

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 448/10
5310775

BETWEEN IAN WARD ELECTRICAL
LIMITED
Applicant
AND DARRYL JONES
Respondent

Member of Authority: Dzintra King
Representatives: Louise Foley, Counsel for Applicant
Respondent In Person
Investigation Meeting: 27 July 2010 at Taupo
Evidence received: 5 August 2010 from Respondent
Submissions received: 25 August and 4 October 2010 from Applicant
23 September 2010 from Respondent
Determination: 18 October 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ian Ward Electrical Limited, seeks orders requiring the respondent, Mr Darryl Jones, to comply with clauses 36 and 37 of his employment agreement. The applicant also seeks a penalty for breach of the employment agreement and damages.

[2] Clause 36 provides:

The Employee shall not at any time during the period of employment or for a period of six months after termination of employment, for whatever reason, either on the Employee's own account or for any other person, firm, organisation or company, solicit, endeavour to entice away from or discourage from being employed by the

Employer, any other employee or actual client/customer or prospective client/customer of the Employer.

[3] Clause 37.1 provides:

Employees 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 relation in any way to the Employer within a radius of fifty-five kilometres, without the express written consent of the Employer, provided that such consent shall not be unreasonably withheld..

[4] Mr Jones was dismissed on 22 December 2009. The matter of the dismissal was settled in mediation.

[5] The applicant notified the respondent that the restraints would continue to apply.

[6] On 12 May 2010 Mr Jones' wife registered a company, Electrical Contracting Supplies Limited.

[7] The applicant says Mr Jones has attempted to solicit existing customers.

[8] Given that clause 36 was for a six month period and the employment terminated on 22 December 2009 the clause could not be enforced after 22 June 2010. The Statement of Problem was filed on 30 June 2010.

[9] Leaving aside the fact that the time period has lapsed, there was no evidence that Mr Jones had solicited the customers referred to. He admitted he had done work towards the end of May for De Bretts and AC Baths but said he had been approached by those customers and he had not made any approaches.

[10] Mrs Jones said there was a social relationship with a person with De Bretts. Ms Foley submitted that it was highly unlikely that Mr Jones would not have discussed employment.

[11] No evidence from any customers of the applicant was provided. The rationale for the belief that Mr Jones had taken custom was that there had been a decrease in the applicant's business with some clients. That alone is insufficient.

[12] I cannot order compliance with clause 36 and the evidence is insufficient for me to order an account of profits or damages.

Clause 37.1

[13] Mr Jones is an employee of Electrical Contracting Supplies. Ms Foley sought a compliance order preventing the respondent from operating Electrical Supplies Contracting Limited by offering services to customers within a 55 kilometre radius of Taupo. Mr Jones does not operate Electrical Contracting Services Limited.

[14] I asked Mr Ward what the purpose of the restraint was. He said it was there so that an employee could not take clients away from the company. It was not to stop an ex-employee working as an electrician. Clause 37 was an extension of clause 36 and was there to provide the employer with the opportunity to consolidate after an employee left.

[15] Clause 37 is curiously worded. It prevents the employee establishing, purchasing or obtaining an interest in any business *in relation in any way to the Employer*. This would appear to prohibit an interest in any business that deals in work related to that carried out by the employer, not just electrical work. It is difficult to understand what proprietary interest of Ward Electrical is to be protected by this clause. As there is no proprietary interest clause 37 is not reasonable and is unenforceable.

[16] In considering clause 37 the nature of the proprietary interest to be protected needs to be ascertained. There is a proprietary interest in the customer base but the non-solicitation clause had a six month not a twelve month limit. That proprietary interest cannot extend beyond the six months specified in clause 36.

[17] A restraint will be enforced only to the extent that it is necessary in order to protect a proprietary interest of the employer. The area, nature and duration of the

restraint are all factors to be taken into account when assessing the reasonableness of the restraint.

[18] Given the duration disparity between the two clauses it is difficult to see what interest clause 37 is to protect. It appears to be an anti-competitive clause. Twelve months is at the higher end of restraint periods and had it been necessary I would have reduced it to a six month period; which has already expired. The clause is not enforceable. Mr Jones has not breached either clause 36 or clause 37.1.

[19] I decline to make compliance orders or an award of damages. There has been no breach so there can be no penalty.

COSTS

[20] As Mr Jones represented himself no costs have been incurred.

Dzintra King

Member of the Employment Relations Authority