Determination Number: AA 246/06
File Numbers: AEA 1112/05 and 5037664

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Ross Ivan Harlick (Applicant)
AND	Tournament Parking Limited (Respondent)
REPRESENTATIVES	Ross Ivan Harlick In person James Brown, for Respondent
MEMBER OF AUTHORITY	Y S Oldfield
INVESTIGATION MEETING	15 June 2006
FURTHER INFORMATION RECEIVED	10 July 2006
DATE OF DETERMINATION	19 July 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem arose when the respondent (Tournament) lost the contract to manage the car parking operations at Middlemore Hospital, and Mr Harlick, who was the manager on site, was made redundant. At that time he had worked for Tournament for just over ten months.

[2] Tournament Parking Ltd did not contract directly with the hospital, but with the company responsible for the construction of its main car park building, Middlemore Carparking Ltd. I was told that in consideration for the construction, the hospital had agreed that Middlemore Carparking Ltd was to retain all the revenue from the car parking operation. When the building was completed in September 2002 Middlemore Car Parking Ltd in turn engaged Tournament Parking Ltd, at a flat fee, to run the operation for a term of three years.

[3] At the end of the three years Middlemore Carparking Ltd did not renew the contract (having decided to run the car parking itself.) Tournament Carparking Ltd offered to redeploy Mr Harlick to another part of its operations, but he declined. On 7 September he was given notice that his employment would be terminated on 30 September 2005. It was also confirmed that he would receive redundancy compensation pursuant to clause 16.2 of the employment agreement which sets out:

"16.2 If the Employee's employment is terminated on account of redundancy:

16.2.1 the Employee shall be entitled to two (2) weeks notice of that termination or payment in lieu of notice but shall not be entitled to an extended period of notice;
16.2.2 the employee shall be entitled to 4 weeks salary as redundancy compensation."

[4] However, Mr Harlick never got his redundancy pay. After getting his notice he wrote to Middlemore Carparking Ltd and offered to manage the car parking operation for them as he had previously done for the respondent. He began working for them when his notice period ended. (Tournament Parking Ltd believes that he began working on their behalf even sooner than this and that Mr Harlick's involvement with Middlemore Carparking Ltd was the reason the latter decided not to renew the management contract.) As a result of all this, Middlemore Carparking Ltd claims that Mr Harlick was in breach of the confidentiality, restraint, and conflict of interest provisions in his employment agreement.

[5] Each of the parties now makes claims against the other. Mr Harlick wants the four weeks' redundancy pay provided for in his employment agreement.[1] Tournament Parking Limited does not dispute that he is entitled to this, but says that a result of his breaches, damages of $2,000.00[2] should be offset against the redundancy pay. Those damages do not relate to specific losses the respondent has incurred. (The loss of profit associated with the loss of the contract would have been $180,000.00 over three years.) The figure of $2,000.00 is the additional cost to the respondent of employing Mr Harlick over and above what the respondent received from Middlemore Carparking Ltd for that purpose.

[6] Because the obligation to pay redundancy pay is not, in itself, disputed the issues for determination are those relating to the respondent's damages claims. Specifically these are:

i. Whether there has been a breach of the confidentiality clause;
ii. Whether there has been a breach of the conflict of interest clause;
iii. Whether the restraint of trade was enforceable, and if so, whether there has been a breach.

First Issue: whether there was a breach of the confidentiality clause

[7] Mr Harlick's employment agreement contains the following confidentiality clause:

"Confidentiality

11.1 For the purposes of this clause, "confidential information" means any knowledge or information the Employee may acquire or may have already acquired during the course of the Employee's employment by the Employer concerning the business, operations, affairs, property, customers, clients or principals of the Employer and shall include, but shall not be restricted to, lists of clients and suppliers, payment arrangements, payment rates, financial information and methodologies.
11.2 The provisions of this clause shall cease to apply to information which enters the public domain other than that directly or indirectly entered through the failure of the Employee to observe its terms.
11.3 The Employee shall during the continuance of employment and after its termination however occasioned:

[1] Originally Mr Harlick also claimed holiday pay but at my meeting with him he withdrew this claim.
[2] Tournament Parking Ltd also amended its original counterclaim, which was for $10,000.00, to a final figure of $2,000.00

11.3.1 not disclose any confidential information to any person other than an employee of the Employer authorised to receive it;
11.3.2 use his best endeavours to prevent the disclosure or publication of any confidential information;
11.3.3 not use, or attempt to use, any confidential information to his own benefit as distinct from the benefit of the employer;
11.3.4 not use or attempt to use any confidential information in any manner which may injure or cause loss whether directly or indirectly to the Employer;
not turn his personal knowledge or influence over any employees, clients, suppliers, customers or contractors of the Employer to his own direct or indirect benefit;

[8] Mr Brown, director of Tournament Parking Ltd, has conceded that he does not have any knowledge or evidence of a specific breach of this provision. He believes a breach can be inferred because when Mr Harlick went to work for the respondent's former client he took with him his knowledge of how the respondent ran its business and "must have" passed this on.

