



[2] The issue for determination are: has Mr Read breached the agreement? If so, are the remedies sought by the respondent appropriate?

### **Investigation**

[3] During a telephone conference call on 24 November the parties agreed to an investigation in New Plymouth on 14 January 2010.

### **Background and Parties' Positions**

[4] In partnership with his wife, Mr Read had earlier carried on the business of vehicle transportation, operating over the North Island.

[5] The Company approached Mr Read who agreed to sell his business to it. Aspects of the resulting contracts included an agreement that the Company would employ Mr Read in a casual on call basis, and that he was to always act for the benefit of the Company. An individual employment agreement dated 4 March 2009 was concluded by the parties.

[6] In a statement of problem filed on 11 September 2009 the Company alleged Mr Read, in breach of his employment agreement, was continuing to transport vehicles.

[7] Consistent with the employment agreement, the Company sought an injunction preventing Mr Read from working within the vehicle transportation industry until 4 February 2010.

[8] As is made clear above, during an investigation into this employment relationship problem the parties reached an agreement which they asked the Authority to record by way of a consent determination.

[9] In respect of the current problem, the Company relies on evidence that, on 24 October and 17 November 2009 Mr Read was seen transporting vehicles carrying registration plates, and thereby breached the consent determination.

[10] The Company originally sought (non-quantified) damages of not less than \$20,000, costs and orders requiring Mr Read to surrender his heavy transport vehicles and his heavy vehicle driver's licence.

[11] During yesterday's investigation its counsel, Mr Glenn Mason advised that his client – in light of Mr Read's evidence he had declared bankruptcy – was no longer seeking financial damages. It continued to seek costs notwithstanding its appreciation it was unlikely to ever benefit from a costs decision in its favour. It also sought an order directing Mr Read to surrender his heavy driver's licence until the expiry of the period agreed by the parties, i.e. 2 April 2010.

[12] Mr Read opposed the application he be ordered to surrender his driver's licence on various grounds including that he made use of it to transport a stock car belonging to a group that he was a member of, and for which he derived no income, as well as to service his farmlet, help others out and transport parts and equipment from his property, for sale elsewhere (an activity that was not in breach of the consent determination).

[13] Mr Read reiterated he had not acted in breach of the determination. In support of that claim he gave affirmed evidence he had been on a sickness benefit since December 2009, and to undertake paid employment before April 2010 would be in breach of the terms of the benefit and a doctor's certificate.

### **Discussion and Findings**

[14] The Company's evidence in respect of Mr Read's activities was supplied first by way of sworn statements and, at yesterday's investigation, by way of affirmed evidence by the same eye-witness.

[15] Of the 24 October incident, Mr Read agrees he was carrying vehicles but said they were his own. He was not sure of the detail of the second incident, but said that he had not acted in breach of the consent determination at any time. The Company does not accept that claim and is strongly of the view Mr Read has been acting in breach of the consent determination (and, it follows, also his sickness benefit).

[16] The onus is on the applicant, the Company, on a balance of probabilities basis, to establish that Mr Read has acted in breach of the consent determination, in particular that he has transported vehicles “*for reward*” (par 2, i., 1 October 2009 memorandum of consent). I do not accept it has done that as there is no evidence of Mr Read rewarding himself. Mr Read has broadly accounted for the two incidents evidenced by the Company: the latter does not accept, but is unable to contest, his explanations. The Company is asking me to draw an inference: I am not prepared to do so. The benefit of the doubt resides with Mr Read, on the basis of the evidence before the Authority and a resulting balance of probabilities finding.

[17] It is not necessary for me to determine here the Company’s claim that I direct Mr Read to surrender his driving licence. However, for what it is worth, I record here my reluctance to do so, notwithstanding the broad scope of s. 137 of the Employment Relations Act 2000, including the Authority’s discretionary power to “*require ... that person to do any specified thing ... for the purpose of preventing further ... non-compliance*” (ss. 2). I would hesitate to issue such an order as it was not part of the original consent determination, and thus amounts to a significant variation of that determination. It is also a draconian step with significant human rights implications which almost certainly should be removed to the Employment Court as an important question of law.

### **Determination**

[18] The Company’s application is dismissed.

[19] Costs are reserved.

**Denis Asher**

**Member of the Employment Relations Authority**