

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 259
5375907**

BETWEEN

KELLY SERVICES (NEW
ZEALAND) LIMITED
Applicant

AND

JANET POTTINGER
First Respondent
NINE DOT CONSULTING
LIMITED
Second Respondent
KIRI CAREW
Third Respondent

Member of Authority: Eleanor Robinson

Representatives: Tim McGinn, Counsel for Applicant
Richard Harrison, Counsel for Respondents

Investigation Meeting: On the papers

Submissions Received: 13 and 20 July 2012

Determination: 31 July 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Kelly Services (New Zealand) Limited (Kelly Services) in a Statement of Problem dated filed in the Authority on 28 March 2012 sought an interim injunction, in addition to a number of other orders, against the Respondents, Ms Janet Pottinger and Ms Kiri Carew, former employees of Kelly Services, and Nine Dot Consultancy Limited (Nine Dot),

[2] In determination [2012] NZERA Auckland 150 the Authority granted interim relief to the Applicant, Kelly Services. This determination was upheld by the Employment Court in a judgment dated 28 June 2012. As a result of the interim order of the Authority the Respondents must avoid canvassing or soliciting or accepting business or work from customers of Kelly Services with whom Ms Pottinger and Ms Carew have had dealings in the twelve months prior to their respective terminations of employment. The interim order is effective until 12 September 2012 in the case of Ms Pottinger, and 14 September 2012 in the case of Ms Carew.

[3] The issue before the Authority now for determination is the scope of the interim order identifying customers in relation to that matter.

[4] The parties agreed to the Authority determining this issue based on submissions from the parties.

Background Facts

[5] Kelly Services is a recruitment consultancy with offices throughout New Zealand, recruiting staff for clients in the areas of permanent and temporary employment.

[6] Both Ms Pottinger and Ms Carew were employed at the Greater South Auckland (“GSA”) branch of Kelly Services as Manager and Business Development Manager respectively. Ms Pottinger resigned her employment with Kelly Services on 11 March 2012 and Ms Carew on 14 March 2012. Ms Pottinger and Ms Carew subsequently became employees of Nine Dot.

[7] Ms Pottinger and Ms Carew were employed subject to individual employment agreements (the Employment Agreements) with Kelly Services, clause 69 of which stated:

69. In the event of the termination of your employment by either party, you agree that you will, for a period of six (6) months from the date of termination, not personally or as a shareholder, director, partner, employee or in any other capacity, directly or indirectly:

- *Canvass, solicit, entice or otherwise deal with any employees, agents, officers or consultants of the employer any of whom you have met as a result of your employment with the employer to end their employment or other relationship, or employ or engage them;*
- *Canvass or solicit any of the employer’s customers with whom you had dealings in the twelve (12) months prior to terminating your employment;*
- *Accept business or work from any customers of the employer with whom you had dealings in the twelve (12) months prior to terminating your employment;*
- *Procure or assist anyone else to breach any of the covenants contained within this paragraph.*

Determination

[8] This determination is primarily concerned with the second and third points in clause 69 which refer to customers of Kelly Services with whom Ms Pottinger and Ms Carew have had dealings in the previous twelve months.

[9] There are two qualifiers contained within the clause: the first qualifier is that the prospective customers (of Nine Dot) are customers of Kelly Services, and the second qualifier is that Ms Pottinger and /or Ms Carew had dealings with these Kelly Services customers in the preceding 12 months.

First Qualifier: Customers

[10] There is no dispute between the parties that ‘customers’ refers to actual customers and not prospective customers of Kelly Services.

[11] I accept Mr McGinn’s submissions that Kelly Services must have provided services for the customer in return for payment. I also accept that a customer definition would include any person or company who had entered into an agreement with Kelly Services to provide those services.

[12] Whilst in the majority of cases there will be clear evidence of a customer relationship by way of an invoice, in some cases the agreement to provide those services might not have eventuated in an invoice. In this latter situation, it would be reasonable to expect that there would be some form of documentation or other evidence confirming the relationship and nature of the services to be provided.

[13] Kelly Services is a recruitment consultancy with offices throughout New Zealand. In this situation it is possible that an employee in Dunedin for example may enter into an agreement to provide services to a customer who also has a nation-wide presence. It is in this situation that the second qualifier has application.

Second qualifier: Ms Pottinger and/or Ms Carew ‘had dealings’ with the customers

[14] The New Zealand Oxford dictionary defines ‘dealings’ as “*contacts or transactions esp. in business*”¹. The Oxford Dictionaries online defines it as ‘*business transactions or*

¹ The New Zealand Oxford Dictionary, pub by Oxford University Press 2005

relations". In the Employment Court case *Enterprise Staff Consultants Ltd v Durno*² Travis J in considering the words 'any dealings' stated:

There is an issue as to whether the words "any dealings" amount to a prevention of all competition and not merely unfair competition. I am not satisfied at this stage that those words are capable of bearing the meanings claimed by Ms Latimer, preferring to accept Miss Meechan's submissions that they are synonymous with the wider concept of soliciting clients referred to in cases such as Dee Jay Distributors Ltd v Spring unreported, Goddard CJ, 12 April 1995, WEC24/95 where it was accepted for present purposes that the word 'solicit' was one of broad meaning and did not need proof of earnest entreaty "Any indication of a willingness to do business is probably sufficient".

[15] I consider that to qualify as a customer for the purposes of clause 69, there needs to be evidence of a business relationship with Kelly Services for which the issuing of an invoice or other evidence confirming an agreement to provide future services would suffice, (the first qualifier) together with evidence that Ms Pottinger and/or Ms Carew had dealings with these customers, for which evidence that either Ms Pottinger or Ms Carew, or indeed both, had had business related transactions, for example by means of a visit to that customer (the second qualifier).

[16] I do not consider that the fact that an invoice had been issued by another branch of Kelly Services to that at which Ms Pottinger and Ms Carew had worked acts as a limitation on the definition of 'a customer' provided that Ms Pottinger and/or Ms Carew had dealings with the customer.

[17] There has been agreement between the parties concerning a number of clients who qualify under clause 69 of the Employment Agreements in accordance with the two qualifier definitions as being affected by the interim injunction. These clients' details are attached to this determination as Schedule 1.

[18] There are an additional number of customers Kelly Services claims are also affected pursuant to clause 69 of the Employment Agreements and these are in dispute. I shall address each of these separately according to the two qualifiers.

[19] Kelly Services have supplied invoices and/or other evidence to confirm that the customer was an actual customer of Kelly Services, and lists of Client Visits planned for various weeks (client visit lists) during the relevant period of Ms Pottinger and Ms Carew's

² [1998] 3 ERNZ 547

employment to assist in establishing whether or not of Ms Pottinger and Ms Carew had dealings with these customers.

[20] I shall address the process of identifying which of the disputed customers are subject to the directions contained in the Authority's determination granting interim relief to the Applicant on an individual company basis.

Alto

[21] Kelly Services invoiced Alto Plastic Packaging (NZ) Ltd (Alto) on 11 March 2012, tax invoice number 35728. According to the affidavit evidence of Mr James Nutt, (Exhibit note "JN 2"), Auckland Sales Manager of Kelly Services, Kelly Services provided permanent and temporary staff to Alto who were invoiced on a weekly basis.

[22] There are no visits to Alto recorded as having been made by either Ms Pottinger or Ms Carew to Alto on the client visits lists, although other Kelly Services employees are identified as having done so.

[23] I find that there is no evidence that either Ms Pottinger or Ms Carew had dealings with Alto and therefore determine that the Respondents are not precluded from canvassing or soliciting or accepting business or work from Alto.

IRD (Hamilton)

[24] Kelly Services invoiced IRD (Hamilton) on 11 March 2012, tax invoice number 35819. According to the affidavit evidence of Mr Nutt, IRD (Hamilton) was invoiced on a weekly basis.

[25] The client visits lists confirm that Ms Pottinger visited IRD (Hamilton) on 14 September 2011,

[26] I determine that the Respondents are precluded from canvassing or soliciting or accepting business or work from IRD (Hamilton)

Fulton Hogan

[27] Kelly Services invoiced Fulton Hogan Limited (Fulton Hogan) on 6 November 2011, tax invoice number 598849.

[28] The client visits lists confirm that Ms Pottinger visited Fulton Hogan on 9 November 2011.

[29] I determine that the Respondents are precluded from canvassing or soliciting or accepting business or work from Fulton Hogan.

Pacific Brands

[30] Kelly Services have provided customer evidence in the form of a 'screen dump' which shows that Kelly Services had a customer relationship with Yakka NZ Limited (Yakka). A search on the Companies House Register and on the internet confirms Mr Nutt's affidavit evidence that Pacific Brands is the parent company of Yakka.

