IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 196
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	BETWEEN	TERRY TIBBITTS Applicant
	AND	EWP SALES LIMITED First Respondent
	AND	UP2IT ACCESS HIRE LIMITED Second Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Bridget Smith, Counsel for Applicant Rani Amaranathan, Counsel for Respondents
Investigation Meeting:	19 &20 May 2015 at Auckland
Submissions received:	20 May 2015 from Applicant and from Respondents
Determination:	30 June 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Terry Tibbitts, commenced joint employment with the First Respondent, EWP Sales Limited (EWP) and the Second Respondent, UP2IT Access Hire Limited (UP2IT) on 14 January 2013, and was issued with individual employment agreements with each company. EWP and UP2IT are related companies having the same shareholders and directors.

[2] In 2014 Mr Tibbitts' position with UP2IT was made redundant and he transferred to working full-time for EWP, being issued with a new individual employment agreement with EWP which commenced on 16 April 2014.

[3] Following a proposal of restructuring of EWP In November 2014 which had the potential to impact on Mr Tibbitts' continued employment, the parties, being EWP and Mr

Tibbitts, entered into settlement discussions with resulted in a Record of Settlement under s 149 of the Employment Relations Act 2000 (the Act) which was signed by the parties and a Mediator employed by the Ministry of Business, Innovation and Employment (the Record of Settlement).

[4] On 3 February 2015, an application for a compliance order between Mr Tibbitts and UP2IT Access Hire Limited was filed with the Authority. Two further claims were subsequently filed with the Authority involving EWP and Mr Tibbitts.

[5] In all, there were three different applications which have resulted in three legal issues which will be dealt with and addressed in this determination.

Issues

[6] The issues for determination are whether or not there has been a breach of:

- the individual employment agreement between Mr Tibbitts and UP2IT: by UP2IT failing to accurately pay Mr Tibbett's bonus payment for the 2013/2014 year

- the Record of Settlement: by EWP failing to pay Mr Tibbitts the sum of $24,500.00 due and owing pursuant to it.

- the Record of Settlement: by Mr Tibbitts breaching clause 28 Restraint of Trade clause in his individual employment agreement with EWP.

[7] At the Authority's investigation on 19 and 20 May 2015 the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' representatives. The representatives also gave closing submissions on the facts and law. I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on the issue necessary to dispose of the matter, and specified orders made as a result

Background Facts

[8] EWP and UP2IT Access Hire are owned by Mr Paul Connell and his wife, Mrs Nicki Connell, who are the joint shareholders of EWP and UP2IT. Mr Connell fulfils the role of managing director of both companies although he is not an employee of either, and Mrs Connell is the financial controller of the two businesses. Mr Connell also has other corporate businesses, including Kiwi Roofing Limited.

[9] EWP and UP2IT are involved in the sale and leasing of elevated work platforms machines and the provision of training to customers in the use of such machines. UP2IT hires/leases the machines to various customers and provides associated training, and EWP sold machines and provided associated training until it ceased trading in 2014. The elevated work platform machines are mainly sourced from a company in China, Sinoboom.

[10] UP2IT was established on 27 October 2011 and EWP was established on 20 December 2012. UP2IT's main customer is Kiwi Roofing Limited which accounts for approximately 30% of UP2IT's revenue. EWP's main customer was UP2IT.

[11] In 2012, Mr Tibbitts met Mr Connell at a conference, and was subsequently contacted by Mr Connell and offered employment. He was employed jointly by both EWP and UP2IT. The commencement date of both periods of employment was 14 January 2013. He was employed to perform the duties of operations/sales manager for UP2IT and of sales manager for EWP.

[12] Initially Mr Tibbitts signed two employment agreements, one with EWP and one with UP2IT. His work included conducting business for both EWP and UP2IT sales and he worked from the same building and desk,

UP2IT Employment Agreement

[13] The individual employment agreement with UP2IT (the UP2IT Employment Agreement) set out details of Mr Tibbitts' remuneration at clause 5. Clause 5.1 concerned a bonus payment and stated:

> ***Bonus -*** *A bonus will be payable based on the following calculations. If the company exceeds net profits of $300,000 a bonus will be calculated on 20% of excess profits over and above $300,000 (i.e. $400,000 net profit, then bonuses calculated on $100,000 at 20% being a $20,000 bonus). This will be payable to the employee within 30 days of signing off on the end of year financial statements. Note financial year is from 1 April to 31 March. Note the employee is eligible for a bonus after 12 months' full time employment*

[14] Clause 18 concerned redundancy and stated:

> *18.1 In this clause "redundancy" means a situation where the employee's employment is liable to be terminated, wholly or mainly, owing to the fact that the employee's position is, or will become, superfluous to the needs of the employer.*
>
> *18.2 In the event that employment is terminated on grounds of redundancy or due to a restructure you will receive one month's notice and compensation equivalent to two months' base salary. To be effective after successful completion of the 90 day period.*
>
> *18.3 Where the employer's organisation or company is sold or transferred the employer will not pay redundancy compensation to the employee.*
>
> *18.4 In the event of redundancy the employee will be given four weeks' notice.*

EWP Employment Agreement No 1

[15] The individual employment agreement between Mr Tibbitts and EWP (the EWP Employment Agreement No: 1), contained the following clauses:

> *5.* ***Remuneration***
>
> *5.1 Refer to UP2IT Access Hire Limited employment contract for remuneration package. Every 12 months the employer will review the employee's salary and other benefits.*
>
> *5.2* ***Bonus****. A bonus will be payable based on the following calculations. 10% of net profits. This will be payable to the employee within 30 days of signing off of the end of year financial statements. NB the employee is eligible for this bonus payment after completing 12 months of employment. Note: financial year is from 1 April to 31 March.*
>
> *18.* ***Redundancy***
>
> *18.1 In this clause redundancy means a situation where the employee's employment is liable to be terminated, wholly or mainly, owing to the fact that the employee's positions is, or will become, superfluous to the needs of the employer.*
>
> *18.2 In the event that employment is terminated on the grounds of redundancy or due to a restructure, you will receive one month's notice. Refer to compensation via clause 18.2 as per UP2IT Access Hire Limited employment contract.*
>
> *18.3 Deleted.*

> *18.4 In the event of redundancy the employee will be given four weeks' notice.*

[16] Both the UP2IT and EWP Employment Agreements contained provisions in relation to confidentiality, non-solicitation of clients and non-competition for a period of 12 months. The wording of the restraint of trade clause was identical in each and stated:

> *28.1 The employee 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 100km, without the express written consent of the employer, provided that such consent shall not be unreasonably withheld. This clause does not preclude the employee from working in a standard waged or salaried position in a similar business.*

[17] Mr Connell said that at the time of Mr Tibbitts' employment, UP2IT was a start-up company, and for the first 12 months after the commencement of Mr Tibbitts' employment, his main focus was to build up the sales in that business. The agreed intention from the outset of Mr Tibbitts' employment had been to grow the UP2IT business to the point at which an operations manager could be employed, thereby releasing Mr Tibbitts to spend more time dedicated to EWP sales.

[18] Mr Tibbitts' salary and annual leave and statutory leave entitlements were accounted for and paid through UP2IT and initially EWP paid only himself (Mr Connell) and Mrs Connell.

[19] In accordance with the agreed intention at the commencement of Mr Tibbitts' employment, Mr Connell employed an operations manager for UP2IT in November 2013. At that stage, Mr Tibbitts was very busy with EWP and therefore Mr Connell had also employed an assistant for the operations manager in UP2IT.

Redundancy from UP2IT

[20] During the early part of 2014, Mr Connell said he had discussions with Mr Tibbitts about his assuming the full-time sales role in EWP but could not reach any agreement. Accordingly he had started a formal consultation process and gave Mr Tibbitts a letter explaining the situation. The letter dated 8 April 2014 addressed to Mr Tibbitts was entitled *"Proposed restructuring"* and stated the following:

> *As you know, I am considering restructuring your position. I have been talking to you for some time about what I would like to do. I have been unable to reach agreement with you so would now like to restart the process in a more formal manner and in a way where we can properly explore any alternatives with you.*

Restructuring proposal

At present, you have joint employment with both UP2IT Access Hire and with EWP Sales New Zealand Limited. The reason your employment is joint is that when we first employed you EWP was a new company. It did not yet have sufficient customers or funds to employ a sales manager full time.

So you were initially employed to work full time, partly as sales manager for UP2IT Access Hire and partly as sales manager for EWP Sales. We discussed with you our hope that EWP would be built up fairly quickly and you would be able to move more and more into that company and that there might be the possibility of you becoming an owner of it in time. …

I now propose that your position where you are jointly employed to work for both companies be disestablished and a new position be created working solely for EWP. I believe this will be more efficient because over time the nature of your actual duties has changed so you hardly do any work for UP2IT anymore and because EWP is now able to pay your salary and keep you busy full time, on its own. …

Effect on you if the proposal goes ahead

I am very grateful for all the work you have put in to building up EWP. Therefore, if the proposal goes ahead, I will offer you an employment agreement with EWP. It would include the same salary you have now, the same bonus you have from EWP and the possibility of putting in place an employee share scheme with EWP instead of your UP2IT bonus.

If you did not wish to accept a new position, you will receive your redundancy entitlements under your employment agreement. …

Consultation process

You are invited to a meeting at 10am on Wednesday with me.

At the meeting I will explain my proposal to you, I will tell you how your position will be affected if the proposal goes ahead. You will be able to ask me any questions you have.

I will then give you a chance to think about what I have told you. I will meet with you again on Friday at 10am. You can then give me your views on my proposal and suggest any alternatives to it.

I will consider your views and take them into account before I make a final decision about the proposed restructuring.

You are welcome to seek any advice about this process and bring an adviser/representative or support person to any meetings.

[21] Mr Tibbitts said that although he felt financially disadvantaged by the proposal, but he had no alternative but to accept it. He had not subsequently taken a representative or support person with him to the meetings with Mr Connell, with whom he said he had had a

good working relationship, because he felt confident about discussing the proposal with Mr Connell on his own.

