IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2018] NZEmpC 48
EMPC 162/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	JOHN BAYLISS Plaintiff
AND	SOLAR BRIGHT LIMITED Defendant

Hearing:	13 April 2018 (heard at Christchurch)
Appearances:	P Cahill, advocate for the plaintiff No appearance for the defendant
Judgment:	16 May 2018

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Of the various aspects of a relationship problem which Mr John Bayliss originally raised against his former employer, Solar Bright Limited (SBL), only one has been brought to this Court by way of challenge.

[2] It relates to whether Mr Bayliss breached comprehensive non-solicitation restrictive covenants contained in his individual employment agreement (IEA), after his employment with SBL ended.

[3] The background is that Mr Bayliss worked as an engineer for SBL from about March/April 2014 until he was formally dismissed on the grounds of redundancy on 25 May 2016; he was placed on garden leave for the period of notice, which ran from that date until 22 June 2016.

[4] Following an investigation meeting, the Employment Relations Authority (the Authority) determined that Mr Bayliss had not been constructively or actually unjustifiably dismissed from his employment; this conclusion was reached because the Authority considered there was a genuine redundancy that followed a fair process.[1]

[5] Prior to the termination of Mr Bayliss' employment, however, an issue had arisen within the workplace, which the Authority found gave rise to a disadvantage grievance; it determined that he had been unjustifiably suspended from his employment for approximately a month, and lost the benefit of the use of his company car for five weeks. SBL was accordingly ordered to pay $5,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), and $1,730.76 as compensation for the lost use of the vehicle under s 123(1)(c)(ii). No order was made for a penalty for a breach of good faith.

[6] There was a dispute as to whether Mr Bayliss owed money to SBL and/or whether certain monies which had been deducted from his salary should be reimbursed. The Authority ordered the parties to attempt to resolve these issues directly, if need be at mediation.

[7] Turning to the restrictive covenants for non-solicitation which applied for a period of six months following termination of employment, the Authority modified these provisions so that they took effect from the commencement of the garden leave period on 25 May 2016. Otherwise, it was determined that they were reasonable and enforceable. That conclusion is not challenged.

[8] However, the Authority went on to make the following factual findings on the basis of the covenants:

> [108] Mr Bayliss says even if he is bound by restrictive covenants he has not solicited in breach of his employment agreement. Although he accepts that both Solar Bright and his new employer are in the lighting market and that there is some overlap in the products they sell he says his new employer is in the wholesale market. I find, having heard the evidence, that Bright Light is a competitor in the LED market.

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1 *Bayliss v Solar Bright Ltd* [2017] NZERA Christchurch 90.

> [109] Mr Bayliss agreed that he had made contact with the four customers referred to in Solar Bright's lawyer's letter. They are all customers of Solar Bright. The communications commenced from early September.
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> [110] Mr Bayliss initiated communication with an individual at Queenstown airport by email on 1 September 2016 advising that he had moved on from Solar Bright and wanted the individual's cell phone so that he could *give him a buzz*. Further interactions appear to have taken place in December/January. Whilst Mr Bayliss says that Queenstown airport will never be a customer of Bright Light they use engineers who specify Bright Light products in their design. There was the ability therefore to influence. I find that that contact was in the nature of canvasing/soliciting in breach of clause 17.1.1 and interference in breach of clause 17.1.3.
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> [111] Emails were sent on 9 September and 11 October 2016 by Mr Bayliss to an individual from the CDHB. Mr Bayliss again advises he had moved on from Solar Bright and wants to chat and needs a cell phone number. CDHB is another organisation who uses an engineer that specifies Bright Light products in their designs. There was no response to Mr Bayliss's email. This was, I find, in all likelihood an attempt to canvas or interfere but there is no evidence that any damage could flow as a result because the email was not responded to.
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> [112] There was contact by Mr Bayliss with Signz NZ and a request for pricing. Mr Bayliss says that they have been a customer of Bright Light for some years and the product they purchase is not sold by Solar Bright. I cannot be satisfied there was a breach of the restrictive covenants in terms of that customer.
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> [113] The final information disclosed about contact was that initiated by Mr Bayliss with an individual from a company called Innotrade. There is an email dated 1 September 2016 from Mr Bayliss to this individual again advising he has moved on from Solar Bright and wanted a cell phone number. The number was provided and he visited the individual on 8 September 2016. Mr Bayliss said he simply wanted a social chat but he did end up discussing possible solutions to lighting problems that Solar Bright had been unable to resolve. He suggested products that he said were not part of the Solar Bright portfolio and left information. I find that there was a breach of clause 17.1.1 in that Mr Bayliss tried to canvas or solicit the customer of Solar Bright. There was a breach of clause 17.1.3 that there was interference with the relationship between Solar Bright and its customers. There was a breach of clause 17.1.4 in that there was a referring away from Solar Bright to Bright Light.
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> [114] I have concluded that there were breaches of the restrictive covenants with contact by Mr Bayliss with three of the four customers.