[9] Mr Harlick told me that because the car park was being operated by Tournament for Middlemore Carparking Ltd and all the revenue belonged to Middlemore Carparking Ltd, the latter came in to the car park to count and collect takings. Tournament was also subject to regular reporting requirements relating to such things as maintenance schedules and repairs. In this way Middlemore Carparking Ltd was already familiar with most aspects of the operation.

[10] What Mr Brown has told me is not enough to satisfy me on balance that a breach of the confidentiality provisions has been made out.

Second Issue: Whether there has been a breach of the conflict of interest provision.

[11] Mr Harlick's employment agreement also contains the following:

12 Conflict of Interest

12.1 The Employee will not enter into any other contract of employment or relationship or activity which would bring the Employee into conflict with his obligations under this agreement or adversely affect the Employee's duty of fidelity to the Employer.
12.2 Any breach of clause 12.1 will be treated as serious misconduct and may result in summary termination without notice.

[12] Mr Brown is sure that Mr Harlick has acted in breach of the conflict of interest provisions of the agreement. He told me that Middlemore Carparking Ltd had no knowledge of the business and needed an experienced manager on site. Without such a person, he said, Middlemore Carparking Ltd would have been in no position to terminate its agreement with Tournament Parking Ltd. He says Mr Brown was that person and was instrumental in Middlemore Carparking Ltd deciding to run the car park directly.

[13] During my own investigation Mr Harlick did demonstrate that he had always seen his primary obligation as being to Middlemore Carparking Ltd rather than to his employer. (He described it as the respondent's "parent" company and genuinely seemed to see it in that

light.) I accept that he displayed a misplaced sense of loyalty and it is not surprising that Mr Brown has become mistrustful of him as a result.

[14] Given Mr Harlick's attitude, the inferences that Mr Brown has drawn are not unreasonable. However, Mr Brown did not present evidence at the investigation meeting to show that during his employment Mr Harlick's attitude translated into action that was in conflict with the interests of Tournament Parking Ltd.[3] I explained to Mr Brown that I was not prepared to infer a breach but at his request I did agree to allow him to present further evidence after the meeting.

[15] He did so on 10 July, supplying phone records to show that in the month of September (whilst still employed by Tournament Parking Ltd) Mr Harlick made two calls to Middlemore Carparking Ltd and one to an equipment contractor that he says Tournament did not deal with. Mr Brown believes these calls were for the purpose of establishing on-going operations after 30 September. There was, however, no evidence as to the content of the calls.

[16] In response, Mr Harlick has noted that others had access to the phone; it was not for his exclusive use. He said that the equipment contractor was in fact doing work for Tournament Parking Ltd and noted that the person to whom he spoke at Middlemore Carparking Ltd, Mr McKain, was the individual with whom he normally dealt in a legitimate way on behalf of Tournament Parking Ltd.

[17] Mr McKain is now Mr Harlick's immediate manager and someone to whom Mr Harlick might have spoken about his employment prospects, but he was also someone with whom he dealt regularly throughout his employment. The same applies to the equipment contractor. The nature and purpose of the calls cannot be established on the evidence I have.

[18] It is not possible for me to ascertain whether the calls in question were within the normal scope of Mr Harlick's duties or had another purpose. **The evidence is not sufficient to establish on the balance of probabilities that Mr Harlick has acted against his employer's interests.**

Third issue: was the restraint provision breached and is it enforceable?

[19] On 16 September Mr Harlick wrote to the Director of Covington Group Ltd (of which Middlemore Carparking Ltd was a part) as follows:

> *"As I have been made redundant by Tournament Parking Ltd from the 3 September I am entitled to redundancy pay of four weeks.*
>
> *Having been in parking for a considerable number of years I am well aware of the difficulties in changing from one operator to another.*
>
> …
>
> *To assist with the transition I am offering my services for free for one month from the 1 October 2005. My redundancy payments will cover any wages for the month."*

[3] Mr Harlick provided email evidence dated 26 September and forwarded from Middlemore Carparking Ltd to the car park's own email address. It dealt with arrangements for supply of tickets. Tournament says that this is proof of breach of the conflict of interest provisions. However, I consider it arguable that routine matters such as ordering more parking tickets fell within what Mr Harlick might normally have done during the final days of his employment.

[20] Mr Harlick did begin working for Middlemore Carparking Ltd on 1 October and has been with them ever since performing essentially the same role as the one he filled for Tournament Parking Ltd. He received no remuneration until 6 April 2006, when he says he entered into an oral contract of employment with Middlemore Carparking Ltd. He then received a lump sum "sign on fee" of $28,000.00 gross. Thereafter he received regular fortnightly payments of an annual salary of $62,000.00.

[21] Mr Harlick's employment agreement sets out as follows:

> *21 Restraint*
>
> *21.1 The Employee agrees that for a period of six (6) months following the termination of his employment for any reason the Employee will not:*
>
> *21.1.1 attempt to encourage or persuade any of the Employer's clients, suppliers, and customers with whom the Employee has dealt during the period of 12 months immediately preceding the termination of the Employee's employment and of whose trade circumstances the Employee are [*sic*] aware, to terminate or restrict trade relations with the Employer;*
>
> *21.1.2 attempt to encourage or persuade any employee, contractor, or consultant of the Employer to terminate their contract or agreement with the Employer;*
>
> *21.1.3 engage in employment with, or otherwise receive remuneration for services rendered (whether in a contracting capacity or otherwise) from, any individual, company or organisation, whose business involves the leasing, licensing, management, sale or other dealing or disposition, of carparking services, including but not limited to Wilson Parking Limited (or any of the Wilson Parking Group of companies), Covington Corporation Limited (or any of the Covington group of companies), or Middlemore Carparking Ltd.*
>
> *21.2 The Employee acknowledges that these restraints are fair and reasonable for the proper preservation of the goodwill of the business of the Employer, and the value of the remuneration, training and benefits referred to in this agreement are fair and reasonable consideration for the Employee giving the restraints.*
>
> *21.3 Should this clause be held invalid for any reason, the remainder of this agreement will continue in force and effect as if the invalid provision had been deleted, provided however that the parties to this agreement may negotiate a valid and enforceable provision in replace of he invalid provision."*

[22] Mr Harlick asserts that even if his restraint clause was enforceable, he has not breached it because he was not employed by Middlemore Carparking Ltd until April 2006. I consider this disingenuous to say the least. It is clear that he was employed from 1 October, albeit that payment was deferred until 6 April, and there can be no doubt that Mr Harlick breached the restraint of trade provisions in his agreement.

[23] Less straightforward is the issue of whether the restraint was enforceable. The first issue there relates to the nature of the proprietary interest to be protected. Mr Brown has told me that the respondent's interest lay in protecting the knowledge base that Mr Harlick had acquired whilst employed by Tournament Parking Ltd. However, Mr Harlick had thirteen years in the car parking industry before he ever went to work for the respondent and only ten months with Tournament Parking Ltd. In addition to the practical knowledge and skill he had already built up he also brought to Tournament Parking Ltd the fruits of prior formal training. The respondent cannot argue that it has a proprietary interest in that.

[24] Mr Brown did say that he believed that during his time with Tournament Parking Mr Harlick had obtained a good understanding of what Middlemore Hospital wanted from its car parking services. The problem with this is that Middlemore Hospital was never the client of Tournament Parking Ltd; it contracted directly with Middlemore Carparking Ltd. It is in my view a stretch to say that Tournament Parking Ltd had a proprietary interest in Mr Harlick's knowledge of Middlemore Hospital's parking needs. Middlemore Parking Ltd was always in a good position to obtain this directly from its client. Tournament Parking Ltd has not satisfied me that it had a proprietary interest to protect.

[25] The next issue is whether there was consideration for the restraint. In its fee to Tournament Parking Ltd, Middlemore Carparking Ltd budgeted $40,000.00 for the salary of the car park manager. However Tournament Parking Ltd paid Mr Harlick $42,000.00 per annum. Tournament Parking Ltd argues that the additional $2,000.00 was consideration for the restraint of trade provision. However Mr Harlick received $42,000.00 per annum from the outset of his employment and his initial employment agreement did not contain a restraint provision. In February 2005 it was replaced with a new version which did contain a restraint clause, but there was no change in remuneration to go with the change in the contract. There was clearly no consideration for the restraint of trade.

[26] **In short, because there was no proprietary interest to protect and no consideration, the restraint of trade provisions cannot be enforceable.** In addition, even if they had been their scope and duration are such that it is likely they would have required amendment.

Summary

[27] Mr Brown has not satisfied me that Mr Harlick breached the confidentiality and conflict of interest clauses. Nor am I satisfied that the restraint of trade clause was enforceable. It follows that there can be no question of damages being owed to Tournament Parking Ltd by Mr Harlick.

[28] I now resolve all employment relationship problems between the parties by ordering Tournament Parking Ltd to pay to Mr Harlick the redundancy pay he is owed, that is the sum of $3,230.77 gross.

Costs

[29] There remains a potential issue in relation to costs. If either party wishes the Authority to proceed to determine the matter it should make relevant submissions within 28 days of the date of this determination.

Yvonne Oldfield,
Member, Employment Relations Authority.