[22] Mr Tibbitts entered into a new individual employment agreement with EWP (the EWP Employment Agreement No. 2) on 16 April 2014. Under clause 4 headed *"Remuneration"* (although the subsequent clauses were numbered 5), it stated as clause 5.2:

> *Bonus – a bonus will be payable based on the following calculations. 10% of net profits. This will be payable to the employee within 30 days of signing off on the end of year financial statements. NB, the employee is eligible to this bonus payment after completing 12 months' employment. Note, financial year is from 1 April to 31 March.*

[23] At clause 28 headed *"Restraint of trade"* the EWP Employment Agreement No. 2 contained at clause 28.1 an identical worded restraint of trade clause to that which had been in the UP2IT and EWP employment agreements. The EWP Employment Agreement No. 2 also contained the following clauses in addition to the restraint of trade provision at clause 28:

> *26.* ***Non-competition***
>
> *26.1 The employee must devote the employee's full time and attendance during working hours to the employer and must not take on any employment, business or other interest (without prior consent of the employer) which have or may have the effect of infringing to any significant degree whatever on the employee's time and attention during working hours.*
>
> *27* ***Non-solicitation***
>
> *27.1 The employee shall not at any time during the period of employment or for a period of 12 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.'*

[24] Although Mr Tibbitts had signed the EWP Employment Agreement No. 2 he said he had informed Mr Connell that he had wanted the restraint of trade clause removed. The EWP Employment Agreement No. 2 had not however been amended.

[25] Clause 36.1 of the EWP Employment Agreement No. 2 stated:

> *The employer acknowledges that the employee has received a copy of this agreement and that the employee has been advised by the employer that the employee is entitled to seek independent advice and that the employee has a reasonable opportunity to seek such advice.*

[26] Despite this advice, Mr Tibbitts said he had not sought any independent advice on the EWP Employment Agreement 2 before he signed it.

[27] Clause 37.1 of the EWP Employment Agreement No 1 stated:

> *It is a condition of this agreement that it shall supersede all and any terms and conditions or understandings contained in any previous employment contract, agreement or understanding between the employee and the employer either written or verbal*

[28] Mr Connell disputed that the new position with EWP was to Mr Tibbitts' financial disadvantage. He said that although Mr Tibbitts would no longer be entitled to the UP2IT bonus, he and Mrs Connell had gifted him 10% shares in EWP when he had entered into the 16 April 2014 EWP Employment Agreement No 2. He said that the 10% gifting was not something to which Mr Tibbitts was contractually entitled at that time.

Viability of EWP October 2014

[29] Mr Connell said that during October 2014 EWP's main supplier Sinoboom was renegotiating its payment terms with EWP, and his belief was that the new terms it was proposing would undermine any possible future for EWP. He said he tried to negotiate better terms, but Sinoboom would not agree.

[30] On 22 October 2014, Mr Connell had an informal chat with Mr Tibbitts as a shareholder of EWP, and updated him on the situation.

[31] Mr Connell invited Mr Tibbitts to a formal meeting on Friday, 24 October 2014 to discuss a proposal to cease trading in EWP, which could result in Mr Tibbitts position with EWP becoming redundant.

[32] In this situation, he said he advised Mr Tibbitts that if EWP decided to cease trading, UP2IT would possibly offer some of the services currently provided at that time by EWP and promoted on the UP2IT website. This would include selling any remaining EWP stock machines, and continuing to offer training services.

[33] Mr Connell confirmed his proposal to cease trading in a letter to Mr Tibbitts dated 24 October 2014 which stated:

> ***Restructuring proposal***
>
> *As I will explain to you in our meeting, I am considering ceasing trading EWP Sales New Zealand Limited.*

> *The main reason I am considering this is because I consider it is not prudent to resign the new exclusive dealership agreement with Sinoboom for a three year period. We have had ongoing quality issues with Sinoboom and the new contract has unrealistic payment terms which would hugely affect EWP's cashflow. The new terms required 100% payment upfront for each order.*
>
> *The other reasons I am considering ceasing trading are:*
>
> *1.0 I consider the input required by me is not balanced by the possible reward or me* [sic] *effort.*
>
> *2.0 Given the value of stock we currently have and will require in the future, the funding of this has become an issue as it has an effect on cashflow and will limit the opportunity to pay out any bonuses or profit dividends to shareholders. The funding of stock and effect on cashflow is now a risk factor.*
>
> *3.0 It will allow me to focus more on the other active companies in the group, at the moment I feel I am spread too thinly. I would like to lesson* [sic] *my workload but given EWP is growing this would not be possible or likely in the near future.*
>
> *If I decide to cease trading and there are machines left at this time I am considering selling them to UP2IT Access Hire Limited. It is possible within the future UP2IT may offer some of the services EWP currently does, especially in selling off of any stock machines left over from EWP and training services which are currently offered by UP2IT but run by EWP Sales. But if this happens these tasks will be absorbed into the positions of the current employees of UP2IT. A new position would not be required.*

[34] The letter concluded by informing Mr Tibbitts of the effect on his employment if the proposal were to proceed, namely that his position would be surplus to requirements upon EWP ceasing trading and therefore redundant.

[35] In that situation, Mr Connell confirmed that he would give Mr Tibbitts 4 weeks' notice in accordance with clause 14.1 of the EWP Employment Agreement No. 2, and would make any payment in respect of annual leave calculated under the Holidays Act 2003. In addition Mr Connell confirmed that Mr Tibbitts would be entitled to two months' base salary.

[36] In the letter dated 24 October 2014 Mr Tibbitts was invited to take time to consider the proposal and inform Mr Connell if he needed more information. The letter concluded by inviting Mr Tibbitts to a meeting to be held on 31 October 2014 to provide any feedback including any alternatives to the proposal. Mr Connell confirmed in the letter that he would consider the feedback and make a decision about the proposal. Mr Tibbitts was invited to bring a support person or representative to the feedback meeting.

[37] On 24 October 2014, unknown to Mr Connell, Mr Tibbitts had registered three domain names with Companies Office NZ:

(a) elevatedaccess.co.nz;

(b) elevated-access.co.nz; and

(c) elevated-accessnz.co.nz.

