

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 341
5416684

BETWEEN MOBILE VEHICLE TUNING
 & SERVICING (2005)
 LIMITED
 Applicant

A N D REHAAZ DANIELS
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Eddie Bluegum, Counsel for Applicant
 Respondent in person

Investigation meeting: 16 July 2013 at Auckland

Submissions received: 18 July 2013 from Applicant
 23 July 2013 from Respondent

Date of Determination: 7 August 2013

DETERMINATION OF THE AUTHORITY

- A. The non-competition clause in clause 17 of Appendix A of Mr Rehaaz Daniels' individual employment agreement is unreasonable and is not enforceable.**
- B. The Authority declines to modify the clause under section 8 of the Illegal Contracts Act 1970.**
- C. Mr Daniels is not in breach of the confidentiality clauses contained in clauses 13 and 16 of Appendix A of his individual employment agreement.**
- D. Mr Daniels is not in breach of the good faith provisions of the Employment Relations Act 2000.**

E. No order as to costs.

Employment relationship problem

[1] Mobile Vehicle Tuning & Servicing (2005) Limited (MVTS) provides a range of mobile mechanical services and repairs. The services include jump-starts, flushing, oil changes, engine rebuilding, fluid checks, testing, windscreen replacement, balancing, lube services and are provided by technicians from their “mobile” vehicle workshops. MVTS was incorporated on 25 October 2005.

[2] The respondent, Mr Daniels, was employed by MVTS as an automotive technician for 6 years from 15 January 2007 until 21 March 2013. Prior to his employment by MVTS, Mr Daniels had been employed by Hometune, one of MVTS’ competitors.

[3] Mr Daniels and MVTS entered into an individual employment agreement dated 15 January 2007 (the first agreement) which contained confidentiality and non-competition clauses.

[4] In September/October 2010, Mr Daniels and other MVTS staff participated in a “think tank” considering a possible rebrand of MVTS. Mr Daniels and other staff were provided with information including marketing designs, concepts, mock ups of “Go Garage” a possible rebrand of MVTS. The rebrand did not proceed but the owner of MVTS, Mr Tarus Yanakopulos incorporated Go Garage Limited and purchased the licence for the domain address www.garageonthego.co.nz for one year. When the licence for the domain address expired Mr Yanakopulos did not renew it.

[5] On 2 February 2011, Mr Daniels and MVTS entered into a new individual employment agreement (the new employment agreement). This new employment agreement contained the same confidentiality clauses as the first agreement but the non-competition clause was amended to protect MVTS from competition by Mr Daniels in the greater Auckland area for 6 months from the date of termination of his employment.

[6] Towards the end of 2012, Mr Daniels and his wife discussed Mr Daniels setting up his own mobile mechanical service business. Mr and Mrs Daniels were of the view that the increased cost of living and the fact that Mr Daniels had not had an increase in pay might mean they would be better off having their own business. At a

meeting with the operations manager, Mr Stuart Dean in January 2013, Mr Daniels asked for a pay rise but was told it was not to be discussed at that particular meeting. Mr Daniels became disenchanted with his job and he and his wife decided to set up their own mobile vehicle business.

[7] On 21 February 2013, Mr Daniels resigned from his employment at MVTS. On the same day, Mr Daniels incorporated Garage on the Go Limited. Mr Daniels worked out his period of notice with MVTS and on 22 March Mr Daniels began his new mobile mechanical services business. Mr Daniels purchased the domain address www.garageonthego.co.nz which defaults to www.gogarage.co.nz.

[8] MVTS says that by commencing his own business as a mobile vehicle technician within six months of terminating his employment with it, Mr Daniels is in breach of the non-competition clause (“restraint”) in his new employment agreement. Mr Daniels says the restraint is not valid and not enforceable.

[9] MVTS also says that Mr Daniels utilised its confidential information which included marketing designs and concepts, to name his business The Garage on the Go. MVTS says the breach has caused it to suffer damage Mr Daniels denies the claim and says there was one marketing meeting only over 2½ years prior to his resignation and he can not recall the details of what was discussed.

[10] MVTS claims Mr Daniels’ response when he resigned that he was going to work for a friend at his workshop in East Tamaki was misleading and in breach of his obligations of good faith under the Employment Relations Act (“the Act”).

