

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 581
3035854

BETWEEN	EMMITT CONSULTANTS LIMITED Applicant
AND	CHRISTOPHER PEEL Respondent

Member of Authority:	Vicki Campbell
Representatives:	Andrew Schirnack for Applicant Richard Harrison for Respondent
Investigation Meeting:	19 August 2019
Submissions Received:	28 August and 2 September 2019 from Applicant 30 August 2019 from Respondent
Determination:	11 October 2019

DETERMINATION OF THE AUTHORITY

- A. The restraint of trade provisions are reasonable and enforceable and were breached by Mr Peel.**

- C. The parties are directed to mediation.**

- D. Costs are reserved.**

Employment relationship problem

[1] Emmitt Consultants Limited provides quantity surveying services throughout New Zealand and the Pacific for residential dwellings and commercial developments.

Mr Peel was employed by Emmitt Consultants as a Senior Quantity Surveyor from 18 August 2014 until 31 December 2017.

[2] The terms and conditions of Mr Peel's employment were set out in an individual employment agreement which included restrictions on certain activities during his employment and for three months post-employment.

[3] On 28 September 2017 Mr Peel's wife registered a new company called CJM Consultants Limited. The directors and shareholders of the company are Mr Peel and his wife.

[4] Emmitt Consultants claim Mr Peel breached the implied and express terms of his employment agreement both during the relationship and after the employment relationship ended. Mr Peel has admitted breaches during his employment but denies any breaches after the employment relationship ended.

Issues

[5] In order to resolve Emmitt Consultants' application I must determine whether Mr Peel breached any ongoing obligations owed to Emmitt Consultants following the ending of the employment relationship.

[6] With the consent of the parties this determination deals with the liability issue only. Quantum issues will be investigated and determined at time yet to be established.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Alleged Breaches

[8] The employment agreement sets out several restrictions on Mr Peel post-employment including that for a period of three months after the relationship ended Mr Peel would not be involved with the provision of goods or services to any person or entity who at any time during the employment had been a client of Emmitt Consultants.

[9] Emmitt Consultants allege Mr Peel provided quantity surveying services to the Church of Jesus Christ of Latter-day Saints (LDS) following the ending of the employment relationship and within the three month restrictive covenant.

The ending of the employment relationship

[10] In early 2017 Mr Peel advised Mr Nigel Emmitt, the sole director and shareholder of Emmitt Consultants that he believed he would not have enough work to keep him busy as the major work he had been involved in with LDS was coming to an end. The discussion between the two men ended with an agreement that Mr Peel would stay on if Emmitt Consulting was successful in obtaining a major contract that was at that time in the pipeline.

[11] Mr Peel took a period of leave from 28 November returning to work on 11 December. When he returned to work he told Mr Emmitt he was giving notice as he wanted to establish his own business. In accordance with the terms of his employment agreement Mr Peel give four weeks' notice with a last day of work being 31 December 2017.

Post-employment work

[12] Mr Emmitt told me Mr Peel's resignation came at an inconvenient time because it would be difficult to recruit a new senior quantity surveyor at that time of year. Mr Emmitt had four projects Mr Peel had been working on. As it would take a substantial amount of time for a new person to come up to speed with the projects in order to complete the work, Mr Peel and Mr Emmitt agreed Mr Peel would continue the work as an independent consultant through his company CJM Consultants invoicing Emmitt Consultants for the work he completed.

[13] The parties agreed that Mr Peel would finalise the following four projects post-employment:

- a) LDS Stake Centre;
- b) 2 projects for Sime Darby; and
- c) Auckland Transport

[14] Mr Peel used Emmitt Consultants' facilities including its printer from time to time and had retained his access key during the time he completed the four projects.

[15] Mr Peel has provided me with an outline of the consulting work he undertook during the three month period from 31 December 2017 to 31 March 2018. With the exception of one client (Galleon) the remaining seven clients had been or were clients of Emmitt Consultants during his employment.

[16] Mr Peel told me that with the exception of work he undertook for LDS the work he completed for the remaining six clients was undertaken on behalf of Emmitt Consultants and he invoiced Emmitt Consultants for his services. Emmitt Consultants then invoiced the client.

[17] Mr Peel undertook work for LDS in Hamilton that was not charged through Emmitt Consulting. He told me he did this because he had been approached by Mr Paul Coward, LDS Australia, who had told him that they would not agree to the work being undertaken by Emmitt Consulting and if Mr Peel was not available LDS would look elsewhere.

Enforceability of the restraining provisions

[18] There is no dispute that Mr Peel had signed an employment agreement containing restraining provisions. As stated earlier he has accepted he breached his obligations during his employment. However, the parties are in dispute about whether the post-employment restraints are enforceable.

[19] Restraint of trade clauses are prima facie invalid and unenforceable because they are contrary to the public interest in people being able to work.¹ What must be established is some proprietary interest or trade secret to be protected.² Proprietary interests include client relationships and trade connections.

[20] The restraint was in place for a limited period of three months. The restraint was not bound geographically instead it was limited to all clients serviced by Emmitt Consultants during Mr Peel's employment.

[21] Mr Peel says this made the provision unreasonable because it prevented competition in relation to clients who had no involvement with him during his employment.

[22] Apart from Mr Emmitt, Mr Peel was the most senior member of Emmitt Consultants' staff. He took a frontline role with clients which allowed him to obtain key personal knowledge and build influential relationships with those he worked with. Emmitt Consultants is a small business and Mr Peel had access to all information relating to Emmitt Consultants' clients.

[23] I find Emmitt Consultants had a proprietary interest in its client relationships and trade connections which it was entitled to protect for the limited period of three months. The restraint provisions were reasonably necessary to protect those proprietary interests and are enforceable. Given the limited nature of the restraints I find the restraints would not be against the public interest.

Did Emmitt Consulting waive its rights to enforce the restraint provision?

[24] After his employment ended in December 2017 Mr Peel undertook work for clients of Emmitt Consultants as an independent contractor invoicing Emmitt Consultants for that work. There is no dispute that this work was not a breach of the restraint provisions.

¹ *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97 at [37].

² *Ibid* at [20].

[25] Mr Peel also undertook work for LDS from January 2018 that was invoiced directly to the client. It is this work Emmitt Consultants claims was undertaken in breach of the restraint provisions.

[26] Mr Peel says Emmitt Consultants waived its right to enforce the restraint when it allowed him to work for its clients under his new company and invoice Emmitt Consultants for that work. Emmitt Consultants says it waived the restraint only in respect of agreed activities which were undertaken on behalf of Emmitt Consultants.

[27] Mr Peel argues that the employment agreement does not enable the parties to agree on arrangements that would otherwise breach the restraining provisions unless it is by way of a written variation signed by both parties.

[28] A waiver may be express or implied (through conduct). There must be a clear and unambiguous representation and the person asserting the waiver must have proceeded to act in reliance on it.³

[29] When Mr Peel ended his employment with Emmitt Consultants, Emmitt Consultants retained his services as an independent consultant to undertake work for Emmitt Consultants' clients on a limited basis. For the work he undertook on behalf of Emmitt Consultants Mr Peel invoiced Emmitt Consultants and not the client directly.

[30] I am not satisfied Mr Peel has established a waiver of the restraint provisions in the employment agreement. While he may have been undertaking client work, he did so as a consultant to Emmitt Consultants and not on his own account.

[31] Concurrently with the work Mr Peel undertook for Emmitt Consultants he also undertook work for LDS in Hamilton invoicing the client directly. LDS was, during Mr Peel's employment, a client of Emmitt Consulting. Mr Peel was aware that undertaking work for LDS within the three month restraint period would bring him into conflict with Emmitt Consultants. He acknowledged this in an email to the Head of the LDS Temple Department in August 2016.

³ *Bates v Gates* (1987) 1 NZELC 95,269 (HC) at 95,272.

[32] When Mr Peel undertook the LDS work on his own account he was acting in breach of the restrictive covenants in his employment agreement.

Direction to mediation

[33] As indicated during the case management call with the parties on 3 April 2019 the parties are directed to attend mediation and attempt in good faith to resolve all outstanding issues between them. Leave is reserved for the parties to revert to the Authority if they are unable to resolve all matters.

[34] For the sake of completeness and to assist the parties in mediation I record that I have accepted Mr Coward's unequivocal evidence that if Mr Peel had not undertaken the work for LDS Hamilton, it is unlikely Emmitt Consultants would have been engaged by LDS to complete the work.

Costs

[35] Costs are reserved.

Vicki Campbell
Member of the Employment Relations Authority