

BETWEEN EWP SALES LIMITED
Applicant
AND TERRY TIBBITTS
First Respondent

Member of Authority: Eleanor Robinson
Representatives: Rani Amaranathan, Counsel for Applicant
Bridget Smith, Counsel for Respondent
Submissions received: 14 July 2015 from Applicant and from Respondent
Determination: 20 July 2015

SUPPLEMENTARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By determination [2015] NZERA Auckland 196 I found that Mr Terry Tibbitts, Respondent, had failed to comply with clause 6 of the Record of Settlement Agreement (Record of Settlement) between himself and the Applicant, EWP Sales NZ Limited (EWP), entered into pursuant to s 149 of the Employment Relations Act 2000 (the Act).

[2] In that determination, I awarded a penalty against Mr Tibbitts for having breached clause 28, Restraint of Trade, of the EWP Employment Agreement No. 2 as incorporated by clause 6 of the Record of Settlement, and ordered compliance by Mr Tibbitts.

[3] Paragraph 120 stated:

I order that Mr Tibbitts comply with the requirements of clause 6, in particular by complying with clause 28 of the EWP Employment Agreement No 2.

[4] There has now arisen between the parties differing views as to what the phrase: “comply with the requirements of clause 6, in particular by complying with clause 28 of the EWP Employment Agreement No 2” requires Mr Tibbitts to do.

[5] By consent between the parties I shall address this issue by means of a supplementary determination.

Background Facts

[6] EWP was involved in the sale and leasing of elevated work platforms machines and the provision of training to customers in the use of such machines. EWP proposed making Mr Tibbitts' position redundant as a result of which the parties attended mediation on 27 November 2014 which concluded in a Record of Settlement being signed by Mr Tibbitts and EWP.

[7] Clause 6 of the Record of Settlement stated:

The employee agrees to abide by all continuing employment obligations he has and in particular he agrees to comply with the obligations in clauses 24, 27 and 28 of his written employment agreement dated 16 April 2014.

[8] Clause 28 of EWP Employment Agreement No.2 was unclear in its originally existing form and I modified it to accord with the meaning both parties understood it to mean¹ so that it read:

The employee shall not at any time during the term of this agreement and for a period of 12 months after the termination of employment with the employer establish, purchase, or obtain an interest in, either directly or indirectly any business in competition in any way with the employer within a radius of 100km, without the express written consent of the employer, provided that such consent shall not be unreasonably withheld. This clause does not preclude the employee from working in a standard waged or salaried position in a similar business.

[9] Mr Tibbitts last day of employment with EWP was 28 November 2014.

[10] On or about 1 December 2014 Mr Tibbitts and Ms Williams (Mr Tibbitts' partner and sole shareholder and director of Elevated Access New Zealand Limited (Elevated Access) began operating Elevated Access which offers training services and the selling of elevated work machines.

¹ Tibbitts v EWP Sales Limited & UP2IT Access Hire Limited [2015] NZERA Auckland 196 at para [97]

[11] EWP raised a compliance order in respect of a breach by Mr Tibbitts of clause 6 of the Record of Settlement. I determined that the clause had been breached in multiple ways by Mr Tibbitts and that such breach had been flagrant and deliberate, and ordered a penalty to be paid by him in respect of the breach. I stated at paragraph [120] of the determination that:

I order that Mr Tibbitts comply with effect with the requirements of clause 6, in particular by complying with clause 28 of the EWP Employment Agreement No 2.

[12] The determination was issued on 30 June 2015. Ms Williams stated by way of affidavit evidence that on that date she rented offices for Elevated Access in Whangarei and changed the records on the Companies Office website to list the registered office as 34 Porowini Avenue, Morningside, Whangarei.