[11] MVTS seeks injunctive relief against Mr Daniels including orders:

- (a) Restraining Mr Daniels from being directly or indirectly interested and engaged in the company, Garage on the Go Limited;
- (b) That the restraint clause be modified to give it effect pursuant to s.8 of the Illegal Contracts Act 1970 in the event the Authority finds the restraint to be unreasonable;
- (c) Restraining Mr Daniels from using the name Garage on the Go Limited and the Domain address www.gogarage.co.nz;

- (d) Restraining Mr Daniels from using MVTs' confidential information and an order for the immediate return of confidential information;
- (e) As to damages and penalties for alleged breaches by Mr Daniels of the employment agreement and the Employment Relations Act 2000 (the Act).

[12] Mr Daniels opposes such orders claiming the restraint to be unreasonable and unenforceable. Mr Daniels also opposes the orders pertaining to breach of the confidentiality clauses in his employment agreement and orders seeking damages and penalties in respect of the alleged breaches claiming he has not acted in breach of them.

[13] Despite attempts by the parties to settle the employment relationship problem between themselves, including attending mediation, no resolution was reached. The matter proceeded to an investigation by the Authority.

Issues

[14] The Authority must determine the following issues:

- (a) Is the restraint contained in clause 17, Appendix A of Mr Daniels' new employment agreement reasonable and enforceable by MVTs;
- (b) If the restraint is not reasonable and enforceable, should the Authority modify it pursuant to s.8 of the Illegal Contracts Act 1970;
- (c) If the restraint of trade clause is reasonable, has Mr Daniels breached it;
- (d) Has Mr Daniels breached the confidentiality clause contained in clause 13 of his employment agreement and in clause 16, Appendix A of his employment agreement;
- (e) If there have been breaches of either the restraint or confidentiality clauses or both, has MVTs suffered any damage;
- (f) If Mr Daniels is in breach of the confidentiality and restraint clauses in his new employment agreement, is he liable to pay a penalty;

- (g) Has Mr Daniels acted in breach of his obligation to act in good faith under s.4 of the Act and if so, is he liable to pay a penalty?

First issue

Is the restraint contained in clause 17, Appendix A of Mr Daniels' new employment agreement reasonable and enforceable by MVTs?

[15] Mr Daniels' first agreement contained a restraint in the following terms:

6. *Competition with employer*

Without the employer's written consent the employee agrees that during employment with the employer the employee will not be directly or indirectly interested, engaged or concerned and any other person, firm or limited company engaged in the business of the employer and further, the employee will not canvas or solicit orders for or from any person, firm or limited company which is in competition with the employer.

The employee will not be engaged in their own business for financial gain, that will give rise to competition with their employer.

[16] Clause 17 of Appendix A of Mr Daniels' new employment agreement dated 2 February 2011 contained the following restraint:

17. *Competition with employer*

Without the employer's written consent the employee agrees that during employment with the employer the employee will not be directly or indirectly interested, engaged or concerned in any other person, firm or limited company engaged in the business of the employer and further, the employee will not canvas or solicit orders for or from any person, firm or limited company which is in competition with the employer.

The employee will not be engaged in their own business of a similar nature to the employer within the Greater Auckland area for a period of six months from the date of termination for financial gain that will give rise to competition with their employer.

(highlighting is the differences between the first and most recent non competition clauses)

[17] In early 2011, Mr Daniels and his wife had a baby. Mr Daniels requested a change to his work hours so that he could spend more time with his young family. A few days after making the request, Mr Dean provided Mr Daniels with a new employment agreement with the changes to work hours requested by Mr Daniels. Mr Daniels accepts that he was given a new employment agreement with changes to

his work hours but did not realise and was not told by Mr Dean that the restraint provision had also been changed. Mr Daniels signed the agreement on the spot.

[18] Mr Dean says he explained the change to the restraint clause to Mr Daniels. I prefer Mr Daniels evidence. Mr Daniels was an experienced technician and was well aware of restraint clauses. Mr Daniels had owned his own automotive business and had had a restraint clause when employed at Home Tune. He had not requested a change to the restraint provision, simply a change in his work hours so he could have more family time in the weekend. I find that Mr Daniels believed the only change to his new employment agreement was to his hours of work and he was not aware despite signing the new employment agreement that the restraint had been altered.

[19] At the time of entering into the new employment agreement Mr Daniels' position was described as "Automotive Technician full time". Mr Daniels' pay rate was \$27.50 per hour and the employment agreement could be terminated by either party on one month's notice.

[20] Mr Daniels was employed as an Automotive Technician to undertake service, repair and breakdown work on MVTs's customers vehicles through out the Greater Auckland area. At the time of his employment Mr Daniels was a very experienced fully qualified automotive technician and had owned his own automotive business in South Africa. Mr Daniels came to MVTs from Home Tune, a competitor of MVTs. Mr Daniels worked for approximately 60% of his time on MVTs's large lease and fleet car customers including Lease Plan, Fleet Smart, Fleet Lease. The other 40% of his time was spent providing service and repair work for MVTs's residential clients, generally individual clients seeking a mobile mechanic to undertake maintenance and repair work.

[21] Mr Daniels resigned from his employment with MVTs on 21 February 2013 and worked out his period of notice which expired on 21 March. On 21 February, Mr Daniels incorporated Garage on the Go Limited of which he is sole director. On 22 March, Garage on the Go began operations as a mobile mechanical services business. The business is a "one man band", Mr Daniels provides the mobile mechanical services.

[22] MVTS says during the course of his employment, Mr Daniels had “*access to a wide range of commercially sensitive and confidential information in addition to having commercial relationships with suppliers, agents and customers*”¹

[23] Mr Stuart Dean says technicians such as Mr Daniels had company laptops to which the bookings each day were emailed but after that MVTS was not aware of what occurred “*on the road*”. Mobile technicians such as Mr Daniels dealt with MVTS’ customers regularly, developed relationships, attended to their own bookings and estimated the cost of jobs. It was Mr Dean who decided that MVTS needed protection. Mr Dean felt the existing restraint in the employment agreement was not fair on MVTS because the industry is highly competitive and staff such as Mr Daniels were in a position of being able to build up a significant knowledge of MVTS’s database. This meant they posed a risk to MVTS’ business if they left and obtained employment in a similar business. Mr Dean redrafted the restraint clause to ensure the restraint applied to employees both during employment and after termination.

[24] When Mr Daniels resigned Mr Dean and Mr Yanakopulos understood he was working for a friend at his workshop in East Tamaki. Neither knew Mr Daniels had set up his own mobile mechanical business.

[25] After Mr Daniels left MVTS, Mr Dean had reason to contact him about a work related matter. Mr Daniels’ wife answered the phone “*The Garage on the Go*”. MVTS says that Mr Daniels’ new business, Garage on the Go, is a mobile vehicle tuning and servicing business in competition with MVTS. It says Garage on the Go provides some of the services offered by MVTS and is a competitor. MVTS says that by setting up his own company, Garage on the Go, Mr Daniels is in breach of the restraint.

[26] The onus is on MVTS of establishing the restraint is enforceable and reasonable at the time the parties entered in to the employment agreement and that the clause was reasonable in the interests of the contracting parties and the public interest².

¹ Applicant’s submissions, para.6

² *Transpacific Industries Group (NZ) Limited v Harris&anor*[2013] NZ EmpC97[para.41]

[27] Counsel for MVTs refers to the proposition of law in *Allright v Canon New Zealand Limited*³ that a:

... restraint of trade is prima facie void and unenforceable unless it can be shown to be necessary to protect the proprietary interests of the former employer.

[28] In determining whether a covenant restricting the activities of employees after termination of their employment, it is first necessary to determine whether the employer has a proprietary interest which is entitled to protection or whether the covenant is merely an attempt to limit or reduce competition.⁴

[29] A restraint is enforceable if the employer has a proprietary interest to be protected. In *Herbert Morris Ltd v. Saxelby*⁵ the Court stated that the only reason for upholding a restraint was that the employer had some proprietary right “*whether in the nature of trade connection or in the nature of trade secrets*” for the protection of which a restraint was “reasonably necessary”.

[30] A “trade secret” was defined in *Lansing Linde Ltd v. Kerr*⁶ as:

“... information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret ...but must be information used in trade or business, and ... the owner must limit the dissemination of it or at least not encourage or permit widespread publication.”

[31] In *Airgas*⁷ Goddard CJ said:

The employer may possess a proprietary interest in trade secrets, confidential information, in its business or trade connections. The employer is permitted to protect its business connection – that is, to prevent the departing employee from enticing its clients or customers. These are the most obvious but not the only examples of legitimate proprietary interest.

[32] Mr Dean referred to MVTs’s client database as being a proprietary interest which needed protection. Mr Dean emailed bookings to each of the mobile mechanics on a daily basis and the mobile mechanics, such as Mr Daniels, dealt with

³ [2008]6 NZELR 367

⁴ *Airgas Compressor Specialists Ltd v. Bryant* [1998] 2 ERNZ 42

⁵ [1916] AC 688 (HL)

⁶ [1991] 1 All ER 418 at 425

⁷ At [54]

the individual customer that had been booked in by Mr Dean. There is no evidence of Mr Daniels accessing the database for his own benefit. There are a number of mobile mechanic companies operating throughout Auckland, including Home Tune from which Mr Daniels had come. A client database is a legitimate protectable interest. However, the restraint protecting such interest must be shown to be no wider than is reasonably necessary to protect that interest.

[33] The restraint in my view is far too wide, is unreasonable and unenforceable. The restraint purports to prevent Mr Daniels from competing with MVTs. There is no definition of “*competitor*” in the employment agreement. Mr Daniels is simply prohibited from being engaged in his own business of a “*similar nature*” to that of MVTs...”*for financial gain that will give rise to competition with MVTs*”. On the face of it the restraint would cover all businesses in the Greater Auckland area providing any type of automotive mechanical servicing and repair work.

[34] At the time of signing the new agreement, Mr Daniels was being paid modestly at \$27.50 an hour. The hourly rate being paid to Mr Daniels was not adequate consideration for the wide and onerous restraint imposed upon him in my view. Further, there was no other form of consideration offered in the form of mutual promises. Mr Daniels had discussed with Mr Dean a change in his work hours after the birth of his child and this had been agreed to, it was not part of a negotiation in respect of the restraint. Mr Daniels was led to believe the only changes to his employment agreement were to his hours of work and did not know the restraint had also been changed.

Second issue

If the restraint of trade clause is not reasonable and enforceable, should the Authority modify it pursuant to s.8 of the Illegal Contracts Act 1970?

[35] Section 8 of the Illegal Contracts Act 1970 provides:

8. Restraints of trade

(1) *Where any provision of any contract constitutes an unreasonable restraint of trade the Court may –*

(a) *delete the provision and give effect to the contract as so amended; or*

(b) *so modify the provision that at the time the contract was entered into the provision as modified would*

have been unreasonable, and give effect to the contract as so modified; or

(c) *where the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand, decline to enforce the contract.*

(2) *The Court may modify a provision under paragraph (b) of subsection (1), notwithstanding that the modification cannot be effected by the deletion of words from the provision.*

[36] I am not persuaded that a restraint such as contained in Mr Daniels' employment agreement was warranted in the circumstances. I am of the view I should not exercise my power under s.8 of the Illegal Contracts Act to modify the restraint.

[37] In light of these findings, I am not required to consider whether Mr Daniels is in breach of the restraint contained in his employment agreement.

Third issue

Has Mr Daniels breached the confidentiality clause contained in clause 13 of his employment agreement and in clause 16, Appendix A of his employment agreement?

[38] Clause 13 of Mr Daniels' new employment agreement contains a confidentiality clause as follows;

13. Confidentiality

Commercial information and material regarding the employer's business which the employee comes into contact with during employment is confidential and is the commercial property of the employer and must not be disclosed to any third party or used in any way except as authorised by the employer.

[39] Clause 16 of Appendix A of Mr Daniels' employment agreement contains the following confidentiality clause:

16. Confidential Information

The employee will treat all information as strictly confidential unless otherwise instructed and will not disclose any information to any person, firm, company or other body unless previously and expressly authorised in writing by the employer.

All transactions, records and information pertaining to the business of the Company, to salary and to terms of employment, shall be held

in strict confidence by the employee, both during the period of employment and also after its termination for a period of six months.

The employee will not use or attempt to use any confidential information in any manner and for any purpose other than the purpose of the business of the employer.

[40] MVTS claimed Mr Daniels had knowledge of its systems and client data base and used these to gain a competitive advantage. There was no evidence Mr Daniels used such information for his own benefit. There are a number of mobile mechanics operating in the Auckland region, including Home Tune, Mr Daniels' former employer. Mr Daniels did recall names of MVTS' clients, the larger ones, but these were not clients of the mobile side of the business and he has not approached or done work for them. As the English Court of Appeal stated in *Littlewoods Organisation Limited v Harris*⁸:

...experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head.

[41] The confidentiality clause in Mr Daniels employment agreement was very general and did not adequately establish what MVTS regarded as confidential information. MVTS claimed Mr Daniels had performed work for one of its clients, Barbara Pengelly. However, Ms Pengelly was a former employee of MVTS, not a client.

[42] Another claimed breach related to the name of Mr Daniels new business. In September 2010, Mr Yanakopulos decided to look into whether he should be rebranding MVTS because the name was "*a mouthful*" and he was considering a change to something "*snappier and easy to remember*".