[38] Mr Connell said he spoke to Mr Tibbitts on 28 October 2014 about the option of him (Mr Tibbitts) forming his own company. He offered to assist him and to hold EWP's current stock for Mr Tibbitts to sell in due course at no cost to him. This proposal would have a mutual benefit as it was anticipated EWP would have an amount of stock to be sold.

[39] He said Mr Tibbitts responded on 30 October 2014 advising him (i) that he had no wish to continue the work of EWP if Mr Connell did not intend to do so, (ii) he was intending to have a holiday, and (iii) he was interested in learning about finance and entering into business in that area. Mr Tibbitts did not tell him about the company names he had registered six days earlier.

The Record of Settlement

[40] The parties agreed to, and subsequently did, attend mediation on 27 November 2014 and they entered into the Record of Settlement.

[41] The Record of Settlement was signed under s.149 of the Act. The parties to it were Mr Tibbitts and EWP Sales NZ Limited and it was signed by Mr Tibbitts and by Mr Connell as a director for and on behalf of EWP Sales NZ Limited..

[42] The Record of Settlement had also been signed by a mediator from the Mediation Service of the Ministry of Business Innovation and Employment (MBIE).

[43] In accordance with clause 3 of the Record of Settlement, EWP agreed to pay to Mr Tibbitts by direct credit to his bank account:

> *(a) Two months' salary paid as redundancy compensation in the sum of $23,333 (gross) and*
>
> *(b) $13,110 (gross) in full and final settlement of any claim that the employee has as a shareholder to payment from the company; and*
>
> *(c) $13,110 (gross) in full and final settlement of any claim the employee has to payment of a bonus.*

[44] Clause 4 provided:

> *In accordance with s.8.1 of the shareholders' agreement the employee agrees to sell and the employer agrees to repurchase for the sum of $24,500 the employee's shares in the employer company by 28 November 2014 and the parties agree they will sign all documents necessary to effect that transfer of shares.*

[45] Clause 6 provided:

> *The employee agrees to abide by all continuing employment obligations he has and in particular he agrees to comply with the obligations in clauses 24, 27 and 28 of his written employment agreement dated 16 April 2014.*

[46] Clause 9 provided:

> *This agreement is in full and final settlement of:*
>
> *a) All matters pertaining to the Employee's employment and its termination including any events arising during the course of employment; and*
>
> *b) All matters arising out of the Employee's shareholding in the Employer Company.*

[47] The following day, Friday 28 November 2014 was Mr Tibbitts' last day of employment with EWP and he attended the EWP office to complete a return of any EWP property in his possession. He was at that time given a cheque for $24,500.00 in respect of the shares referred to in clause 4 of the Record of Settlement, and paid a further sum of $49,000.00 (gross) in respect of the other amounts agreed under the Record of Settlement.

Personal Grievance

[48] The next day, Saturday 29 November 2014, Mr Connell received an email from an employment advocate who had been engaged by Mr Tibbitts, which raised a personal grievance on behalf of Mr Tibbitts. The basis for the personal grievance claim was that Mr Tibbitts had been unjustifiably dismissed from UP2IT. Under the heading *"amicable settlement"*, the letter stated at para.23:

> *If the employer is interesting in settling this matter quickly and amicably and to avoid costly litigation, we propose the following payment for hurt feeling, loss of dignity and humiliation under s.123(1)(c)(ii) of the Employment Relations Authority Act the sum of $50,000 in full and final settlement. This offer is open until 3pm on 8 December 2014.*

[49] Mr Connell said he had been shocked and upset by a further demand for a payment as his belief was that the Record of Settlement had been made in respect of all events arising during Mr Tibbitts' employment, which included his employment with UP2IT.

[50] Mr Connell said he had become aware on Monday 1 December 2014 that Mr Tibbitts had registered the three domain names in relation to Elevated Access and as a consequence he stopped the cheque made payable to Mr Tibbitts for $24,500.00 until Mr Tibbitts complied with the Record of Settlement.

[51] Mr Connell's solicitors wrote by letter dated 1 December 2014 to Mr Tibbitts' employment advocate at that time, Mr Max Whitehead , stating at clause 7:

> *In conclusion:*
>
> *(a) The personal grievance is out of time and our client does not consent to it being raised now;*
>
> *(b) Your client has breached the settlement agreement he signed on 27 November 2014 which prevents his raising the personal grievance emailed on 29 November 2014; and*
>
> *(c) Your client appears to have breached his good faith obligations.*

[52] At clause 9 the letter advised:

> *Due to Mr Tibbitts' breach of the settlement agreement our client has put a stop on the cheque it handed to him on Friday. However, those funds are still available to Mr Tibbitts upon his undertaking in writing that he will comply with the record of settlement by not pursuing the issues raised on 29 November.*

[53] Mr Connell said he had subsequently discovered that Mr Tibbitts had:

- taken photographs of EWP ansd UP2IT documents which were uploaded to Mr Tibbitts' drop box account which was linked to his personal Gmail account, including private client payment information, and customer sales agreements;
- a photograph of a logo design for Elevated Access which he had sent it to EWP's graphic designer on 6 November 2014 when he was absent from work on sick leave;

- taken 14 photographs of EWP's training register book during working hours on 13 November 2014. The EWP training book contains all the information held on every person EWP had trained; and

- when absent from work on 26 November 2014 on sick leave, sent 32 emails containing sensitive company information relating to both EWP and UP2IT from his company laptop to his personal email address.