[13] Mr Tibbitts stated by way of affidavit that the operating premises of Elevated Access has been moved to Whangarei. It is Mr Tibbitts' and Ms Williams' affidavit evidence that:

- He is employed by Elevated Access as a Sales Executive;
- He does not deal with prospects or customers within 100 kms radius of the former EWP premises;
- He has provided training to Ms Williams in selling machines and training courses as she is managing the Auckland region
- Ms Williams is dealing with phone calls and emails from customers within the 100km radius of the former premises of EWP; and
- Ms Williams is organising training courses

[14] EWP's interpretation of the compliance order is that Mr Tibbitts: should

- Cease filling any orders placed prior to 30 June 2015;
- Cancel all training booked prior to 30 June 2015; and
- Cease dealing with any customers or potential customers dealt with prior to 30 June 2015.

[15] The Respondent's interpretation of the compliance order is that:

- By Elevated Access having relocated the operating premises from which it operates to Whangarei, it no longer operates from premises within a 100 km radius of the former premises of EWP;
- Because the order of the Authority is for Mr Tibbitts to comply with the requirements of clause 6 of the Record of Settlement. Elevated Access can continue to offer sales of and training in elevated work platforms provided Mr Tibbitts does not offer any future sales or training to customers who are within a 100 km radius of EWP's former premises;
- Whilst Mr Tibbitts undertakes that he will not do business for Elevated Access Limited within a radius of 100km of the former premises of EWP, this does not prevent him continuing to be employed by Elevated Access Limited and doing business with clients outside of the 100km geographic area and he will continue to do so.

Determination

[16] This determination is to address the scope of the order made at paragraph [120] of determination [2015] NZERA Auckland 196. In order to do so, I make further findings on the following issues:

What does compliance with clause 28 of the EWP Employment Agreement No 2 mean?

[17] Clause 28 of the EWP Employment Agreement No 2 stated:

The employee shall not at any time during the term of this agreement and for a period of 12 months after the termination of employment with the employer establish, purchase, or obtain an interest in, either directly or indirectly any business in competition in any way

[18] In determination [2015] NZERA Auckland 196 I found that at paragraph [102] that Mr Tibbitts had established, purchased or obtained an interest either directly or indirectly in Elevated Access, which was in breach of clause 28 of the EWP Employment Agreement No 2.

[19] The clause was incorporated into the Record of Settlement by means of clause 6 and although I accept that Mr Tibbitts was not legally represented at mediation, he did attend the mediation hearing and I am satisfied that he understood the implications of the terms to which he was agreeing because the mediator, as indicated as at of the s 149 Record of Settlement, explained to the parties the effect of subsection (3) which states:

149 (3)

(a) Those terms are final and binding on, and enforceable by, the parties; and

(b) The terms may not be cancelled under section 7 of the Contractual Remedies Act; and

(c) Except for enforcement purposes, no party may seek to bring those terms before the Authority or court, whether by action, application for review, or otherwise.

[20] In determination [2015] NZERA Auckland 196 I determined that Mr Tibbitts had, by his actions since 27 November 2014, breached the Record of Settlement and clause 28 of the EWP Employment Agreement No 2, and that his actions in so doing were punishable by the imposition of a penalty.

[21] A finding that there has been a breach of the agreed terms in a Record of Settlement does not render the undertakings given in a Record of Settlement agreement null and void to that point. It is a determination by the Authority that a party has not adhered to his or her undertakings given in the Record of Settlement.

[22] Such breaches are enforceable and have been enforceable from the date of signing a Record of Settlement, such that any breach may result in an order for compliance and is punishable by the imposition of a penalty against the party in default.

[23] Mr Tibbitts agreed by virtue of clause 6 of the Record of Settlement that he would not establish or obtain an interest in any business: "*in competition in any way with the employer within a radius of 100km*". I found that he had done so, and imposed a penalty in respect of that breach.

[24] Compliance with clause 28 of the EWP Employment Agreement No 2 means that Mr Tibbitts must do whatever is necessary to comply with the Record of Settlement, as indeed he should have done from the date of entering into the Record of Settlement.