[43] Mr Yanakopulos enlisted the services of Shout Design, Evolve Marketing and invested \$1,500 for an initial rebrand insight. A "*think tank*" meeting with staff including Mr Daniels was held in approximately October 2010 at McDonalds, Greenlane, at which there were discussions about a possible rebrand of MVTS. Mr Yanakopulos provided staff, including Mr Daniels, with the presentation from Shout Design which included concepts for design and possible new names for MVTS. The presentation included various mock ups and a proposed new logo, Go Garage.

⁸ [1978] 1 AllER 1026 at 1033

[44] The feedback from the staff was that there was no need to rebrand. Mr Yanakopulos discussed the matter further with the office manager, Ms Pamela Browne. For a number of reasons, including the fact that there was a global financial crisis, Mr Yanakopulos decided to “*park*” the proposed rebrand. On the basis that he may revisit rebranding MVTs, Mr Yanakopulos asked Ms Browne to incorporate a company by the name of Go Garage Limited. Mr Yanakopulos also requested Shout Design to register a domain name, gogarage.co.nz. No further work was done with regard to the Go Garage concept. The domain name lapsed after 12 months and was never renewed.

[45] Despite the amount of work that may have occurred behind the scenes, Mr Daniels only participated in one meeting at which the marketing material was provided and as far as he and the other staff were concerned, that was the end of the matter. Mr Daniels was not provided with commercially sensitive information which he has used for his own benefit. Mr Daniels saw a rebrand concept at an initial stage which was never used by MVTs.

[46] Mr Daniels decided to set up his own business in early 2013 after he and his wife discussed the idea and formed the view Mr Daniels could make a better income for his family.

[47] Mr Daniels’ wife and her sister, who had studied marketing became involved and did all the set up arrangements including preparation of marketing documents, development of a website, coming up with a name and logo and incorporating a company. Mr Daniels said he could not remember the name “Go Garage” from the meeting more than 2 years earlier in Greenlane, it was his wife who came up with the name “The Garage on the Go”. I accept that to be the case. There was no evidence that Mr Daniels utilised the information presented to him in one meeting more than 2 years prior to set up his own business.

[48] I do not accept Mr Daniels acted in breach of the confidentiality clause in his employment agreement. As I have made findings that Mr Daniels is not in breach of either the restraint or confidentiality clauses in his employment agreement, it follows that there was no damage suffered by MVTs which can be attributed to any action by Mr Daniels.

Fourth Issue

Has Mr Daniels acted in breach of his obligation to act in good faith under s.4 of the Act and if so, is he liable to pay a penalty?

[49] MVTS allege a breach of the good faith provisions of the Act by Mr Daniels, I do not accept this to have been the case.

[50] Section 4 of the Act states:

4. ***Parties to employment relationship to deal with each other in good faith***

(1) *The parties to an employment relationship specified in subsection(2)-*

- (a) *must deal with each other in good faith; and*
- (b) *without limiting paragraph (a), must not, whether directly or indirectly, do anything-*
 - (i) *to mislead or deceive each other; or*
 - (ii) *that is likely to mislead or deceive each other.*

[51] The Court of Appeal in *Bridge v Big Save Furniture Ltd*⁹, in relation to the employee's duty of fidelity, stated:

It is one thing to plan to leave your employer and set up a competing business if you proceed with discretion. It is quite another, in my view, to do so in such a way that your plans become widely known but without telling your employer, and in a way that is potentially damaging to your employer.

[52] The Employment Court in that same case made it clear that an employee intending to enter in to business for themselves may do many things in preparation for that event, even if ultimately they intend to compete with their employer. However, in doing so the employee can not act against the interests of the employer.

[53] Mr Daniels decided to set up his own business and did not hide that fact from his employer. Submissions on behalf of MVTS allege that before resigning Mr Daniels may have purchased his own vehicle, had the vehicle sign written, designed a website offering cheaper prices than MVTS. There was no evidence that Mr Daniels purchased a new vehicle for his business but even if he did, this is not in breach of his duties of good faith, nor is the design of a website, these are actions of an employee preparing to set up their own business. The prices advertised on the website were not confidential, that information was already in the public domain.

⁹ [1994] 2ERNZ 507

[54] Given my findings I do not need to consider the issue of penalties.

Costs

[55] Mr Daniels was not represented and so no costs order is to be made.

Anna Fitzgibbon
Member of the Employment Relations Authority