

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 92/07
5091601

BETWEEN URLWIN McDONALD and
CLIENTS LIMITED
Applicant

AND NIVEN BOYLE
Respondent

Member of Authority: Paul Montgomery

Representatives: Scott Wilson, Counsel for Applicant
Tim McGinn, Counsel for Respondent

Investigation Meeting: 24 July 2007 at Christchurch

Determination: 6 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter is an application for injunctive relief by the applicant, Urlwin McDonald and Clients Limited (UMC) in respect of a former employee, Mr Niven Boyle.

[2] The company says that Mr Boyle is in breach of his obligations to his former employer in that he is alleged to have solicited, while still an employee of UMC, the business of three very significant clients. Mr Boyle's role at UMC was to place media advertising on behalf of the applicant company's clients. UMC says Mr Boyle sought to secure the business of these companies to commence business on his own behalf.

[3] Mr Boyle says that he has not breached his obligations to UMC and neither has he attempted to gain the business of the three UMC clients for his newly established enterprise while employed by UMC.

[4] Both parties have given undertakings as to damages in the event that the Authority, at the determination of the substantive issues, finds either party has suffered financial loss.

The test

[5] When considering an application of this type, the test to be applied comprises three considerations.

- Whether the applicant has established an arguable case or a serious question to be tried;
- Whether the balance of convenience favours the granting of interim relief;
- Whether consideration of the overall justice of the case favours the granting of the relief sought.

The arguable case

[6] At the heart of this issue is whether Mr Boyle, who had given notice to UMC of his departure, acted in breach of his obligations to the applicant in respect of Computer Power Institute (CPI), New Zealand School of Travel and Tourism (NZSTT) and the Hunter Group.

[7] Prior to the hearing of this application, in an email to Mr Wilson, counsel for Mr Boyle conceded that there was *an arguable case of breach of fidelity only*. The respondent's position is that in respect of the allegations regarding CPI and NZSTT there is a relatively weak arguable case, but in respect of the allegation involving the Hunter Group, there is no arguable case.

[8] On that basis, I accept there is a serious issue to be tried in this matter.

The balance of convenience

[9] For the applicant, it is argued that UMC would lose significant revenue in the event the relief is not granted. It submits that CPI and NZSTT are high users of the media and that Hunter Group, although a recent *capture* after very considerable effort, is potentially among the company's high volume media users.

[10] Further, it submits that Mr Boyle was responsible for securing and managing the CPI and NZSTT accounts and securing the media business of the Hunter Group for UMC. It says the respondent was the primary point of contact of these organisations and had close working relationships with their senior executives.

[11] The applicant says that in relation to the Hunter Group account, Mr Boyle concealed his actions from his employers and says the respondent's explanations are highly implausible. Mr Boyle strongly contests this assertion.

[12] The respondent submitted that if the relief was granted, then Mr Boyle would be prevented from earning his living and any reverting to a previous position, as opposed to holding the status quo, runs the risk of having a final result – the demise of the respondent's company.

[13] From the affidavits, it appears that all three organisations are recent acquisitions so any financial loss by the applicant is predominantly a future loss. That loss can be constrained by promptly setting a fixture for the substantive matter to be investigated. Any loss to the applicant can be easily identified.

[14] Considering the relative hardship likely to be suffered by the parties, and in the light of my decision that damages will provide a sufficient remedy should the applicant succeed when the substantive matter is investigated, I find the balance of convenience lies in favour of the respondent.

The overall justice of the case

[15] The consideration of overall justice involves a process in which the Authority stands back from the details of the case and has regard in the more general way to the situation disclosed in the affidavits. Of importance in this matter, at least at this early stage of the proceedings, the respondent's defence looks to be relatively strong.

[16] In particular, I refer to the affidavits of Ms Deans, Mr Roberts and Mr Hunter all of which tend to support the respondent's position.

[17] There is also indication of some extraordinary behaviour on the part of Mr Urlwin. There are also some internal inconsistencies in Mr Urlwin's affidavit. While I accept that affidavits for interim proceedings are prepared in some haste and these inconsistencies may well be able to be explained at the investigation of the

substantive matter, at this preliminary stage they perhaps indicate some uncertainty as to the timing of relevant events.

[18] Having considered the issues in front of the Authority at this initial stage, I find the overall justice of the case favours the respondent.

Determination

[19] The application for interim relief is declined.

[20] The support officer managing this file will contact counsel in the present week for a teleconference to set a date for the substantive investigation meeting.

[21] The parties are directed to mediation at the earliest available opportunity. They are reminded of their obligations in good faith to attempt to resolve the issues between them without further intervention by the Authority.

Paul Montgomery
Member of the Employment Relations Authority