[25] The action by Mr Tibbitts which was in breach of clause 28 of the EWP Employment Agreement No 2 was to: “*establish, purchase or obtain an interest, directly or indirectly*”, in Elevated Access. I find these to be completed actions for which Mr Tibbitts was penalised; however as I have stated in paragraph [22] the prohibitions in this clause continue until the end of the restrictive period and must be complied with..

[26] Having found that Mr Tibbitts has obtained an interest directly or indirectly in Elevated Access and is employed by that company, I must now look to the final term of clause 28 which states:

This clause does not prevent the employee from working in a standard waged or salaried position in a similar business.

[27] I find that this term allows Mr Tibbitts to earn his living by continuing to work in the areas he is fully conversant with, there are no geographical restrictions, however he must be employed in a standard waged or salaried position in order not to be in breach of this term while at the same time complying with the requirement noted in paragraph [22].

[28] The issues therefore are whether or not Mr Tibbitts is employed by Elevated Access in a standard waged or salaried position, as a business in competition in any way with EWP within a radius of 100 km.

[29] In the High Court proceeding² Justice Lang stated at para [22]:

.... Although Elevated Access is a separate legal entity from Mr Tibbitts, it is a family business in every sense of the work. There can also be little doubt that Elevated Access would not exist but for the fact that Mr Tibbitts was prepared to apply his lengthy experience and industry knowledge for its benefit. Moreover, although he does not own shares in the company and is not a director, it must be arguable that he has acquired an interest in the business by virtue of his relationship with Ms Williams. At the very least, the shares in the business are arguably relationship property in respect of which Mr Tibbitts would have an interest under the Property (Relationships) Act 2006. His position with Elevated Access is also arguably not a “standard waged or salaried position” of a type that would be permitted by the clause.

² *EWP Sales Limited, UP2IT Access Hire Limited v Terry Tibbitts & Karen Williams & Elevated Access New Zealand Limited* [2015] NZHC 619, CIV-2015-404-0488

[30] There is no evidence before me that Mr Tibbitts has received a dividend from Elevated Access, or that he is a director. It is therefore necessary to examine the evidence to ascertain on the balance of probabilities whether Mr Tibbitts employment by Elevated Access constitutes immediate compliance with clause 6 of the Record of Settlement.

(i) *A family business*

[31] Mr Tibbitts' evidence for the Investigation Meeting held on 19 and 20 May 2015 was that the effect upon his family would be significant if he could no longer work for Elevated Access.

[32] Mr Tibbitts gave evidence at the Investigation Meeting that payment of the mortgage on the property he owns with Ms Williams would be affected. This was not only in terms of a loss of salary, which impacts adversely on any employee faced with the loss of employment and thereby on mortgage payments; but at the date of the Investigation Meeting, there was evidence that Elevated Access was operating from the family home, which was also the registered office, and which was within the 100 km radius of the former EWP premises.

[33] Although it is submitted that Mr Tibbitts no longer works from the family home - in his affidavit evidence Mr Tibbitts states that: "*I am not working from home.*" - however Mr Tibbitts fails to indicate the address of his work base.

[34] Despite the fact that both Ms Williams and Mr Tibbitts claim that they have relocated the Business of Elevated Access to Whangarei, Ms Williams in her affidavit evidence does not state that she is not operating the business of EWP from the family home, nor does she mention the whereabouts or locations of the purchased stock held by Elevated Access. I also note that in paragraphs 22 -25 of her affidavit Ms Williams gives details of the tasks she is currently undertaking, but does not state the workplace.

[35] Further, in his written evidence for the Investigation Meeting Mr Tibbitts refers to the impact a location move would have on their son, but having now relocated the business, Mr Tibbitts makes no reference to the actions taken to deal with this or the actual consequences that have followed.

[36] As Mr Tibbitts has an interest in the family home, contributes to the mortgage on the property, which he allows to be used for the operational purposes of Elevated Access, with all the resultant consequences relating to taxation, I find it is arguable that he has a direct interest in Elevated Access on that basis, and this does not accord with him allegedly working in a standard waged or salaried position.