[9] It is these findings which are the subject of the non de novo challenge.

[10] The issue which the Court must resolve, then, is whether the Authority erred in reaching its conclusions that there were breaches of the restrictive covenants with respect to three customers.

[11] Initially, SBL was represented by counsel; for the purposes of this challenge, a statement of defence was filed and a separate challenge was brought by SBL against the Authority's determination.

[12] A telephone directions conference was convened on 15 September 2017, attended by representatives for both parties. Counsel for SBL stated that the defendant would file a notice of discontinuance in respect of the challenge which it had brought. Accordingly, the Court was not required to consider that challenge further. At the same telephone conference, a timetable for disposition of Mr Bayliss' challenge was established, with a minute being sent to counsel for SBL later that day confirming the Court's directions which included the date of hearing.

[13] On 26 October 2017, SBL filed a memorandum stating it was now unrepresented.

[14] On 21 December 2017, the Registrar confirmed to the parties the date of hearing for Mr Bayliss' challenge which had been referred to at the initial timetabling conference: that is, 13 April 2018.

[15] There was no appearance for the company at the hearing. I am satisfied that appropriate notice of that hearing was provided to it.

[16] For the purposes of Mr Bayliss' challenge, the Court was provided with a bundle of documents which had previously been before the Authority. Mr Bayliss gave oral evidence, in which he had the opportunity of explaining fully the surrounding circumstances with regard to the alleged breaches of the non-solicitation covenants. I shall refer to his evidence shortly.

Clause 17 of the IEA

[17] The starting point for a consideration of the factual findings which are under review is cl 17.1 of the IEA, which states:

> **17. Non-Solicitation**

17.1 Save in the event that the Employee is recalled to the New Zealand Military, the Employee acknowledges and agrees with the Employer that they shall not for a period of six months after the termination of this Agreement for whatever reason, either solely or jointly, whether directly or indirectly, within New Zealand:

17.1.1 canvas, procure or solicit in competition with the Employer the custom of any person or entity who has at any time during the period of this Agreement been a client, customer or supplier of the Employer;

17.1.2 accept an offer of employment from, provide services to or engage in any competing business or activity to the Employer or any business or activity similar to or like the business or a material part of the business of the Employer;

17.1.3 interfere with the relationship between the business of the Employer and its customers, employees, clients, contractors or suppliers; or

17.1.4 accept, refer away from the Employer to any person/entity or undertake work for any previous customer or client of the Employer, who was a customer or client of the Employer during the term of this Agreement;

17.1.5 employ, or offer employment, or cause employment to be offered, to any person or entity that at any time during the period of six months before such termination shall have been an employee or contractor of the Employer.

[18] Applying standard principles of interpretation,[2] several points may be made about these provisions.

[19] First, as already indicated, the question of whether the restrictive covenants are reasonable and enforceable was the subject of findings by the Authority. Because no challenge has been brought in respect of those conclusions, the Court is not required to consider that topic further. I proceed on the basis that the clause is fair and reasonable, subject only to the modification that its six-month term took effect at the commencement of Mr Bayliss' garden leave, 25 May 2016.

[20] Second, it is to be noted that the preamble is cast in the broadest possible terms. The various limitations are to apply for six months "for whatever reason, either solely or jointly, whether directly or indirectly, within New Zealand".

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[2] Conveniently summarised with regard to provisions of this kind by Judge Ford in *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153 at [25].

[21] Third, cl 17.1.1 captures the act of canvassing, procuring or soliciting the custom of any person or entity who has been a client, customer or supplier of the employer, if it occurs "in competition with that employer". Such a qualification does not apply to the other clauses which are in issue in this challenge, cls 17.1.3 and 17.1.4.

