

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Fire Security Services Ltd (Applicant)

AND Ian Smith (Respondent)

REPRESENTATIVES Vicki Campbell for the applicant
Harry Jordaan for the respondent

MEMBER OF AUTHORITY James Wilson

INVESTIGATION MEETING 17 July 2003
11 August 2003

DATE OF DETERMINATION 16 September 2003

DETERMINATION OF THE AUTHORITY

Previous Determination

1. On 23 June 2003 the applicant, Fire Security Services Limited (Fire Security), requested that the Authority issue an urgent interim injunction restraining the respondent, Ian Smith, from continuing his employment with Total Fire Protection Ltd. Fire Security also sought an order requiring Mr Smith to comply with the restraint of trade provisions set out in his employment agreement.

2. In a Determination dated 29 July 2003 (AA to 228/03) I declined to issue an interim order restraining Mr Smith from continuing to work for his new employer, Total Fire Protection Ltd. However, in that determination I ordered Mr Smith:

- ...to refrain from conveying any information whatsoever regarding the business, customers or systems of Fire Security Ltd to Total Fire Protection Limited and in particular from contributing in any way to any discussion or documentation which might be used in attracting customers from Fire Security Ltd to Total Fire Protection Ltd.
- ...to refrain from contacting or communicating with any customers of Fire Security Ltd.

These orders were to remain in force until 31 August 2003 unless revoked, amended or extended by the Authority prior to that date.

3. On 11 August 2003 I heard evidence from both Fire Security and Mr Smith regarding Fire Security's request that Mr Smith be required to comply with the restraint of trade provisions of his employment agreement.

Background

4. Although the background to Mr Smith's employment with Fire Security was canvassed in my earlier determination it is appropriate, for completeness, that it be repeated in this determination.

5. The respondent, Ian Smith, was employed by Fire Security in March 1996 as a tester of fire alarm and sprinkler systems. Mr Smith was initially employed under an arrangement with ACC to assist with his rehabilitation from a back injury. In 1998 he was offered and accepted permanent employment. While there is some disagreement between the parties as to the circumstances surrounding Mr Smith's being offered and accepting a new employment contract, there is no disagreement that this contract contained the following clause:

In consideration of the payment of a separate and additional allowance of \$1300 per annum to be paid by weekly instalments of \$25, the employee hereby agrees to be bound by the following conditions and restrictions, that is to say: - the employee agrees that they will not at any time within one year after ceasing to be employed by the company undertake or carry on or act as a director, partner, principal or employee of, or consultant or contractor to any person, firm or corporation whose business competes, or might compete with the business of this company within a radius of 50km of the General Post Offices at Auckland, Whangarei, Tauranga, Rotorua, Hamilton or Wellington New Zealand, and Melbourne, Adelaide and Sydney Australia without the company's prior permission in writing.

6. There is little disagreement regarding the circumstances under which Mr Smith left his employment with Fire Security. In May 2003 Mr Smith advised his manager that he intended moving to Australia for family reasons. On 14 May 2003 Mr Smith resigned from his position giving two weeks notice. His last day of employment with Fire Security was stated to be 28 May 2003. It appears that between the time of handing in his resignation and his last day of work Mr Smith's family circumstances changed and he decided he no longer needed to move to Australia. At about the same time a friend advised him that a position was coming available at Total Fire Protection (the friend was leaving Total Fire) and suggested that Mr Smith apply for this position. Mr Smith approached Total Fire and was offered a position on terms and conditions, according to Mr Smith, substantially better than he had been receiving at Fire Security. He accepted this position and started work at Total Fire immediately after leaving Fire Security. Regrettably Mr Smith did not advise Fire Security of his change in circumstances or that he intended to take up a position at Total Fire. On the contrary he continued, passively, to lead Fire Security to believe that he was moving to Australia.

Legal considerations

Restraint of trade

7. In *Airgas Compressor Specialists Ltd vs. Bryant* [1998] 2 ERNZ 42, Chief Judge Goddard in the Employment Court set out forty propositions that are relevant in respect to restraints of trade. These propositions included:

- (1) *A covenant in restraint of trade in an employment contract is void as being contrary to the public interest and, being void, is incapable of being enforced unless one of two conditions is satisfied.*
- (2) *First, a covenant in restraint of trade can be enforced if it is found to be reasonable as between the parties and with reference to the public interest*

- (3) *Secondly, such a covenant (although unreasonable) is capable of being enforced if the Court is prepared, under the Illegal Contracts Act 1970, to give effect to the contract of which the restraint is part after so modifying the restraint that it would have been reasonable when the contract was entered into. However, modifying and giving effect to the contract as modified is not the only option that the Court case to consider. It may also:*
- (i) *Delete the provision and give effect to the contract as so amended; or*
 - (ii) *Where the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand, decline to enforce the contract.*
- (See Illegal Contracts Act 1970 s 8(1)(a) and (c).)*
- (4) *To determine whether a covenant is reasonable with reference to the interests of the parties, several questions must be asked. First, does the employer have a proprietary interest which is entitled to protection or is the covenant merely an attempt to limit or reduce competition? Secondly, are the duration, geographical ambit, and scope of the covenant too broad? Thirdly, is the covenant prohibitive of competition generally, or is it limited to proscribing the solicitation of clients of the employer? Fourthly, is the net cast wide or confined to a named competitor or reasonably compact class of competitors?*
- (5) *The employer may possess a proprietary interest in trade secrets, confidential information, and its business or trade connections. The employer is permitted to protect its business connection – that is, to prevent the departing employee from enticing its clients or customers. These are the most obvious but not the only examples of legitimate proprietary interest.*
- (6) *A covenant against solicitation of clients or customers is not unreasonable merely because it is not limited to clients or customers of whom the employee had knowledge or with whom he or she had contact during the employment.*
- (7) *A restraint may be held to be reasonable if the nature of the employment is such that customers will either learn to rely upon the skill and judgement of the employee, or will deal with the employee directly and presently to the virtual exclusion of the employer, with the result that the employee will probably gain their custom on setting up in business.*

For the purposes of this case it is not necessary to set out the rest of the propositions outlined by the Chief Judge.

Use of confidential information

8. In *Peninsular Real Estate Ltd v. Harris* [1992] 2 NZLR 216, the Court set out a number of guidelines regarding the extent of the ability of a departing employee to compete with a former employer and to make use of information obtained in the course of the employment. These guidelines are set out in Brooker's *Employment Law*, Wellington, 2000:

- (i) *In the absence of a valid restraint of trade clause, the former employer cannot prevent a former employee simply from competing.*
- (ii) *A former employer cannot normally therefore prevent a former employee from contacting or even soliciting clients or customers of the former employer.*
- (iii) *After ceasing employment, an employee may not however use truly confidential information obtained in the course of that employment for the purpose of competing with the former employer, or in any other way detrimental to the former employer's interest.*
- (iv) *What amounts to confidential information for this purpose is not susceptible to strict definition but depends on the facts of each case.*

(v) *There is a clear trend of authority to the effect that departing employees may not take with them customer or client lists for the purpose of using them in a competing role.*

(vi) *Neither may a departing employee deliberately memorise such information for the purpose of competing.*

(vii) *Generally a departing employee may not solicit or approach a client of the employer in respect of the transaction current at the time of their departure.*

The law related to the facts

9. Fire Security argues that:

Mr Smith(was) in a position of great importance. The work (he) undertook on customer premises required that (he) developed a high degree of trust and confidence from the customers. (He was) the principal point of contact. (He) had access to a customer's confidential information including their system design features and access codes. As a Tester working for Fire Security Service Limited (he) had specific unique knowledge and application of customer systems and access codes.

Fire Security submitted that Mr Smith's new employer is in the same field of activity as Fire Security and in direct competition with them. They argue that Mr Smith's relationship with their customers may be used by his new employer to entice those customers to change service provider.

10. Mr Smith says that the work he undertook was neither particularly secret nor difficult to learn. He and other witnesses suggested that, assuming a new employee had a general background in basic electronics or electrical work they could easily be taught the rudiments of the job in a matter of weeks. This training would entail visiting the client sites with another tester on two or three occasions to be shown the relevant monitors/controls, testing codes etc. On behalf of Mr Smith Mr Jordaan argues that it is highly unlikely that the availability of a particular tester would influence a client to change from one service provider to another.

11. Mr Smith was employed by Fire Security as a tester. His job was to visit a number of clients per day and test their fire alarm and sprinkler systems. He was not required to carry out other than minor repairs (the replacement of batteries, light bulbs etc). While Mr Smith did on occasions carry out a slightly wider range of duties such as the repair of signage, he was not employed as a qualified technician. While he no doubt built up a personal knowledge of the fire security systems of the customers he visited, this knowledge was for the most part readily available and quickly assimilated. Without wishing to denigrate the work carried out by Mr Smith and his fellow testers, the work can be classified as that of a skilled trade's assistant. (Even with the so called "confidentiality" allowance Mr Smith was paid only \$16.63 per hour.) It is extremely unlikely that:

the nature of the employment is such that customers will either learn to rely upon the skill and judgement of the employee, or will deal with the employee directly and presently to the virtual exclusion of the employer, with the result that the employee will probably gain their custom on setting up in business. (Airgas supra).

I do not accept that the availability of a particular tester, no matter how highly skilled or how extensive his knowledge of the customers to whom he provides a service, has any influence on a customer when that customer is considering changing service providers. There is no inherent proprietary interest in the knowledge, skill or customer relationships developed by Mr Smith. There is therefore no proprietary interest to be protected and the clause in Mr Smith's employment agreement restraining him from working for a competitor is unenforceable.

11. Although I have found that there is no proprietary interest to be protected, and that the restraint clause in Mr Smith's employment agreement is therefore unenforceable, there remains the question of Mr Smith's duty of fidelity to his former employer. It is difficult to classify the information obtained by Mr Smith in the course of his employment as *truly confidential information*. Much of the information he gathered was readily available if not in the public domain then certainly to others in the fire security industry. What was not available could easily be obtained by a new service provider from the client's own records and by inspecting the client's premises. Such information of necessity transfers from one provider to another whenever a client chooses to change provider. The ability to obtain this information is not dependent on the knowledge of any particular tester. In any event Mr Smith assured me, and I have no evidence or reason to believe otherwise, that he has not and will not disclose relevant information to his new employer. Given the nature of any information and Mr Smith's assurances, it is not appropriate or necessary to issue any orders in this regard.

Determination

12. For the reasons set out above, I have found that the restraint of trade clause in Mr Smith's employment agreement is unenforceable. Fire Security Services Ltd's application for an order requiring Mr Smith to comply with that restraint clause is therefore declined.

Costs

13. Costs are reserved in the hope that the parties will be able to settle this issue between themselves. If they are unable to do so Mr Smith may file and serve an application for an award in respect to costs within 21 days of the date of this determination. Fire Security will then be given 14 days in which to file and serve a response. When considering whether or not to seek a contribution towards his costs Mr Smith may wish to take into account the circumstances surrounding his resignation and the fact that he accepted a financial consideration for agreeing to a restraint of trade clause.

James Wilson
Member of Employment Relations Authority