[31] A 'screen dump' submitted in evidence indicates that Yakka had placed an order with Kelly Services on 28 June 2010, order number 56836. Additionally Kelly Services had invoiced Yakka Apparel Solutions Ltd (Yakka Apparel) on 4 July 2010, tax invoice number 530150.

[32] The client visit lists confirm that Ms Pottinger and Ms Carew both visited Pacific Brands on 25 November 2011.

[33] I determine that the Respondents are precluded from canvassing or soliciting or accepting business or work from, Pacific Brands or its subsidiary companies Yakka and Yakka Apparel.

LSG Sky Chefs

[34] Kelly Services invoiced LSG Sky Chefs New Zealand Limited (LSG Sky Chefs) on 11 March 2012, tax invoice number 36293. According to the affidavit evidence of Mr Nutt, LSG Skycheffs was invoiced on a regular basis.

[35] The client visit lists confirm that Ms Carew visited LSG Sky Chefs on 21 November 2011 and 1 March 2012.

[36] I determine that the Respondents are precluded from canvassing or soliciting or accepting business or work from LSG Sky Chefs.

Watercare

[37] Kelly Services invoiced Watercare Services Limited (Watercare) on 21 May 2012 tax invoice number 43772.

[38] The client visit lists confirm that Ms Pottinger and Ms Carew both visited Watercare on 3 and 27 February 2012.

[39] The invoice to Watercare was issued 3 months after Ms Pottinger and Ms Carew had left the employment of Kelly Services. Although Ms Pottinger and Ms Carew had visited Watercare in February 2012, there is no evidence that Watercare was a customer prior to 21 May 2012

[40] On this basis I determine that the first qualifier has not been met as there is no evidence that Watercare was an actual rather than a prospective customer at the time the client visits were made by Ms Pottinger and Ms Carew. I determine that the Respondents are not precluded from canvassing or soliciting or accepting business or work from Watercare.

The Warehouse

[41] The Warehouse Ltd (The Warehouse) was invoiced on 11 March 2012, tax invoice number 35876. According to the affidavit evidence of Mr Nutt, The Warehouse was invoiced on a regular basis.

[42] The client visit lists confirm that Ms Carew visited The Warehouse on 22 November 2011 and Ms Pottinger and Ms Carew both visited The Warehouse on 12 December 2011.

[43] I determine that the Respondents are precluded from canvassing or soliciting or accepting business or work from The Warehouse.

Farmers DC

[44] Kelly Services have provided customer evidence in the form of two 'screen dumps' which shows that Kelly Services had a customer relationship with Farmers Distribution Group (Farmers DC). One of the screen dumps provides evidence of an invoice having been sent on 3 September 2007, the other records communications regarding orders for the provision of services during November and December 2011.

[45] The client visit lists confirm that Ms Pottinger and Ms Carew both visited Farmers DC on 28 September and 18 October 2011.

[46] I determine that the Respondents are precluded from canvassing or soliciting or accepting business or work from Farmers DC.

Fonterra.

[47] Fonterra Co-Operative Group Limited (Fonterra) was invoiced on 29 August 2010, tax invoice number 536900.

[48] The client visit lists confirm that Ms Carew visited Fonterra on 31 January 2012.

[49] I determine that the Respondents are precluded from canvassing or soliciting or accepting business or work from Fonterra

Linfox

[50] Linfox Logistics Ltd (Linfox) was invoiced on 15 January and 1 April 2012, tax invoice numbers 610933 and 614689 respectively.

[51] Although according to the affidavit evidence of Mr Nutt (Exhibit note "JN 2"), Ms Pottinger visited Linfox on 9 November 2011, I find no confirmation of that on the client visit lists. However the client visit lists do confirm that Ms Carew visited Linfox on 9 and 23 November 2011 and 1 February 2012

[52] I determine that the Respondents are precluded from canvassing or soliciting or accepting business or work from Linfox

Amcor

[53] Amcor Packaging New Zealand Ltd (Amcor) was invoiced as Amcor Business Services on 27 February 2012, tax invoice number 562259.

[54] Mr Nutt's affidavit evidence (Exhibit note "JN 2") notes that it was the parent company which was invoiced; the associated company was Amcor Beverage Cans, which is based in Auckland.

[55] The client visit lists confirm that Ms Carew visited Amcor on 19 October 2011. I find it reasonable to conclude that this was the Amcor operation Amcor Beverage Limited.

[56] On this basis, I determine that the Respondents are precluded from canvassing or soliciting or accepting business or work from Amcor.

Viterra

[57] According to the affidavit evidence of Mr Nutt (Exhibit note "JN 2") on 19 January 2012 Ms Carew submitted a proposal in relation to Viterra NZ Limited (Viterra) whom she visited on 24 and 28 February 2012 as detailed on the client visit lists.

[58] There is no evidence submitted to substantiate that Viterra was a customer of Kelly Services prior to Ms Pottinger and Ms Carew employment with Kelly Services terminating in February and March 2012.

[59] On this basis I determine that the first qualifier has not been met as there is no evidence that Viterra was anything other than a prospective customer at the time the client visits were made by Ms Carew. I determine that the Respondents are not precluded from canvassing or soliciting or accepting business or work from Viterra.

DB Breweries

[60] DB Breweries Ltd (DB Breweries) was invoiced on 5 November 2011, tax invoice number 562259. Additionally there is a screen dump submitted in evidence that confirms that an order was placed by DB Breweries with Kelly Services on 25 June 2006.

[61] The client visit lists confirm that Ms Carew visited DB Breweries on 24 November 2011

[62] I determine that the Respondents are precluded from canvassing or soliciting or accepting business or work from DB Breweries

Ingham

[63] According to the affidavit evidence of Mr Nutt (Exhibit note "JN 2"), Ingham Limited (Ingham) was invoiced by Kelly Services on 5 November 2011. There is no copy of the invoice submitted in evidence.

[64] The client visit lists confirm that Ms Carew visited Ingham on 20 September and 12 November 2011. However without supporting invoice evidence I do not find that Ingham was an actual customer of Kelly Services.

[65] On this basis I determine that the first qualifier has not been met and I determine that the Respondents are not precluded from canvassing or soliciting or accepting business or work from Ingham.

Jack Links

[66] Jack Link's New Zealand Limited (Jack Links) was invoiced on 5 July 2009, tax invoice number 491413.

[67] The client visit lists confirm that Ms Carew visited Jack Links on 19 October 2011

[68] I determine that the Respondents are precluded from canvassing or soliciting or accepting business or work from Jack Links

Frucor

[69] Frucor Beverage Limited (Frucor) was invoiced on 11 March 2012, tax invoice number 36263

[70] The client visit lists confirm that Ms Carew visited Frucor on 8 September, and 5 December 2011, and 1 March 2012. Ms Pottinger visited Frucor on 6 December 2011, and both Ms Carew and Ms Pottinger visited Frucor on 25 February 2012.

[71] I determine that the Respondents are precluded from canvassing or soliciting or accepting business or work from Frucor

Summary

[72] To summarise my findings, in addition to those companies identified in Schedule 1, the following customers are subject to the directions contained in the Authority's determination granting interim relief to the Applicant:

IRD (Hamilton)

Fulton Hogan

Pacific Brands

LSG Sky Chefs

The Warehouse

Farmers DC

Fonterra

Linfox

Ancor

DH Breweries

Jack Links

Frucor

[73] The following companies I have not determined as being subject to the directions containing in the Authority's determination granting interim relief to the Applicant:

Alto

Watercare

Viterra

Ingham

Costs

[74] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority

Eleanor Robinson
Member of the Employment Relations Authority

SCHEDULE 1

Amcor Beverage Cans
Ashland Valvoline NZ
Auckland International Airport
Beak NZ
BOC Group NZ
Bridon New Zealand Ltd
Brinks
Coca Cola Amatil NZ Ltd
Converga
Courier Post
Davey Water Products Ltd
Energiser NZ Ltd
First Contact
Fisher & Paykel Healthcare
Fishpond Ltd
Healthcare Logistics
Hella NZ Ltd
Independent Liquor Ltd
JJ Richards
Marley New Zealand Ltd
MG Markerting
Mondiale Warehousing and Distribution
New Zealand Racing Board
North Power
OfficeMax
Pacific Collcoaters
Progressive
Scholastic Books
Sulo Talbot Ltd
Telegistics
VIP Plastic Packaging (NZ) Ltd
Van der Brink Poultry Ltd
Visy Beverage – PET Plastic
Visy Recycling
Visy Rigid Packaging NZ Ltd