[22] Next, in his submissions, Mr Cahill submitted that the term "solicitation" involved "an attempt to increase the number of one's actual or potential clientele". He said that this does not merely mean "to contact". He went on to argue that proof of solicitation must require evidence of a request, and then the negotiation of price.

[23] I agree that solicitation is a type of contact, and that not all examples of contact fall within the parameters of the clause. That said, solicitation is a broad concept. The relevant definition contained in Black's Law Dictionary emphasises that it involves, inter alia, "an attempt or effort to gain business".[3] The Oxford English Dictionary captures the same definition, by referring to the act of asking for or trying to obtain something from someone.[4] Thus, it is clear that an attempt to solicit will suffice as Mr Cahill acknowledged; but "negotiation of price" is not an essential prerequisite.

[24] Although cl 17.1.1 precludes canvassing, procuring or soliciting – whether directly or indirectly – later clauses involve the potentially different concepts of interference with customer relationships (cl 17.1.3), and accepting, referring away and undertaking qualifying work (cl 17.1.4), again, directly or indirectly. However, there may be overlap in the scope of these sub-clauses. They all fall for analysis.

Discussion

[25] It is now necessary to discuss the circumstances of the three entities in respect of which the Authority found there was a qualifying breach. There is no dispute that these entities were, as the Authority determined, customers of SBL.[5]

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3 Bryan A Garner (ed) *Black's Law Dictionary* (10th ed, Thomson Reuters, USA, 2014).
4 Concise Oxford English Dictionary (11th ed, Oxford University Press, Oxford 2008).
5 At [109].

Queenstown Airport

[26] The focus of the Authority's finding was on an email sent on 1 September 2016 by Mr Bayliss to Mr Joe Gurney, who worked at Queenstown Airport. In it Mr Bayliss advised he had moved on from SBL, and wanted Mr Gurney's cell phone number so that he could call him.

[27] This email, and others also referred to by the Authority, were not provided to the Court. However, their content was summarised in the Authority's determination and is not in issue.

[28] In his evidence, Mr Bayliss stated that he spoke to "Stephen" from Cosgrove & Major Consulting Engineers Ltd (Cosgroves), an entity which was an existing customer of Mr Bayliss' new employer, Bright Lights Ltd (BLL). The Court was told that Cosgroves specified LED lighting products for use at Queenstown Airport. BLL would provide these on a wholesale basis to lighting specifiers such as Cosgroves, other electrical consulting engineers, and architects.

[29] Mr Bayliss stated that he was "advised" that it might be a good idea to contact Mr Gurney, as a courtesy, so as to tell him that he was now speaking to Cosgroves about LED products. He emphasised that this was purely a matter of courtesy.

[30] The conversation in which the advice was given occurred, he said, a few days before he sent the email on 1 September 2016; he said the two events were connected.

[31] The Authority referred to the fact that further interactions appeared to have taken place in December 2016/January 2017. Mr Bayliss said this was not the case. He understood that SBL had communicated with Mr Gurney; he had confirmed receipt of Mr Bayliss' email and that no response had been given by him to Mr Bayliss. It appears the Authority may have been referring to SBL's interactions with Mr Gurney.

[32] The Authority found on the evidence before it that there was an ability to influence; and that the contact in this case was in the nature of canvassing/soliciting in breach of cl 17.1.1. It also found there was interference with SBL's relationship with its customers, under cl 17.1.3.

[33] However, as mentioned, Mr Bayliss told the Court that Cosgroves was an existing customer of BLL. Such a fact could provide an outright defence, unless SBL and BLL competed on a project by project basis.

[34] It appears neither party provided evidence on these issues to the Authority. It is unsurprising that the Authority reached the conclusion it did on the evidence before it, but having regard to the further evidence given to the Court, I have concluded it would be unsafe to affirm the conclusion that cl 17.1 was breached. The challenge is accordingly allowed in respect of this aspect of the determination.

Canterbury District Health Board

[35] The next contact to be reviewed involves emails sent on 9 September and 11 October 2016.

[36] Mr Bayliss said that the emails were sent to a Canterbury DHB employee who came from Doncaster in the United Kingdom as does Mr Bayliss; he could not recall the individual's surname. He said they got on well and he regarded him as an acquaintance.

[37] The Authority found that Mr Bayliss had advised the recipient he had moved on from SBL, and wanted to chat and needed a cell phone number to do so.

[38] Initially, Mr Bayliss told the Court he was absolutely certain he sent one email only, though he then accepted that he may have sent a second email as a chaser. There was no response.

[39] However, he stated that subsequently when he was a patient in a Canterbury DHB hospital, he received a visit from the person concerned which he said illustrated the personal nature of their relationship.

[40] Relying on a retail/wholesale distinction, Mr Bayliss said that whilst SBL provided LED lighting products to the Canterbury DHB, BLL did not. That said, a BLL customer was Opus Ltd (Opus), with whom Canterbury DHB contracted its electrical work. He said that in about September or October 2016, he spoke to an Opus

representative to promote BLL products. He thought the name of Canterbury DHB might have come up in that conversation. However, Mr Bayliss said that he did not state his former employer had also supplied LED products to that client.

[41] The Authority found that the sending of an email by Mr Bayliss was in all likelihood an attempt to canvas or interfere in breach of cl 17.1.1. But it noted there was no evidence any damage could flow as a result because the email was not responded to.

[42] Mr Bayliss' key point was that SBL retailed LED lighting products to customers such as Canterbury DHB; by contrast BLL operated in the wholesale market.

[43] I find that having regard to the broad language used in cl 17 with its reference to "direct and indirect" solicitation, the fact that the form of supply differs does not rule out potential liability under cl 17.1.1.

[44] Mr Bayliss also told the Court that the lighting market is a "broad church", and that the type of LED products sold by SBL and BLL were quite different. Again, I do not consider that distinction to be dispositive. Both sold LED products. Accordingly, they were indirectly in competition for the purposes of cl 17.1.1.

[45] I also find there was an indirect attempt, by the sending of the email, to canvas and solicit, so that there was a breach of cl 17.1.1.

[46] In short, I find there is no error in the Authority's reasoning with regard to its Canterbury DHB findings.

Innotrade Ltd

[47] The contact in question also involved an email sent on 1 September 2016 to Innotrade Ltd (Innotrade) which Mr Bayliss said was a building company creating module work spaces in existing buildings. The Authority found that the email had been sent to an Innotrade employee with whom Mr Bayliss had had previous dealings, telling him that he had moved on from SBL; again, he asked for a cell phone number.

The Authority stated the number was provided and he visited the individual on 8 September 2016. None of this is in dispute.

[48] Mr Bayliss told the Court that when he was an employee of SBL, the company had undertaken an instalment for Innotrade in a project in which they were engaged, a warehouse conversion to office space.

[49] Mr Bayliss said the visit to the Innotrade representative was for the purposes of a social chat, although he acknowledged he did discuss possible solutions to a particular lighting problem which SBL had been unable to resolve.

[50] Mr Bayliss emphasised there was a world of difference between the SBL product range and the BLL product range. He said there had been an issue with colour changing lights for Innotrade. SBL had been unable to provide these. BLL could do so. Accordingly, he provided a pamphlet which described the BLL product range, although to his knowledge no transaction eventuated.

[51] The Authority found that these steps involved canvassing or soliciting under cl 17.1.1, and interference with the relationship between SBL and its customers under cl 17.1.3, as well as referring customers away from SBL under cl 17.1.4.

[52] As before, I do not consider the distinction between retail and wholesale supply is a reason for concluding that the restrictive covenants do not apply.

[53] Nor is the fact that SBL could not supply a particular LED product determinative either. SBL is in indirect competition with BLL. The initial email which was sent falls foul of cl 17.1.1 for that reason. That the conversation turned to a discussion regarding a specific product not retailed by SBL, does not assist Mr Bayliss. As the Authority found, as an employee of a competitor, he attempted to canvas and solicit a customer of SBL.

[54] I also agree with the Authority that there was a breach of cls 17.1.3 and 17.1.4, for the reasons given, on the basis there were relevant attempts which fall within these clauses.

[55] I note that although there are two established breaches, each of them involved attempts only, and there is no evidence they were successful.

Conclusion

[56] The challenge is partially allowed. To the extent that my conclusions differ from those of the Authority, this judgment replaces the determination.

[57] There is no issue as to costs.

B A Corkill
Judge

Judgment signed at 4.35 pm on 16 May 2018