

Employment relationship problem

[1] Sunair Aviation Limited (Sunair) employed Christopher Walters as a rescue fire service (RFS) operator from 18 June 2008 to 31 March 2015.

[2] Sunair is an airport services and aviation company managed, and partly owed, by William Daniel Power. Sunair holds various contracts at Tauranga Airport including “ramp services” (baggage handling and the like) for Air New Zealand and plane-refuelling services for BP. Sunair also operates aircraft engineering and charter air services businesses at the airport.

[3] Between 1988 and 2015, Sunair provided rescue fire services to the Tauranga Airport. The agreement between Sunair and the Tauranga City Council (Council), which owns the airport, to provide this service, effectively on a labour-only basis, was described as being on a “casual, verbal basis”.

[4] Sunair employed three employees in the RFS: Unit Manager, Brian Godfrey and RFS operators, Jason Hawke and Mr Walters.

[5] On 21 January 2015, the Council issued a request for tender for the RFS. It was a competitive tender and the Council was not required by its terms to accept any of the tenders submitted. The tender document also reserved the right of the Council to call for further tenders as it saw fit.

[6] On 9 February 2015, Mr Walter, while employed by Sunair, submitted a tender for the RFS contract to the Council. The tender was submitted in the name of “Advanced Aviation Services” (AAS). AAS is a partnership between Mr Walters and his wife, Pam Walters.

[7] On 13 February 2015, Sunair submitted its tender for the RFS contract. Also on that day, Sunair issued a notice to employees engaged within the RFS that if its tender were successful they would have on-going employment but if it were not, they would be made redundant.

[8] A panel comprising three people considered the five tenders received by the Council. Two members of the panel were employees of the Council: Ray Dumble, Tauranga Airport manager and Quintin Dace, a civil engineer. The third person was Mike Groome, Chief Executive of Taupo Airport Authority.

[9] The panel members individually considered the tenders and gave scores for each based on a series of attributes. The panel then convened and arrived at a common position, which was to award the contract to AAS.

[10] On or about 15 February 2015, Mr Dumble advised Mr Power that Sunair had been unsuccessful in its tender and that it had been awarded to Mr Walters under the auspices of AAS.

[11] On 20 February 2015, the Council formally advised Sunair via letter that its tender had been unsuccessful.

[12] On 23 February 2015, Sunair advised employees engaged with the RFS that they would be redundant from 1 April 2015.

[13] At or around this time, Mr Walters, while still an employee of Sunair and acting under the auspices of AAS, advised Mr Power that AAS would be offering employment to Mr Hawke but not Mr Godfrey.

[14] In March 2015, as Mr Walters was still an employee, Sunair commenced an employment investigation alleging a breach of contractual obligations. However, this was not completed by the time Mr Walters' employment with Sunair ended.

[15] Sunair also commenced, but subsequently discontinued, High Court proceedings against Mr Walters.

[16] In April 2015, Mr Power complained to the Council about Mr Walters' actions and the Council commenced an investigation. The subsequent report of the independent probity advisor to the Council, concluded, in effect, that the tender process was fair and reasonable.

[17] In September 2015, Mr Power requested the tender scores from the Council but this request was denied. However, it was confirmed by the Council that Sunair had come second to AAS on tender price. The Council subsequently provided the requested documents to Sunair in November 2015 after it commenced proceedings against Mr Walters in the Authority.

[18] In its statement of problem lodged with the Authority, Sunair contended that Mr Walters breached his expressed and implied obligations (including, initially, the duty of good faith) he owed to it by tendering for the RFS contract while still an employee. Mr Walters denied such allegations in his statement in reply.

The Authority's investigation

[19] During a case management conference (CMC) convened with the parties' representatives on 22 December 2015, the Authority proposed, and the representatives agreed, that it would first investigate the question of liability. In the event the Authority found liability, the question of remedies would then be investigated. It was also discussed that any subsequent investigation examining remedies, particularly the quantification of damages, may involve expert witnesses.

[20] During the CMC, I also raised with Counsel for Sunair about a potential difficulty with the claim for damages for breach of s 4A of the Employment Relations Act 2000 (the Act) in light of the Court's decision in *Hally Labels Limited v Powell*.¹ Sunair subsequently did not press this claim against Mr Walters.

[21] During the investigation meeting, I heard evidence from Mr Power, Mr Walters, Mr Dumble and Mr Dace. Mr Groome also provided a witness statement. However, as he was unable to attend the investigation meeting, this was set aside.

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

¹[2015] NZEmpC 92

Issues

[23] The issues for investigation and determination are:

- (i) In tendering for a contract against his employer, did Mr Walters breach his:
 - (a) contract of employment;
 - (b) the duty of fidelity; and/or
 - (c) if owed, fiduciary obligations?
- (ii) Should either party contribute to the costs of representation of the other party?

[24] If the answer is 'yes' to any of (i) above, Sunair is entitled to an assessment of remedies arising out of any breaches which will be dealt with at a separate investigation meeting.

Did Mr Walter's breach his individual employment agreement in tendering for the RFS contract?

[25] During the course of Mr Walters' employment with Sunair, the parties were bound by and to an individual employment agreement dated 18 June 2008.

[26] It was common ground that there was no restraint of trade provision in the agreement. However, the agreement did contain the following clause:

18. **Conflicts of interest:** During the period of employment the Employee shall not engage in any employment with, or become involved in, any business which may compete with the Employer's business. The Employee shall not undertake any employment or activities that may impact on the Employee's attention or commitment to his/her duties under this agreement.

[27] The principles of contractual interpretation are well established. The leading decision is that of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.² These principles also apply in the employment jurisdiction.³ The Court in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission* gave useful guidance about how these principles apply to employment agreements.⁴ I adopt and apply these principles.

[28] There are two limbs to cl 18 of the employment agreement. The first prohibited Mr Walters from being employed by or involved with any business that may compete with Sunair. The second prohibited Mr Walters from undertaking employment or other activities that may impact on his duties as an employee.

[29] In his evidence, Mr Power said Mr Walters had breached the first limb of cl 18. Mr Dumble appeared not to be aware of cl 18 of Mr Walters' employment agreement when asked about it during the investigation meeting. When pressed further on this, Mr Dumble stated that he would have expected Mr Walters to have "dealt with it" before putting in a tender for the RFS contract.

[30] Advocate for Mr Walters contended that when Mr Walters submitted the tender under the auspices of AAS, it was just a "concept" as he had neither formalised the AAS partnership with his wife or applied for IRD trading status. He further contended that the only steps Mr Walters took that could be regard as "becoming involved in a business" occurred while he was serving his notice period and, therefore, any breach of cl 18 was "inadvertent".

[31] This argument is problematic for Mr Walters. The winning of the tender by AAS triggered the redundancy process for Mr Walters with Sunair. Clearly, Mr Walters cannot then shield himself under the blanket of notice of termination from the express obligation contained in cl 18 of his employment agreement.

[32] A further problem with this argument is that Mr Walters said in his evidence that he had been considering tendering the RFS contract for some time. Indeed, his AAS "concept", formalised or not as a partnership, actually went on to win the tender.

²[2010] 2 NZLR 444 (SC)

³*Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trades Union* [2010] ERNZ 317 (CA)

⁴[2011] NZEmpC 149

[33] The Concise Oxford English Dictionary (dictionary) defines a “concept” as “an abstract idea”. If the submission is to be accepted, then in the present matter a “concept” with its own branding (as AAS) submitted a tender capable of acceptance and which was, in fact, accepted by the Council. The tender documents submitted by AAS were relatively comprehensive and contained, for example:

- (i) a declaration signed by Mr Walters in his capacity as “Director”;
- (ii) details of a “company” office;
- (iii) reference to an AAS policy requiring “staff” to declare secondary employment or business; and
- (iv) reference to an AAS “customer relationship system”.

[34] In addition, the tender document in a section titled “resources” identified that, if successful, AAS would have five staff. These staff included Mr Walters, Mr Godfrey and Mr Hawke. The evidence before the Authority was that Mr Walters did not inform either Mr Godfrey, who subsequently was not offered employment by AAS, or Mr Hawke that they had been identified as future employees of AAS.

[35] The dictionary definition of two further words is relevant in determining whether Mr Walters’ breached cl 18 of his employment agreement, these are: “business” and “compete”. “Business” is defined, among other things, as “commercial activity”. “Compete” is defined as “strive to gain or win something by defeating or establishing superiority over others”. There can be no dispute on the evidence that Mr Walters was “involved”, as that word is commonly understood, with AAS.

[36] In my view, the process of tendering for a contract is clearly “commercial activity”, regardless of whether it is undertaken by a formal or informal entity. I further find that this commercial activity did “compete” with Sunair because AAS tendered for a contract that Sunair held which required it to carry out a scope of work within the RFS that Mr Walters participated in delivering as an employee.

[37] The answer to this question is, therefore, “yes”, on the balance of probabilities, Mr Walters did breach cl 18 of his employment agreement in tendering for the RFS contract while an employee of Sunair.

[38] Sunair is entitled to an assessment of remedies arising out of this breach by Mr Walters.

Did Mr Walters breach the implied duty of fidelity he owed to Sunair?

[39] The Court of Appeal in *Schilling v Kid Garrett Ltd* found that contract of service contained, for its life, an implied term that an employee would perform that contract in good faith and with fidelity.⁵ The content of the duty of fidelity is not subject to a fixed test,⁶ but its boundaries are to be determined by the facts of the case.⁷ Breach of the duty is determined by conduct which, viewed objectively, undermines the relationship of trust and confidence between an employee and employer.⁸

[40] Advocate for Mr Walters submitted that absent a fiduciary duty or any contractual provision to the contrary, “an employee is free to plan for his future and his duty of fidelity and loyalty is simply to do the job that he is paid to do”. The advocate further submitted that the cases relied on by Counsel for Sunair, particularly the Court of Appeal’s decision in *Schilling*, dealt with very different factual scenarios and, presumably, therefore, could be distinguished. However, it is not the facts of these decisions which are relevant, it is their legal principles.

[41] Advocate for Mr Walters also made favourable reference to a recent decision of the English Court of Appeal in *Ranson v Customer Systems*⁹ which is suggestive of a more modulated view of the duty of fidelity than currently applied in New Zealand.¹⁰ Given the approach to the duty of fidelity consistently taken by the Court of Appeal (and Employment Court) since *Schilling*, it is difficult for the Authority to afford much weight to *Ranson*.

⁵[1976] 1 NZLR 243 (CA)

⁶*Korbond Industries Ltd v Jenkins* [1992] 1 ERNZ 1141

⁷*Tisco Ltd v Communication and Energy Workers Union* [1993] 2 ERNZ 779 (CA)

⁸*Big Save Furniture Ltd v Bridge* [1994] 2 ERNZ 507 (CA)

⁹[2012] EWCA Vic 841

¹⁰See, for example, *Morris v Interchem Agencies Ltd* [2003] 1 ERNZ 93 (CA) and *Rooney Earthmoving Ltd v McTague* [2012] ERNZ 273

[42] However, even if accepting the *Ranson* approach – which is, in effect, the scope of the duty, and, therefore, any resultant breach, is determined by the boundaries of the employment agreement - as the way forward for the law in this area, this does not assist Mr Walters in the present matter as he has been found to have breached cl 18 of his employment agreement.

[43] Mr Walters conduct in submitting a tender against Sunair while an employee, as outlined above and elsewhere in the evidence, when viewed objectively, is conduct that undermined the relationship of trust and confidence. I accept the submission of Counsel for Sunair that concerns that Mr Walters had about his future employment cannot justify this conduct. Mr Walters could have resigned from Sunair - meaning he would not have been subject to cl 18 or the duty of fidelity, as neither term would have survived the end of the employment relationship - and then submitted his tender under the auspices of AAS (or any other entity). However, he chose, for whatever reason, not to take this course. Unfortunately, in making the decisions he did, Mr Walters breached his obligations to Sunair.

[44] The answer to this question is “yes”, on the balance of probabilities, Mr Walters did breach the implied duty of fidelity he owed to Sunair.

[45] Sunair is entitled to an assessment of remedies arising out of this breach by Mr Walters.

Did Mr Walters owe fiduciary obligations to Sunair and, if so, were these breached?

[46] Counsel for Sunair submitted that Mr Walters’ actions in tendering for the RFS contract while an employee constituted a breach of fiduciary obligations.

[47] The Authority has previously found it has jurisdiction to hear and determine a claim founded on breach of fiduciary obligations where the “essence” of claim relates to or arises out of the employment relationship.¹¹ I accept this view. However, in doing so, I also accept the view expressed in that determination “that care must be taken not to equate and confuse special obligations of a fiduciary nature with the duties of fidelity and good faith that are owed by every employee”.¹²

¹¹*Nova Energy v Mitchell and Ors* [2014] NZERA Auckland 94 at [131] and [133]

¹²At [131]

[48] The employment relationship itself is not a fiduciary one.¹³ Something more than the implied duties of trust and confidence, fidelity and good faith is required.¹⁴ The Privy Council in *Arklow Investments Ltd v Maclean*,¹⁵ in a matter on appeal from the Court of Appeal, adopted the following formulation:

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances, which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. ...¹⁶

[49] The Court followed this formulation in *Lloyd v Museum of New Zealand Te Papa Tongarewa* in deciding that a union owed a fiduciary duty to a union member.¹⁷

[50] An assessment of whether Sunair was entitled to Mr Walters' "single-minded loyalty" requires an examination of the position he held within Sunair and nature of the business undertaken.

[51] Mr Walters was employed by Sunair as an RFS operator within a three person unit managed by Mr Godfrey. Mr Walters was not a director or shareholder of Sunair. He was to be made redundant by Sunair if it had lost the RFS contract. There was no suggestion in the evidence that he would have been redeployed elsewhere in Sunair's operation, as ultimately happened with Mr Godfrey. It could be reasonably expected that significant efforts would be made by an employer in any restructuring process to retain an employee subject to fiduciary obligations.

¹³*Jerram v Franklin Veterinary Service (1977) Limited* [2001] ERNZ 157 at [52]

¹⁴*Ibid*

¹⁵[2000] 2 NZLR 1 (PC)

¹⁶At [10]

¹⁷[2003] 2 ERNZ 685

[52] Counsel for Sunair submitted that as Mr Walters' duties as a RFS operator were performed on a "sole charge" basis, this meant he was, in effect, "Sunair" during those periods of duty. This, together with the authority and trust arising out of being a firefighter, meant Mr Walters' position attracted a "greater obligation of trust and confidence". Counsel also argued that because Mr Dumble saw Mr Walters as being the "de facto" manager of the RFS, this increased his importance within Sunair.

[53] However, against this, Mr Power's written evidence disclosed that he did not regard Mr Walters as either a senior or management employee of Sunair. He stated:

14. ... Mr Dumble arranged for Mr Walters to attend a Safety Management Systems ("SMS") course (without my knowledge at the time). This surprised me as this course was not relevant to Mr Walters' job description or role. The SMS course is suited to staff at management level who are overseeing quality control, and is not appropriate for firefighters.
15. It later came to my attention that Mr Dumble had arranged for Council to pay fund the SMS course. This again surprised me, as if any the RFS team should attend the course, it would have been the unit manager, Mr Godfrey.
...
17. Mr Walters had no authority to liaise with the Airport management (Mr Dumble). This was the task of the unit manager, Mr Godfrey.
...

[54] That Mr Power seemingly, on the evidence, acquiesced to a situation where Mr Dumble saw Mr Walters as the de facto manager of the RFS, effectively usurped the role performed by Mr Godfrey, does not, in my view, give rise to Mr Walters owing fiduciary obligations to Sunair. Further, while it is accepted Mr Walters was "sole charge" firefighter, so were Mr Godfrey and Mr Hawke when they were rostered to perform work at the fire station. In my view, being "sole charge" at the fire station was a function of labour deployment requirements of the RFS contract between Sunair and Council, rather than one giving rise to fiduciary obligations.

[55] I find that Mr Walters' position within Sunair was not one which required his "single-minded loyalty". Therefore, the answer to this question is "no", Mr Walters did not owe fiduciary obligations to Sunair. As these obligations were not owed, it is not necessary to determine the subsequent issue of breach.

Next Steps

[56] The findings that Mr Walters has breached cl 18 of his employment agreement and the implied duty of fidelity he owed to Sunair means the company is entitled to an assessment of remedies.

[57] It may be the parties are able to resolve this matter between them. Given the centrality of the RFS operation to Tauranga Airport, it may be prudent for the Council to also be involved in any discussions. The parties are welcome to request the assistance of a mediator if they believe that will assist them achieving resolution.

[58] If the matter proceeds to a further investigation meeting, a careful examination of the evidence about the tender process will be required. As part of this examination an assessment will need to be made about the likelihood of Sunair winning the RFS contract in the absence of a tender submitted by Mr Walters/AAS. If that likelihood is low, consideration will need to be given as to whether Mr Walters' breaches give rise to damages, beyond nominal or peppercorn, for "loss of a chance" by Sunair and how such damages, if any, are quantified.

Costs

[59] I reserve the issue of costs until after any further investigation by, and any final determination of, the Authority.

Andrew Dallas
Member of the Employment Relations Authority