[54] Mr Tibbitts said that he had only taken the EWP and UP2IT information for the purposes of the mediation he attended on 27 November 2014.

[55] On or about 1 December 2014 Mr Tibbitts and Ms Williams began operating Elevated Access Limited which offers training services and the selling of elevated work machines.

[56] Mr Connell said he was unaware of Elevated Access Limited until 5 January 2015 when Ms William's father, a website designer, accidently sent to him an email which was intended for EWP's website manager; in which Ms William's father stated that he was working on: "*Terry's site*".

[57] Sometime later, on 19 January 2015, Mr Connell emailed EWP and UP2It's graphic designer regarding some work to be undertaken in respect of UP2IT. He asked if the graphic designer had modified any EWP forms for Mr Tibbitts, and he confirmed that he had reset an order/sales form.

[58] On 24 February 2015 Mr Connell's solicitors wrote to Mr Tibbitts, Ms Karen Williams, Mr Tibbitts' partner, and Elevated Access alleging that Mr Tibbitts had breached his confidentiality, non-solicitation and non-compete obligations, and that Ms Williams and Elevated Access were assisting him to do so. Undertakings were required, but none were provided at that time.

[59] Settlement proposals were subsequently made by both parties, but this did not resolve the issues between the parties which have now come before the Authority for determination.

Determination

Is UP2IT in breach of clause 5.1 of the individual employment agreement by failing to accurately pay Mr Tibbett's bonus payment for the 2013/2014 year?

[60] Mr Tibbitts claims that UP2IT breached clause 5.1 of the UP2IT Employment Agreement by failing to accurately pay him the bonus payment due under it. In particular, Mr

Tibbitts believes that UP2IT has not paid him the full amount of bonus to which he is entitled in accordance with clause 5.1 of the UP2IT Employment Agreement,

[61] In accordance with the UP2IT Employment Agreement Mr Tibbitts was entitled to a bonus payment in accordance with clause 5 which stated at clause 5.1:

> ***Bonus -*** *A bonus will be payable based on the following calculations. If the company exceeds net profits of $300,000 a bonus will be calculated on 20% of excess profits over and above $300,000 (i.e. $400,000 net profit, then bonuses calculated on $100,000 at 20% being a $20,000 bonus). This will be payable to the employee within 30 days of signing off on the end of year financial statements. Note financial year is from 1 April to 31 March. Note the employee is eligible for a bonus after 12 months' full time employment.*

[62] Mr Tibbitts commenced employment with UP2IT on 14 January 2013 which meant he became eligible, subject to the conditions of clause 5.1 of the UP2IT Employment Agreement, for a bonus payment on 14 January 2014.

[63] Pursuant to clause 5.1, any bonus due became payable within 30 days of the signing off of the end of year financial statements.

[64] The financial statements for the financial year ended 31 March 2014 were completed and signed off on 23 June 2014 by Skipper Lay & Associates. Skipper Lay & Associates are an Auckland based firm of Chartered Accountants, a professional body carrying out financial services for clients.

[65] Clause 35.3 of the UP2IT Employment Agreement states:

> *No representations, understandings or other agreements or arrangements will be recognised as terms of this agreement unless they are:*
>
> *a. set out in this agreement; or*
>
> *b. have been agreed and recorded in writing to take effect as additional terms and conditions, and are not inconsistent with anything in this agreement.*

[66] There is no evidence that any representations, understandings or other agreements or arrangements have been agreed and recorded in writing to take effect as additional terms and conditions. Therefore, I find that only clause 5.1 of the UP2IT Employment Agreement is determinative of any bonus considerations.

[67] In the notes to the financial statements for UP2IT, Skipper Lay & Associates state that the financial statements have been prepared in accordance with the required financial

reporting acts of New Zealand and there are no notes relating to adjustments or definitions other than 1(a) –1(f).

[68] The format of the financial statements follows the requirements of the schedule in the Financial Reporting Order 1994 and uses the term '*Net surplus'* to describe the difference between the Company Gross Surplus from Trading and expenses, which includes taxation issues. Depreciation is shown separately and the final line of the statements as defined as '*Surplus after Tax'*.

[69] Clause 5.1 of the UP2IT Employment Agreement uses the term '*Net Profit*' related to the signed off Financial Statements. In the absence of any specific definition relating to the terms in clause 5.1, the terms '*Net Surpluse*s' and '*Net Profits'* both represent the company's income made in excess of its expenditure. Therefore, I find that the term '*Net Profit'* as used in clause 5.1 of the UP2IT Employment Agreement equates to the term '*Net Surplus'* as used in the financial statements.

[70] Clause 5.1 of the UP2IT Employment Agreement states, "*....A bonus will be payable based on the following calculations. If the company exceeds net profits of $300,000...."* The financial statements show the '*Net Surplus (Net Profit)*' after tax to be $000.

[71] I find therefore that there is no bonus payable to Mr Tibbitts, and that EWP incorrectly calculated the bonus it paid to Mr Tibbitts, which in effect resulted in an overpayment.

[72] The Wages Protection Act 1983 sets out in s.6 how such an overpayment may be recovered, and I find that when considering s.6 of the Wages Protection Act 1983, EWP may not now recover the overpayment made, nor I note, is it seeking to do so.

[73] Mr Tibbitts claims that Mr Connell made various statements regarding estimated profits for UP2IT. While such statements may have raised Mr Tibbitts expectations, I find that any bonus due was to be calculated pursuant to clause 5.1 of the UP2IT Employment Agreement, and in particular the financial statements produced by Skipper Lay & Associates.

[74] I determine that in fact UP2IT did in fact fail to accurately pay Mr Tibbett's bonus payment for the 2013/2014 year in accordance with c 5.1 of the UP2IT Employment Agreement, however this resulted in an overpayment of $15,154.75 to Mr Tibbitts and not an underpayment as he claims.

Is EWP in breach of clause 4 of the Record of Settlement by failing to pay Mr Tibbitts the sum of $24,500.00?

[75] EWP claims that it is entitled to withhold the $24,500.00 payment due and payable under clause 4 of the Record of Settlement because Mr Tibbitts breached his good faith obligations during his employment and breached the Record of Settlement during and after his employment by:

- Immediate breaches of the confidentiality provisions, and breach of the non-solicitation provision of clause 6;
- A continuing breach of the clause 9, and good faith obligations by raising a personal grievance; and
- A continuing breach of his non-competition obligations.

[76] The Record of Settlement was signed by the parties EWP and Terry Tibbitts and by a Mediator in accordance with s. 149 of the Act, a person empowered to do so in accordance with s. 149 of the Act.

[77] The certification under s 149 of the Act clearly sets out that prior to the Mediator signing the Record of Settlement, she had, in accordance with subsection 149 (2) explained to the parties the effect of subsection (3) which states:

> *149 (3)*
>
> *(a) Those terms are final and binding on, and enforceable by, the parties; and*
>
> *(b) The terms may not be cancelled under section 7 of the Contractual Remedies Act; and*
>
> *(c) Except for enforcement purposes, no party may seek to bring those terms before the Authority or court, whether by action, application for review, or otherwise.*

[78] As stated by Her Honour Judge Inglis in *Young v Board of Trustees of Aorere College*[1] in regard to the s. 149 provisions*:*

> *The combined effect of these provisions is that a settlement agreement which has passed through the s. 149 process cannot be challenged or*

[1] [2013] NZEmpC 11 at para [20]

set aside, except with the possible exception of duress on public policy grounds.

[79] There is no evidence in this case that either EWP or Mr Tibbitts entered into the Record of Settlement as a result of duress. In that situation I find that the Record of Settlement cannot be challenged or set aside.

[80] The breaches of clause 6 of the Record of Settlement, being breaches of confidentiality, non-solicitation and non-competition will be further discussed below, but even if determined that they have been breached, I find that they will not act to challenge or set aside the Record of Settlement entered into by EWP and Mr Tibbitts under the provisions of s. 149 of the Act.

[81] Clause 9 of the Record of Settlement states that it is in full and final settlement of:

> *a) All matters pertaining to the Employee's employment and its termination including any events arising during the course of employment; and*
>
> *b) All matters arising out of the Employee's shareholding in the Employer Company.*

[82] Although the Record of Settlement identifies the parties as EWP and Terry Tibbitts, EWP submits that although the personal grievance raised by Mr Tibbitts following the signing of the Record of Settlement refers only to UP2IT, the matters raised in it relate to joint employment with EWP and UP2IT, and are a breach of clause 9 of the Record of Settlement and his good faith obligations during his employment.

Joint Employment

[83] In the Employment Court case *Hutton v Provencocadmus*[2] Judge Inglis stated in relationship to joint employment that:[3] "*It is common ground that it is possible to have joint employers. Common control by the joint employers is usually a feature of such a relationship".* Further that the situation was to be ascertained by asking the Question: "*Who would an independent but knowledgeable observer have said was the plaintiff's employer?".*

[84] I find that there are factors in this case which indicate joint employment, including:

- EWP and UP2IT have common directorships, shareholding and services;

[2] [2012] NZEmpC
[3] Ibid at para [79}

- Although there are two separate employment agreements, the EWP Employment Agreement refers to the UP2IT Employment Agreement for both salary and redundancy compensation.

- The two employment agreements do not provide for any separation of duties or hours between the two companies;

- UP2IT paid Mr Tibbett's salary, there was not a separate salary for EWP, although arrangements relating to pay, PAYE and employer contributions to ACC may be an administrative convenience and not determinative of joint employment[4]

- Mr Tibbitts was under the control at all times of Mr Connell; and

- Mr Tibbitts represented both EWP and UP2IT to customers, making sales on behalf of both and working under the direction of their common director, from the one office, one desk and one phone number on which to make and receive calls of behalf of both companies.

[85] However even were I to find that a situation of joint employment between Mr Tibbitts, UP2IT and EWP existed, and that the raising of a personal grievance against UP2IT was in fact a raising of a personal grievance against EWP and UP2IT, this might, and no doubt would, constitute a breach of clause 9 of the Record of Settlement, but it would not act to challenge or set the settlement agreement aside.

[86] Mr Tibbett's behaviour in entering into a mediation process and Record of Settlement with EWP, accepting the payments made in accordance with that Record of Settlement, and immediately raising a personal grievance against UP2IT may constitute a breach of good faith in a joint employment situation. However again, reprehensible as this behaviour might be should joint employment exist, breach of a mediated settlement may result in a compliance order and/or a penalty being imposed upon the party in breach, but does not act to challenge or set the settlement agreement aside.

[87] As stated at page 7 in the Explanatory note to the Employment Relations Law Reform Bill referring to the addition of s.149(3)9ab) which states that the terms of a s.149 settlement agreement may not be cancelled under section 7 of the Contractual Remedies Act 1979, the policy underlying the amendment was to give: "*greater certainty of outcome in mediated settlements"*

[4] Ibid at [97]

[88] I determine that EWP is in breach of clause 4 of the Record of Settlement by failing to pay Mr Tibbitts the sum of $24,500.00

Is Mr Tibbitts in breach of clause 6 of the Record of Settlement by breaching clause 28 Restraint of Trade clause in his individual employment agreement with EWP?

(i) Is the Restraint of Trade clause enforceable?

[89] In signing the Record of Settlement Mr Tibbitts agreed in clause 6 to: "*comply with the obligations in clauses 24, 27 and 28 of his written employment agreement dated 16 April 2014."* EWP is seeking compliance by Mr Tibbitts in respect of that clause.

[90] As addressed in the preceding paragraphs, the Record of Settlement has been certified by the mediator and is binding upon the parties and may not be cancelled. Mr Tibbitts entered into the agreed terms freely and without duress, and seeks himself to have the terms contained in clause 4 enforced. I accordingly find that he expressly agreed to clause 6 of the Record of Settlement knowing the ramifications of so doing.

[91] The obligations in clause 28 of the EWP Employment Agreement No 2 are in respect of Restraint of Trade and the clause states:

> 28. RESTRAINT OF TRADE
>
> *28.1 The employee 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 100km, without the express written consent of the employer, provided that such consent shall not be unreasonably withheld. This clause does not preclude the employee from working in a standard waged or salaried position in a similar business.*

[92] Prior to entering into the Record of Settlement Mr Tibbitts knew that EWP would cease trading and his position with EWP was to become redundant, and he also had been informed by Mr Connell that if EWP did cease trading, UP2IT would be offering some of the EWP services and selling EWP stock.

[93] In that situation the business of Elevated Access Limited which offers training services and the selling of elevated work machines would compete with the business interests of EWP. Mr Tibbitts agreed to and signed the Record of Settlement in the full knowledge of this information.

[94] Whilst at common law restraint of trade clauses have to be reasonable to be enforceable, I find that the statutory scheme of s. 149 of the Act in essence ousts the common law principle. As previously stated, I find support for this conclusion by the Explanatory Note referred to in page 7 in the Explanatory note to the Employment Relations Law Reform which noted the requirement for certainty of outcome in mediated settlements.

[95] Accordingly whether or not EWP still had a proprietary interest to protect is not relevant since I find that requirement was ousted when Mr Tibbitts agreed to the inclusion of clause 6 of the Record of Settlement. I note that he did so in the knowledge that he was being made redundant, EWP was ceasing trading and UP2IT would continue to provide training services and to see EWP's remaining stock..

[96] Consequently since there is no requirement for me to address whether or not the Restraint of Trade clause would be enforceable in accordance with common law principles, I need to determine whether or not having been incorporated by means of a clause in the Record of Settlement, it has been breached by Mr Tibbitts.

(ii) Has The Restraint of Trade been breached by Mr Tibbitts?

[97] The Restraint of Trade clause wording does not make its meaning clear on a plain reading, however the business of EWP was the sale and provision of training in elevated work platforms, and I find the insertion of missing wording so as to render the clause reading:

> "*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 competition in any way with the employer within a radius of 100km"*

makes clear the meaning of the clause as appears from their evidence to have been so understood by Mr Connell and Mr Tibbitts and so interpreted by them. The clause should be accordingly so modified pursuant to Section 164 of the Act.

[98] Mr Tibbitts claims his status with Elevated Platforms Limited is solely that of an employee and not a director or shareholder. This situation is not precluded by the wording of clause 28.1 which states: "*This clause does not preclude the employee from working in a standard waged or salaried position in a similar business*.".

[99] However the clause does prevent Mr Tibbitts establishing, purchasing or obtaining an interest in a competing business, **directly or indirectly**, (emphasis mine) to EWP without the express written consent of EWP. Although Mr Connell said that he had discussed the prospect of Mr Tibbitts setting up his own business, and offered to assist in that process, there

is no evidence that: "*the express written consent of the employer*" had been provided in respect of that venture..

[100] In the recent High Court proceeding[5] Justice Lang stated at para [22}:

> *…. Although Elevated Access is a separate legal entity from Mr Tibbitts, it is a family business in every sense of the work. There can also be little doubt that Elevated Access would not exist but for the fact that Mr Tibbitts was prepared to apply his lengthy experience and industry knowledge for its benefit. Moreover, although he does not own shares in the company and is not a director, it must be arguable that he has acquired an interest in the business by virtue of his relationship with Ms Williams. At the very least, the shares in the business are arguably relationship property in respect of which Mr Tibbitts would have an interest under the Property (Relationships) Act 2006.His position with Elevated Access is also arguably not a "standard waged or salaried position" of a type that would be permitted by the clause.*

[101] In his written evidence Mr Tibbitts refers to the financial consequences if he should not be permitted to continue working for Elevated Access Limited, citing an inability to fund mortgage payments in relation to the property he and Ms Williams own, the impact a location move would have on their son, and the severe financial consequences which would follow and impact on him, Ms Williams, and all their family, if he were unable to apply his knowledge and experience to Elevated Access.

[102] I find this to support the conclusion that Mr Tibbitts had established, purchased or obtained an interest in either directly or indirectly in Elevated Access Limited as a business that competes with EWP. Further the business of Elevated Access Limited is physically situated within the geographical area prescribed by clause 28 of the EWP Employment Agreement No: 2.

[103] I find there is evidence that Mr Tibbitts breached the Restraint of Trade clause by directly or indirectly establishing or purchasing an interest in Elevated Access, namely he during his employment with EWP::

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[5] *EWP Sales Limited, UP2IT Access Hire Limited v Terry Tibbitts & Karen Williams & Elevated Access New Zealand Limited* [2015] NZHC 619, CIV-2015-404-0488

- Registered domain names containing the words ‘elevated access’ on 24 October 2014, the same day Mr Connell spoke to him about a proposal to cease trading in EWP;

- Amended EWP‘s sales template to refer to elevated access and sent it to EWP’s designer to create an Elevated Access Limited document;

- Sent a logo to EWP’s designer asking him to create a logo for Elevated Access Limited from it; and

- Took photographs of EWP confidential information which would allow him Elevated Access Limited to duplicate EWP’s business and sent it to himself.

[104] After his employment Mr Tibbitts:

- Presented all Elevated Access Limited documents at Companies Office on 1 December 2014 for registration;

- Changed the address for service from his name to that of Ms Williams on 3 December 2014; and

- Had a website for Elevated Access Limited as referenced in the email from Ms William’s father dated 5 January 2015.

[105] I determine that Mr Tibbitts breached clause 6 of the Record of Settlement by breaching clause 28 Restraint of Trade of the EWP Employment Agreement No. 2.

Remedies

(i) *Breach of clause 4 of the Record of Settlement*

[106] I determine that EWP has failed to comply with clause 4 of the Record of Settlement.

[107] **In order to effect compliance with clause 9 of the Record of Settlement, I therefore order EWP to pay Mr Tibbitts, no later than 14 days from the date of this determination, the outstanding sum of $24,500.00, plus interest on that sum at the rate of 5.0%[6].**

Penalty

[6] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

[108] Mr Tibbitts has applied for a penalty against EWP.

[109] Pursuant to s 149(4) of the Act, a person who breaches an agreed term of settlement to which the Act applies, is liable to a penalty of up to $10,000.00 for an individual or up to $20,000.00 for a company.

[110] As the then Chief Judge observed in *Xu v McIntosh*[7], a penalty: "*is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act …"*

[111] EWP is a company which has breached the terms of an agreed settlement certified under s 149 of the Act by the Mediator. As such EWP is liable to a penalty not exceeding $20,000.00.

[112] The Employment Court in *Xu v McIntosh*[8]said that the first question to be asked in contemplating the award of a penalty is "*how much harm has the breach occasioned?"*

[113] I find that the harm in this case can be attributable to Mr Tibbitts being deprived of the use of the outstanding monies from the date of breach until the monies are paid, being due 14 days after the date of this determination.

[114] I have awarded interest on the sum owed to Mr Tibbitts, which is to compensate him for being deprived of the use of that money during the period. In that respect, the degree of harm to Mr Tibbitts occasioned by the breach has been largely remedied.

[115] The Employment Court said in *Xu v McIntosh*[9] that the next question to be examined is the culpability of the perpetrator. Was the *"the breach technical and inadvertent or was it flagrant and deliberate?"*

[116] I find that the breach by EWP was deliberate. Whilst EWP believed that it was entitled to withhold the payment due under clause 4 of the Record of Settlement on the basis of Mr Tibbitts' breach of clause 6, this is not the case. However I accept that this was a genuinely mistaken belief.

[117] In these circumstances I find that a penalty of $250.00 is appropriate, such penalty to be paid to the Crown.

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[7] [2004] 2 ERNZ 448
[8] Ibid at para [47]
[9] Ibid at para [48]

[118] **I order that EWP pay a penalty of $250.00, such payment being made to the Crown.**

(ii) *Breach of clause 6 of the Record of Settlement*

[119] I determine that Mr Tibbitts has failed to comply with clause 6 of the Record of Settlement.

[120] **I order that Mr Tibbitts comply with the requirements of clause 6, in particular by complying with clause 28 of the EWP Employment Agreement No 2.**

Penalty

[121] Mr Tibbitts has breached the terms of an agreed settlement certified under s 149 of the Act by the Mediator. Mr Connell's evidence is that the breach has caused considerable harm to him and Mrs Connell, placing them under great stress.

[122] I find that Mr Tibbitts' breach of the Record of Settlement was neither technical nor inadvertent in circumstances in which he had purposefully turned his mind to the restraint of trade clause and to how he could circumvent it. I find that Mr Tibbitts engaged in a course of conduct which resulted in a flagrant and deliberate breach of clause 6 of the Record of Settlement.

[123] Public confidence in s 149 settlements will be undermined if it is perceived that parties are permitted to breach these settlements with impunity. It is important that parties can have confidence in the enforceability of the terms of agreed settlements.

[124] It is consequently in the public interest to impose a penalty which will additionally act as a deterrent to others who may contemplate engaging in such behaviour.

[125] I have found the breach by Mr Tibbitts to be significant, and the penalty should be set to reflect the Authority's disapproval of such behaviour. I determine that the maximum penalty of $10,000.00 is appropriate in the circumstances, and is to be paid to EWP.

[126] **I order that Mr Tibbitts pay a penalty of $10,000.00 , such payment to be made to EWP.**

Costs

[127] Costs are reserved. Given the extent to which both parties have been successful, I am of a mind that costs should lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions by the Respondent to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Eleanor Robinson
Member of the Employment Relations Authority