[37] More significantly Mr Tibbitts referred in the Investigation Meeting to the devastating financial impact which would impact upon him if there was to be an inability to sell stock and meet customers' orders.

[38] In a normal business environment, these would be concerns for the business and not a standard employee and invites the question as to Mr Tibbitts financial interest in the stockholding. This evidence led me to the conclusion that on the balance of probabilities Mr Tibbitts had an interest directly in Elevated Access, a business in competition with EWP and situated within a 100 km distance of the former EWP premises that transcended the standard employee definition.

[39] I find that these are not matters which usually affect an employee in a standard waged or salaried position.

(ii) *Existence of Elevated Access a result of Mr Tibbitts experience and industry knowledge*

[40] The evidence of Mr Tibbitts and Ms Williams is that Mr Tibbitts is applying his experience and industry knowledge to the training of Ms Williams in order that she can interact with any potential and existing customers of Elevated Access within the 100 km radius of the former EWP premises.

[41] Whilst this had already led me to the conclusion that Elevated Access would not exist but for Mr Tibbitts experience and industry knowledge, I find that an employee in a standard waged or salaried position is not precluded from training other employees, or applying his or her experience and knowledge for the benefit of the business.

(iii) *Shares in the business by virtue of relationship property*

[42] I find that there is a basis for Mr Tibbitts to have acquired an entitlement to a share in the business of Elevated Access as relationship property pursuant to the Property (Relationships) Act 1976.

[43] I find that this is not a claim open to an employee in a standard waged or salaried position.

[44] I find that on the balance of probabilities Mr Tibbitts is not working in a standard waged or salaried position for Elevated Access which would meet the criteria of s 28 of the EWP Employment Agreement No 2.

[45] Moreover whilst Elevated Access may have rented a small office in Whangarei which is the registered office address, it is reasonable to assume that it continues to operate by virtue of Ms Williams' daily involvement from the original operational base and an undisclosed location housing Elevated Access' stock, within a 100km radius of the former EWP premises.

[46] The registered office address of the company is where the company records are kept, and the address for service, it need not be at the company's place of business, indeed it is not determinative of the location of the place of business. For example, many businesses use the addresses of their accountant or solicitor as both their registered office and address for service.

[47] I therefore determine that compliance with clause 28 of the EWP Employment Agreement No 2 as incorporated by clause 6 of the Record of Settlement means that Mr Tibbitts cannot work for Elevated Access.

[48] Pursuant to s 137 (2) of the Act, I order that Mr Tibbitts cease his employment with Elevated Platforms in order to prevent further non – compliance with my order set out in paragraph [120] of determination [2015] NZERA Auckland 196, and paragraph [47] of this supplementary determination.

[49] Pursuant to s137 (3) of the Act this order is to be complied with within 7 days of the date of this supplementary determination.

Should further penalties be awarded against Mr Tibbitts?

[50] As observed, the actions taken by Mr Tibbitts which were in breach of the Record of Settlement are completed actions, for which Mr Tibbitts has been penalised. That penalty was the maximum amount which might be awarded for penalty action against an individual and cannot be exceeded pursuant to s. 135(4) of the Employment Relations Act 2000 (the Act).

[51] I find no basis for awarding further penalties against Mr Tibbitts at this stage.

Does the compliance order mean that Mr Tibbitts should cease filling orders placed prior to 30 June 2015, or that Mr Tibbitts should cease dealing with any customers or potential customers dealt with prior to 30 June 2014?

[52] I have determined that compliance with clause 28 of the EWP Employment Agreement No 2 as incorporated by clause 6 of the Record of Settlement means that Mr

Tibbitts cannot work for Elevated Access with effect from 7 days of the date of this determination. Therefore these actions must cease to be carried out by Mr Tibbitts after this date.

Costs

[53] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority