

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 391
3035854

BETWEEN	EMMITT CONSULTANTS LIMITED Applicant
AND	CHRISTOPHER PEEL Respondent

Member of Authority: Vicki Campbell

Representatives: Andrew Schirnack, counsel for Applicant
Richard Harrison, counsel for Respondent

Investigation Meeting: 7 July 2020

Submissions Received: 24 July and 10 August 2020 from Applicant
6 August 2020 from Respondent

Determination: 30 September 2020

SECOND DETERMINATION OF THE AUTHORITY

- A. Mr Peel is ordered to pay damages to Emmitt Consultants Limited in the sum of \$46,898.54 within 28 days of the date of this determination.**
- B. Costs are reserved.**

Employment relationship problem

[1] Emmitt Consultants Limited (ECL) provides quantity surveying services throughout New Zealand and the Pacific for residential dwellings and commercial developments. Mr Peel was employed by ECL as a Senior Quantity Surveyor from 18 August 2014 until 31 December 2017.

[2] ECL claimed Mr Peel breached the implied and express terms of his employment agreement both during the employment relationship and after the employment relationship ended.

[3] Mr Peel admitted breaches during his employment but denied any breaches after the employment relationship ended. In a determination dealing with the issue of liability only, I found the restraint of trade provisions in Mr Peel's employment agreement were reasonable and enforceable.¹ I found Mr Peel had breached the restraining provisions when he provided quantity surveying services to the Church of Jesus Christ of Latter-day Saints (LDS).

[4] The parties were directed to mediation to resolve the quantum issues relating to ECL's claims. When making that direction I recorded my acceptance of the evidence from Mr Coward of LDS that if Mr Peel had not undertaken the work for LDS Hamilton it was unlikely ECL would have been engaged to complete the work.

[5] The parties have been unable to resolve the issue of quantum and have asked the Authority to investigate and determine the issue.

Issues

[6] In its statement of problem ECL claimed (verbatim):

2.9 As a result of the respondent's breaches outlined above the applicant has suffered loss including for:

- c. Legal costs of investigating the breaches;
- d. Executive time in investigating the breaches, and
- e. Lost profits.

[7] By way of remedies ECL sought the following relief:

- g. Orders that the applicant be awarded damages (in sums to be particularised following disclosure by the respondent) in respect of the losses described at paragraph 2.9.
- h. Any other relief as may be just.

¹ *Emmitt Consultants Limited v Peel* [2019] NZERA 581.

[8] In order to resolve ECL's application I must determine what if any damages should be awarded. As set out above ECL seeks damages as a result of:

- a) Lost profits;
- b) Legal costs of investigating the breaches;
- c) Executive time in investigating the breaches;
- d) Any other relief.

[9] As permitted by s 174E of 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. While I have not referred in this determination to all the evidence and submissions received I have carefully considered all relevant material lodged with the Authority.

Purpose of Damages

[10] The purpose of damages is to compensate ECL for the loss it has sustained as a result of Mr Peel's breaches and to place the company back in the same position financially it would have been if Mr Peel had not injured it by unlawful activity. That is the measure of loss – no more no less.²

[11] ECL is not entitled to a windfall. The damages awarded must be at a level ECL can convincingly say are the result of Mr Peel's conduct. The damages must be sufficiently linked to the breaches and not too remote.³ There must be a causal connection between Mr Peel's breaches and ECL's loss.⁴

Expert evidence

[12] Mr Shane Hussey is a chartered accountant providing specialist services in financial investigation and dispute resolution, in addition to standard chartered accounting and business advisory services. Mr Hussey provided his assessment of the losses suffered by ECL.

² *Medic Corporation Limited v Barrett (No 2)* [1992] 3 ERNZ 977 at page 983 and 984.

³ *Ibid.*

⁴ *Caffe Coffee v Farimond* [2016] ERNZ 157 at [200]. Footnotes removed.

[13] Mr Peter Woodhead is also a chartered accountant who provides general chartered accounting, business advisory and taxation services. Mr Woodhead has experience across different business sectors providing business costing, profitability analysis and business valuation services. On behalf of Mr Peel, he provided his assessment of the losses suffered by ECL.

[14] Both Mr Hussey and Mr Woodhead had the opportunity to review each other's witness statements and assessments of the loss attributed to Mr Peel's conduct prior to the investigation meeting. Mr Hussey helpfully provided a table setting out a comparison of his and Mr Woodhead's assessment of the loss of profits calculations.

[15] Both witnesses were present during the questioning of the other at the investigation meeting and had the opportunity to directly explain competing views on various aspects of the evidence.

Mr Peel's charge out rate

[16] Mr Peel used a charge out rate of \$150 for the work he undertook in breach of his employment obligations. ECL has used a notional figure of \$220 when assessing its loss of profits. Mr Emmitt told me \$220 per hour is a competitive rate to charge out for Senior Quantity Surveyors. He said that while he was trying to get \$300 per hour for work done by Mr Peel this was not always achievable.

[17] I have reviewed a number of tenders produced by ECL where it sets out quotations for work to be undertaken. In each case a fixed fee is proposed. The tender forms are pro forma and include a section entitled "Acceptance of Terms". Those terms are:

- (a) If the scope of the Services changes after acceptance of our fee proposal, extra costs will be incurred by either a revised fee proposal or at an hourly rate of \$180.00 per hour (exc GST).
- (b) Unless stated, the above price also does not include any meetings, which are charged for as an additional cost at an hourly rate of \$300.00 for the first hour and \$180 per subsequent hour (exc GST).

[18] As stated the cost proposals tendered by ECL when tendering for work set a fixed price. The hourly rate achieved for each job was then dependent on how the job went and the timeframe in which the work was completed. Where problems occurred during the completion of the work and the work took longer than anticipated, this would

translate into a lower hourly rate for that job. If the job went well and was completed efficiently, then the business would receive a higher hourly rate for the work.

[19] Mr Peel submits that a more realistic hourly rate is between \$100 and \$150 per hour. In support of his submission he referred to the work he contracted to undertake on behalf of ECL following the end of his employment. Mr Peel and ECL agreed Mr Peel would undertake consultancy work with an agreed charge out rate of \$130 per hour. Mr Peel says it should be this rate that is used to establish the quantum of damages.

[20] Mr Peel's evidence and submissions fail to take into account that while he was invoicing ECL on the basis of \$130 per hour, ECL may have been invoicing the client at a higher rate in order to achieve a margin on his work.

[21] The standard of proof for an assessment of damages is the balance of probabilities. That is, what is more likely than not to be the case as best as can be calculated or assessment from available evidence. I am not satisfied that a proper foundation has been laid by ECL in seeking to recover damages at the rate of \$220 per hour. It is clear from the cost proposal documents that while ECL may have achieved a rate of \$300 per hour in limited circumstances the usual rate per hour was set at \$180. Accordingly, for the purposes of assessing damages against Mr Peel I have preferred the rate of \$180.

Quantum of damages sought

[22] ECL seeks damages relating to two periods:

- a) The period between 8 August 2016 and 31 December 2017 (intra-employment obligations); and
- b) The period between 1 January and 31 March 2018 (post-employment obligations).

[23] In submissions ECL sets out its claim for damages amounting to a total of \$157,830.89 made up of:

- a) \$132,189.52 in damages;

b) \$9,272.56 in interest; and

c) \$16,368.81 in costs.

Lost profits

[24] ECL seeks a sum by way of damages based on what ECL would have earned on the work in question but for Mr Peel's breaches. ECL also seeks damages for repeat work it says it would have secured had it carried out the work originally.

[25] Mr Peel has acknowledged he undertook freelance work while employed by ECL but says the work was undertaken outside his normal working hours. Mr Peel's evidence was not contested by ECL and is largely supported by documents provided by ECL including the profit and loss information which indicates Mr Peel exceeded his budgeted revenue during his employment.

Intra-employment period loss

[26] During the investigation meeting it became apparent that a number of factors were taken into account by Mr Hussey in his assessment of ECL's loss of profits during this period which were not correct.

[27] For example Mr Hussey's assessment was based on the premise that Mr Peel had undertaken the work during his normal working hours and utilised hardware and software owned by ECL. Mr Peel's unequivocal evidence, which I have accepted, is that he undertook the work outside his normal working hours, that is, before and after work and during lunch breaks. Apart from a couple of emails sent during his working day, he used his own personal hardware and software.

[28] The fees charged by Mr Peel to clients net of GST in the intra-employment period totalled \$46,683 for 311.22 hours work. Taking the 311.22 hours at a charge out rate of \$180 per hour, ECL's loss for this period equates to \$56,019.60.

Did Mr Peel cause the loss?

[29] ECL must establish that the loss was caused by Mr Peel's breaches. Mr Peel has acknowledged that during the intra-employment period he undertook work for LDS and a number of clients who did not have a relationship with ECL.

[30] Evidence was given to the Authority in relation to those clients who did not have a relationship with ECL:

a) Hauraki Interiors and Architecture

- i. Mr David Evans, a director of Hauraki Interiors and Architecture, told me he approached Mr Peel to complete two estimates for work in 2017. The estimates were successful. Mr Evans told me he had been using another person for quantity surveying estimates and when he asked for a recommendation was given Mr Peel's phone number. Mr Evans told me he was not aware at the time that Mr Peel was working for ECL. At that time he believed Mr Peel was working on his own account.
- ii. Mr Evans has also engaged Mr Peel on another project in July 2018 (this work was undertaken post-employment and falls outside the restraint period). ECL relies on this evidence to demonstrate its assertion that if it had been referred the work by Mr Peel during the intra-employment period it would have had the repeat work completed by Mr Peel in 2018.
- iii. I find on balance that it is possible Mr Evans would have used ECL if Mr Peel had referred his enquiry to ECL when Mr Evans first approached him. At that time Mr Evans did not have a relationship with Mr Peel and it is possible ECL would have built a relationship with Mr Evans if he had the opportunity.
- iv. While Mr Evans evidence was clear that he did not know of ECL, I have concluded that this is because Mr Peel did not introduce him to ECL as he ought to have done.

b) LDS

As already stated Mr Peel undertook work for LDS during both the intra-employment and post-employment periods. When I interviewed Mr Coward during the investigation into the liability issues, he was very clear that if Mr Peel had not undertaken the work it was unlikely it would have been awarded to ECL. LDS had experienced difficulties in the working relationship with ECL. Mr Coward told me he had become dissatisfied with ECL and the only reason it received any work was because of Mr Peel's

involvement. Mr Coward confirmed that once Mr Peel left ECL no further work would have been awarded to it.

c) Ganellen Limited

- i. Mr Augustine Fepuleai was employed by Ganellen Construction when Mr Peel was approached to complete work on the “Crest Apartments”. Mr Fepuleai told me he had heard about Mr Peel from mutual acquaintances. He also told me that during his employment with Ganellen Construction, ECL had never been approached to bid for work and had never received any enquiries from ECL to be considered for such work.
- ii. Mr Fepuleai told me he had previously been employed by ECL and based on his experiences he would not recommend ECL or approach it to bid for or complete any work.

[31] ECL submitted the Authority ought not to take into account the overheads attributable to the profit which would have been incurred had Mr Peel completed the work during his normal working hours on behalf of ECL.

[32] I am satisfied it is appropriate to factor in overheads including labour costs at the rate suggested by Mr Hussey (in relation to the claim for future loss) of 40 per cent. This equates to a total loss of \$33,611.76.⁵

Allowance for future loss – repeat business

[33] ECL claims if Mr Peel had passed the work to ECL it would have generated repeat business the lack of which has led to a loss of profits. In his assessment Mr Hussey has allowed for a repeat factor of 1.0 to account for repeat business. That equates to an estimate of \$56,019.60.

[34] The evidence I heard does not persuade me ECL would have received repeat business from either LDS or Ganellen Limited. As set out above, Mr Cowan was very clear that LDS would not have returned to ECL after Mr Peel’s departure. Mr Fepuleai was just as adamant given his experiences from working for ECL.

⁵ *Waikanae Holdings (Gisborne) Ltd v Smith*, 1 June 2005, Travis J, AC 28/05 and *Medic Corporation Ltd v Barrett (No2)* [1992] 3 ERNZ 977 followed.

[35] The invoices issued by Mr Peel during the intra-employment period to LDS totalled \$28,900. The invoices issued to Ganellen Limited totalled \$6,750. This equates to a total number of hours invoiced to LDS and Ganellen Limited of 237.67.

[36] Extrapolated out by the hourly rate of \$180 the repeat business estimate is to be reduced by \$42,780.60.

[37] This equates to an estimate of loss of repeat business of \$13,239.60. After deducting direct costs at the rate of 40 per cent the loss of profit attributable to the repeat business is \$7,943.76.

Conclusion on loss of profit – intra-employment period

[38] I am satisfied ECL has established that Mr Peel's conduct was causative of the loss sustained by it and an award of damages for lost profit is appropriate. The total loss of profit for the intra-employment period including an assessment for repeat business, totals \$41,555.52. Mr Peel is ordered to pay this sum to Emmitt Consultants Limited within 28 days of the date of this determination.

Post-employment period loss

[39] Mr Peel breached his employment obligations when he undertook work for LDS and Ganellen Limited during his the post-employment period of 1 January to 31 March 2018 inclusive.

[40] ECL must establish Mr Peel's conduct was causative of any loss sustained by it during the post-employment period.

[41] The work Mr Peel undertook for Ganellen Limited was a breach of his employment obligations to the extent that had he referred the work to Ganellen Limited during his employment and if ECL had undertaken the work Ganellen Limited would have been a client as described under clause 23.1(b)(ii) of the employment agreement.

[42] I have taken into account Mr Fepuleai's unchallenged evidence that Ganellen Limited would not have referred the work to ECL during either the intra-employment period or the post-employment period if Mr Peel had not agreed to undertake the work.

[43] Likewise I am persuaded by the evidence of LDS that it would not have given the work to ECL in the absence of Mr Peel's agreement to undertake the work.

[44] I have reviewed ECL's profit and loss accounts for the period 1 April 2017 to 31 March 2018. These accounts show that the actual income received by ECL was not far short of the budgeted income and was over \$100,000 above the income achieved for the financial year ending 31 March 2017. I noted also that Mr Emmitt benefitted significantly with an increase of more than \$69,000 in his shareholder salary from year ending 31 March 2017 to year ending 31 March 2018.

[45] Given the compelling evidence of Mr Felupeai and Mr Cowan, ECL has not established any loss attributable to the work Mr Peel carried out during the post-employment period for which damages can be awarded.

Legal costs

[46] ECL claims the legal costs associated with investigating Mr Peel's breaches of his employment agreement amounting to \$5,343.02 including GST. The costs were incurred between 5 March and 9 July 2018.

[47] The Court has held that costs may be recoverable as a special damages award.⁶ There needs to be a "bright line" between costs incurred in quantifying money lost as a result of a breach of the employment agreement and party and party costs associated with legal representation to recover the loss.⁷

[48] I accept the fees claimed as damages were incurred and were related to ECL's investigation of Mr Peel's breach of his obligations under his employment agreement. The amount is reasonable and accordingly, Mr Peel is ordered to pay to ECL Limited the sum of \$5,343.02 within 28 days of the date of this determination.

Executive time

[49] ECL seeks an award of general damages totalling \$6,593.50 for management time devoted to the investigation of Mr Peel's breaches of his obligations under his employment agreement.

[50] The Court has held that damages may include an allowance for executive time.⁸ In *Medic Corporation* damages were awarded for time spent in mitigating the loss from the breaches and to prevent further harm to the business.

⁶ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71.

⁷ *Ibid* at [96].

⁸ Above n 2.

[51] Mr Emmitt estimated he and his finance manager each spent about 50 hours going through over ten thousand files to identify and organise evidence of exactly what Mr Peel had done while employed by ECL. There were no records of the time spent by Mr Emmitt or his finance manager to show what work they performed that might be regarded as lost executive time.

[52] I find the time spent by Mr Emmitt and his finance manager was more likely than not in preparation for litigation. The evidence is not sufficient to justify an order for general damages.

Orders as to damages

[53] Mr Peel is ordered to pay to Emmitt Consultants Limited damages in the amount of \$46,898.54 for damages caused by his breaches of his employment obligations. Payment must be made within 28 days of the date of this determination.

Other relief

[54] In submissions ECL seeks an order for the payment of interest on the damages awarded. No claim for interest was made in the statement of problem which is the appropriate place to raise all claims. Mr Peel has not been on notice that interest was sought and has not had a proper opportunity to address the claim. No order for the payment of interest will be made.

Costs

[55] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Emmitt Consultations shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. Mr Peel shall have a further seven days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[56] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority