion

[102] For all the above reasons, I find the non-competition restraint of trade to be far too wide and therefore to be unreasonable and unenforceable. Ecommbi's application for a compliance order is declined.

Fourth Issue

Whether the Authority should exercise its discretion and modify clause 11.6 under s.8 of the Illegal Contracts Act 1970

[103] I am not prepared to modify the clause. A reasonable term for the non-competition restraint would have been 4 to 6 months. This period has long since expired. Ecommbi failed to serve proceedings on Mr Dangi for almost 4 months after the time it became aware of his employment by Soltius, in early April 2016. If seriously concerned about Mr Dangi competing with it, I would have expected much more urgency by Ecommbi in serving Mr Dangi with proceedings and having the matter brought to the Authority for investigation.

¹⁹ Google Maps www.google.co.nz

Fifth Issue

If the clause is held to be reasonable and is not modified by the Authority, can the Authority order that Mr Dangi cease continued employment by Soltius?

[104] The Authority has held the non-competition restraint not enforceable and is not prepared to modify it.

Sixth Issue

The reasonableness of the restraint of trade provision set out in 11.7 of the employment agreement relating to the non-solicitation of clients

[105] Clause 11.7 of the employment agreement states:

11.7 Non-Solicitation of Clients

The Employee agrees that for a period of 24 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, unless otherwise agreed by the employer.

[106] Soltius had a contract with Auckland Council to undertake the Hybris project. Ecommbi and Soltius worked in partnership on the project for mutual benefit. Mr Dangi was employed by Ecommbi and worked on the Hybris project utilising his skills and experience in Hybris.

[107] Ecommbi say that Soltius was its client, and that by working for Soltius, Mr Dangi is in breach of the non-solicitation clause which prevented him from carrying out work for it.

[108] Clause 11.7 prohibits both soliciting and carrying out work of the same nature for any client or customer of Ecommbi with whom Mr Dangi had any contact or dealings whilst employed by it. I do not accept the argument by Mr Dangi's counsel that the clause is ambiguous.

[109] However, it is my view, that clause 11.7 is not intended to cover the working relationship in this case, which was a partnership between Ecommbi and Soltius. This was not a situation where Ecommbi was implementing a Hybris solution for one of its clients, and was being paid by the client. Rather, it was working in partnership with Soltius to implement a Hybris solution for Soltius' client, Auckland Council. This was

recognised by Mr Sadler when he attempted to vary Mr Dangi's employment agreement to include a restraint clause to cover the situation. This is referred to in paragraph [45] of this determination.

[110] If I am incorrect in my conclusion as to the relationship, it is my view the non-solicitation clause is not reasonable and is unenforceable. This is for the following reasons and those already given in respect of the non-competition clause.

[111] The duration of the restraint is for 2 years. In *James Wells Patent and Trademark Attorneys v Snoep*²⁰ the defendant was restrained following termination of employment, from practising as a Patent Attorney for any of the employer's existing clients for twelve months. Judge Couch, in determining the application for an interim injunction, found at [32] the duration of the restraint was at the upper end of what was reasonable but not beyond that range.

[112] In light of the particular circumstances of this case, I find one year would have been a reasonable upper limit of the restraint. This time has expired. Ecommbi's application for a compliance order is declined.

Seventh Issue

Whether the Authority should exercise its discretion and modify clause 11.7 under s.8 of the Illegal Contracts Act 1970

[113] I am not prepared to exercise my discretion and modify the restraint provision.

Eighth Issue

In the event it is determined that Mr Dangi has breached his obligations and clauses in his employment agreement, has Ecommbi suffered any damage to its business and if so the extent of such damage?

[114] The restraint of trade clauses are not enforceable and therefore the Authority is not required to consider damage allegedly suffered by Ecommbi.

[115] However, even if I am not correct in my conclusions, Ecommbi failed to provide the Authority with any detailed analysis of its claim that it was entitled to damages of \$950,000. It says it suffered damage as a result of Mr Dangi's actions and lost out on work from Auckland Council.

²⁰ [2009] ERNZ 284

[116] These were assertions made by Mr Sadler at the Authority's investigation meeting with very little detail. No supporting documents such as financial or other reports detailing loss of business and potential business were provided.

Ninth Issue

If the Authority determines that Mr Dangi is in breach of his obligations to Ecommbi and of clauses in his employment agreement, is he liable to penalties?

[117] Given the Authority's findings, this issue does not require determination.

Tenth Issue

Has Ecommbi failed to pay Mr Dangi expenses reasonably incurred by him during his employment by it? If so, is Ecommbi liable to a penalty for breach of Mr Dangi's employment agreement and for delaying payment of his final pay?

[118] Mr Dangi gave evidence that his final pay was not paid to him until 24 June 2016, almost 3 months after he left Ecommbi. Ms Corbett accepted that she had not paid Mr Dangi's final pay pending Ecommbi's investigation into potential breaches by him of his post-employment obligations. Further, Ecommbi has failed to pay Mr Dangi his parking expenses of \$250.

[119] An employer is not entitled to withhold payments to which an employee is legally entitled because the employer considers there may be potential breaches by the employee of obligations owing to it. In fact, the Authority has found that Mr Dangi has not breached his post-employment obligations to Ecommbi.

[120] I order Ecommbi to pay Mr Dangi the sum of \$250 to reimburse him for expenses incurred by him whilst employed by it. Payment is to be made within 28 days of the date of this determination.

Penalties

[121] Mr Dangi seeks penalties against Ecommbi for its breaches of his employment agreement in failing to pay him his final pay when due and in failing to pay his reasonably incurred expenses.

[122] Ecommbi has taken no steps to pay Mr Dangi's expenses. Clause 7.3 of his employment agreement states:

7.3 Reimbursement of expenses

The Employee shall be entitled to reimbursement by the Employer of all expenses reasonably and properly incurred by the Employee in the performance of their duties, provided the Employee produces appropriate receipts to the Employer when requesting reimbursement.

[123] Mr Dangi provided Ecommbi with evidence of parking expenses incurred by him.

[124] Section 134 of the Act states:

Penalties for breach of employment agreement

(1) Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.

[125] Under s.135 (2), a company is liable to a penalty not exceeding \$20,000, for breach of an employment agreement.

[126] Mr Dangi was entitled to payment of his annual leave at the conclusion of his employment. Ecommbi has accepted that it did not pay Mr Dangi his final pay at the conclusion of his employment by it, because it was investigating potential post-employment obligation breaches by him.

[127] Under s.75 of the Holidays Act 2003, the failure of an employer company to comply with provisions of the Holidays Act including payment for annual holidays incurs a penalty not exceeding \$20,000.

[128] Mr Dangi is seeking payment of penalties in respect of these breaches.

[129] The Full Bench of the Employment Court set out a four step process which is to be adopted when a penalty is being assessed by the Authority to ensure that there is a consistent and reasonably predictable result with penalties across the board²¹. The Court also set out the relevant factors to be considered when imposing a penalty.²²

[130] These factors have been taken into account by me when assessing penalties in this matter. Below is a brief summary by me of the relevant factors:

²¹ *Borsboom v Preet Pvt Ltd* [2016] NZEmpC 143

²² *Ibid*, [65]-[68]

- a. The breaches by Ecommbi were deliberate. With regard to Mr Dangi's final pay, payment was delayed by Ecommbi for a number of weeks after Mr Dangi's final day of employment.
- b. While the sums involved may not be large, a penalty is needed to act as a deterrent, not only to Ecommbi but also to the wider community of employers. It is not appropriate for an employer to deliberately breach fundamental terms of an employment agreement or minimum standards legislation.
- c. The deliberate nature of the breaches is highly undesirable and the Authority must impose a penalty at a level that signals its disapproval of such conduct and which acts as a deterrent to Ecommbi and other employers who may not be minded to abide by their statutory obligations.
- d. In terms of the type and nature and extent of the breaches that the Authority regularly has to deal with, I consider this at the lower end of the scale.

[131] Ecommbi is liable for penalties totalling \$40,000 for the breaches of the Act and the Holidays Act.

[132] Standing back and assessing the proportionality of the outcome, I consider a penalty of 10% of the total penalty Ecommbi is liable for, to be an appropriate penalty in this case.

[133] Accordingly, Ecommbi is ordered to pay a penalty of \$4,000 under s.136 of the Act to the Authority within 28 days of the date of this determination. The entire penalty is to be paid to Mr Dangi.

Costs

[134] Mr Dangi has 14 days from the date of this determination to file and serve his submissions as to costs. Ecommbi has 14 days within which to file its submissions as to costs in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority