

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 31
3001408

BETWEEN WRIGHT TANKS LIMITED
Applicant

AND JOSH IRWIN
Respondent

Member of Authority: Trish MacKinnon

Representatives: Glenn Mason, Counsel for Applicant
Respondent in person

Investigation Meeting: 29 and 30 November 2017 in Palmerston North

Submissions Received: 3 October, 8 and 21 December 2017 from the Applicant
5 October and 15 December 2017 from the Respondent

Determination: 30 April 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Wright Tanks Limited (Wright Tanks or the company) claims Josh Irwin breached his employment agreement and his duty of good faith by starting a business in competition with it while still in its employ and by directing to himself, or otherwise taking, work that was in process before his employment ended.

[2] It claims Mr Irwin also breached the non-competition provisions of his employment agreement. It says he further breached his agreement by attempting to destroy confidential information on a work computer whilst he was employed by the company. Wright Tanks says he copied the information and photographs and attempted to copy its trade secrets, namely its waste water filter process, in breach of his employment agreement.

[3] Wright Tanks seeks orders and damages against Mr Irwin, including the enforcement of the restraint in his employment agreement. The non-competition clause restricted him from carrying on business in competition with the company for three years within a 50 kilometre radius of Wright Tanks' premises. If the Authority finds the restrictive covenant to be unenforceable according to its terms, Wright Tanks asks it to modify the provision.

[4] It seeks damages in relation to work carried out by Mr Irwin that was in process at the termination of his employment; for work he undertook in relation to named clients of Wright Tanks; and for Mr Irwin's breach of his employment agreement by the use of confidential and proprietary information; and for his breach of the restrictive covenant.

[5] Mr Irwin denies he started his business while an employee of Wright Tanks. He disputes the enforceability of the restrictive covenant in his employment agreement and denies all other claims made by his former employer.

The Authority's investigation

[6] In the course of the Authority's investigation evidence was given for the applicant by Mr Andrew Wright, Ms Karen Wright, Mr Bryan McHaffie, Ms Helen Bengston and Mr John Greenwood. Evidence for the respondent was given by Mr Irwin, Mr Ricky Crutchley, Mr Simon Amos, Mr Graham Wellington and Mr Simon Barry.

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

[8] The determination has been issued outside the timeframe set out at s.174C(3)(b) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s.174C(4) to do, are exceptional.

[9] By agreement, this determination deals only with the issue of liability. If necessary, consideration will be given at a later time to the issue of remedies.

Relevant background and the parties' evidence about Mr Irwin's employment

[10] Wright Tanks operates a business as a drainlayer and manufacturer/installer of septic tanks and waste water systems. It provides ongoing service, including emptying, of the systems it installs and holds a patent for its septic tank filter system. The company is based in Manawatu, approximately 9 kilometres from central Palmerston North.

[11] It employed Mr Irwin on 4 August 2014 in a customer liaison role. His background was in sales and he had no qualifications or experience relating to drain laying or waste water. It was not disputed that Mr Irwin had sought employment with Wright Tanks through his acquaintance with Mr Andrew Wright, sole director of the company.

[12] In his customer liaison role Mr Irwin was the face of Wright Tanks to many of building companies for which it undertook work and he had unrestricted access to Wright Tanks' clients. He introduced two building companies to Wright Tanks through his social connections with the directors of those companies.

[13] Mr Wright trained Mr Irwin to do site inspections, quotes and reports for council consents. Mr Wright is a registered Certifying Drainlayer, accredited as a wastewater designer, and certified for wastewater and fresh water sampling. All plans formulated by Wright Tanks and submitted to local authorities for consent used his approved credentials and drainlaying ticket.

[14] Following training, Mr Irwin was able to prepare complete plans and reports for local territorial authorities and clients. He answered clients' questions relating to technical information, acted as customer liaison, checked on the progress of council consents, and met with clients on site to discuss their requirements. Mr Irwin had nothing to do with the manufacturing side of the company's business and was not involved in the installation, setting up or servicing of tanks. Nor was he involved in the design process of the wastewater treatment plants.

[15] Mr Wright's evidence is that the work undertaken by Wright Tanks is specialised and highly regulated. Tanks must be installed by a registered drainlayer, and it took four years to complete a drainlayer's course to become qualified.

[16] Mr Irwin worked for Wright Tanks for two years and one month before resigning on notice on 7 September 2016, with his last day at work being 21 September 2016. The company says he initially did very well in his work and this was recognised by the company in the form of a pay increase.

[17] It acknowledged Mr Irwin had stepped up and expanded the range of his duties after Mr Wright sustained a head injury in an accident which resulted in him reducing the hours he spent at work. The company rejected Mr Irwin's claim that he managed the company from that time and said other employees had similarly stepped up after Mr Wright's injury.

[18] In 2015 Mr Wright and Mr Irwin established a separate company, Wright Pumping Solutions Limited (WPSL). Both were directors and shareholders. Ms Karen Wright, who works for, and is a shareholder of Wright Tanks, was also a shareholder of WPSL.

[19] WPSL operated a portaloo leasing business, mainly to the building trades. Mr Irwin carried out most of the work for WPSL, the arrangement being that his work was paid for by Wright Tanks until such time as the new company became profitable.

[20] Following Mr Irwin's resignation from Wright Tanks, he discussed purchasing Mr and Ms Wright's shares in WPSL. Those discussions broke down and Mr Irwin entered into a deed of settlement with them, by which he sold them his shares; agreed to return all assets owned by WSPL that he held; and agreed not to compete with the business of WSPL for a period of 12 months.

[21] Mr Irwin incorporated his own waste water installation business after his employment ended. It is undisputed that he undertook work in his company's name for which Wright Tanks had previously quoted and for which it had, in some cases, undertaken work.

Mr Irwin's employment agreement

[22] Relevant provisions in the employment agreement between Mr Irwin and Wright Tanks include:

Clause 4.2 Obligations of the Employee

The Employee shall:

- (i) Comply with all reasonable and lawful instructions provided to them by the Employer
- (ii) Perform their duties with all reasonable skill and diligence
- (iii) Conduct their duties in the best interests of the Employer and the employment relationship
- (iv) Deal with the Employer in good faith in all aspects of the employment relationship
- (v) Comply with all policies and procedures (including any Codes of Conduct) implemented by the Employer from time to time, and
- (vi) Take all practicable steps to perform the job in a way that is safe and healthy for themselves and their fellow employees.

Clause 10.1 Confidential Information:

The Employee shall not, whether during the currency of this agreement or after its termination for whatever reason, use, disclose or distribute to any person or entity, otherwise than as necessary for the proper performance of their duties and responsibilities under this agreement, or as required by law, any confidential information, messages, data or trade secrets acquired by the Employee in the course of performing their services under this agreement. This includes, but is not limited to, information about the Employer's business.

10.2 Copyright and other intellectual property

All work produced for the Employer by the Employee under this agreement or otherwise and the right to the copyright and intellectual property in all such work is to be the sole property of the Employer.

...

10.4 Non-competition

The Employee agrees that for a period of **three** years following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, carry on business in competition with the Employer within a radius of 50 kilometres from the Employer's premises.

Issues

[23] The issues for the Authority to determine are:

- a. Whether Mr Irwin breached his employment agreement and obligations of good faith by:
 - i. starting a business in competition with Wright Tanks while working for it; and
 - ii. directing to himself, or otherwise taking, work that was in process before his employment terminated.

- b. Whether the non-competition provisions of Mr Irwin's employment agreement are enforceable and,
 - i. if not, whether/how the provisions should be modified; and
 - ii. whether Mr Irwin breached the original or modified provisions.
- c. Whether Mr Irwin breached his employment agreement by
 - i. deleting confidential information belonging to Wright Tanks; and
 - ii. by copying confidential information and photographs that were the property of Wright Tanks
- d. Whether Mr Irwin breached his employment agreement by attempting to copy trade secrets belonging to Wright Tanks with regard to its waste water filter system.

Did Mr Irwin set up his business in competition with Wright Tanks while employed by it?

[24] Mr Irwin denies having the intention of establishing his company, Waste Product Services (2016) Limited, during his employment with Wright Tanks. He says his intention upon resignation was to purchase Mr Wright and Ms Wright's shares in WPSL and to continue operating that business, which related to portaloos and the import of water tanks.

[25] He and Mr Wright held discussions during September 2016 but, for various reasons, were unable to agree. Mr and Ms Wright eventually bought Mr Irwin's share of WPSL on or around 11 November 2016 and he was removed as a director and shareholder from that company.

[26] Mr Irwin says he did not form the intention to form his own company until well after his employment with Wright Tanks had ended. He said it occurred sometime between 11 and 31 October 2016.

[27] Those dates do not accord with evidence presented that indicates Mr Irwin placed an order on 3 October 2016 with Effluent Management Systems Limited for a waste water treatment plant. The logo of Waste Product Services was on the email on which he placed the order. This indicates he had formed the intention of establishing the company on, or more likely before, 3 October.

[28] The New Zealand Companies Register reveals that Waste Product Services (2016) Limited was incorporated on 26 October 2016, more than a month after Mr Irwin's employment with Wright Tanks had ended.

[29] Counsel for Wright Tanks, Mr Mason, conceded in written submissions that, while the evidence raised suspicions about Mr Irwin establishing his business while employed by Wright Tanks, it does not establish that he did this. Counsel refers to the suspicions arising from Mr Irwin booking in an OSET trial on 6 September 2016, the day before he submitted his resignation, and to his having booked himself on a Weltec course by email sent on that same day.

[30] I accept that the timing of those actions gives rise to conjecture about Mr Irwin's motivation and plans. However, it falls well short of establishing that Mr Irwin started his business while he was still employed by Wright Tanks and I dismiss this claim.

Did Mr Irwin direct work to himself while employed by Wright Tanks?

[31] The proposition was put to Mr Irwin that he had directed work towards himself, or deliberately delayed the undertaking of work, in order that he could perform it in his own right following his resignation. He denied doing this.

[32] Judge Travis considered a similar allegation in *Rooney Earthmoving Limited v McTague and ors*¹. In that case two employees were accused of stockpiling work opportunities coming to their knowledge while employed by Rooney Earthmoving Limited (REL) in order to have that work done by the business they were about to establish rather than arranging for it to be done by REL. The judge accepted the balance of probabilities as the standard, with the burden lying with REL to establish in relation to each of the factual elements. He said that because of the serious allegations being made there was a high threshold to be met and that "*the evidence in support needs to be "as convincing in its nature as the charge was grave"*"²

[33] In the current instance, there is evidence that Mr Irwin took on work for which Wright Tanks had quoted and provided council plans. However, that is a different matter from stockpiling work or directing it to himself during his employment for undertaking on his own account after the termination of his employment.

¹ [2009] NZEmpC CC 10/09

² *Honda NZ Ltd v NZ Boilermakers Union* [1991] 1 NZLR 394 (CA)

[34] I find there was very little evidence to support this claim or the claim of his being deliberately tardy in arranging for the completion of work. By Mr Irwin's own evidence he undertook work that had been on Wright Tanks' books during his employment and I shall consider that matter further shortly.

Did Mr Irwin otherwise take work that was in process at the termination of his employment?

[35] Wright Tanks alleges Mr Irwin completed wastewater and septic tank work on his own account that it had quoted for during Mr Irwin's employment, and for which its quotes had been accepted. The company named several such instances. In those cases Wright Tanks had prepared reports to the relevant local authority for consent purposes before Mr Irwin left the company.

[36] Wright Tanks' terms and conditions of trade are set out in the documentation supplied to clients and prospective clients. They include the following:

"A quote is not a binding contract until the client signs, dates and returns a copy, or accepts the quote in writing, by phone or any other means of communication. However acceptance of plans and reports from Wright Tanks Limited is deemed to be accepted by the client for all work proposed to be undertaken."(underlining added)

[37] Mr Wright gave evidence of nine clients who had accepted quotes from Wright Tanks, and for whom Wright Tanks had obtained local authority consents. He alleged the work had been undertaken by Mr Irwin's company, Waste Product Services Limited, after Mr Irwin had resigned from his employment.

[38] Mr Irwin acknowledged having undertaken work for some, but not all, of the nine named clients. In light of his acknowledgement I will make findings on this issue when I consider whether Mr Irwin breached the non-competition provisions of his employment agreement.

Did Mr Irwin breach his contractual and/or his statutory obligation of good faith to Wright Tanks?

[39] I have found insufficient evidence to support the claim that Mr Irwin was stockpiling work while an employee, or delaying the commencement of jobs, or directing work to himself for completion once he was no longer an employee. If he

had been doing so, he would have been in breach of clause 4.2 (iii) and (iv) of his employment agreement as well as of his statutory obligation of good faith.

[40] Mr Irwin did undertake, on his own account, work that had been in process during his employment with Wright Tanks. However, the obligation of good faith does not survive the termination of employment.³ As the obligation ceases once employment ceases, I find Mr Irwin did not breach his statutory or contractual obligation of good faith in undertaking that work following the termination of his employment.

[41] Counsel for Wright Tanks submits Mr Irwin was under an equitable duty of a fiduciary nature not to profit from business opportunities known to him due to his employment with the company. Mr Mason refers to evidence that Mr Irwin regarded himself as being in a management position; had complete access to the company's clients; and had, or had developed, personal relationships with those clients. He submits Wright Tanks was highly vulnerable to Mr Irwin and that vulnerability was shown by the respondent's taking significant work the company had in progress.

[42] Mr Irwin regarded himself as the Manager or General Manager of Wright Tanks but the evidence of Mr Wright, Ms Wright and Helen Bengston, who was an administrator for the company, was that he was not. Mr Wright said Mr Irwin had voluntarily stepped up and taken on more duties after he (Mr Wright) had sustained head injuries in an accident.

[43] However, he said Mr Irwin's role in the company did not ever change and other employees had similarly stepped up. He expressed concern that Mr Irwin had claimed on his Facebook profile that he was General Manager of Wright Tanks and said he would have asked Mr Irwin to stop making such claims immediately had he known about it at the time.

[44] Ms Wright denied she had ever referred to Mr Irwin as a manager or the manager and said she would not have done so because it was incorrect. Ms Bengston's evidence was that Mr Irwin's role was primarily sales.

[45] Mr Irwin had no financial interest in the company, and was neither a director nor a shareholder of it. I find he did not have a fiduciary duty to Wright Tanks.

³ *Idea Services Ltd (In Statutory Management) v Barker* [2012] NZEmpC 112

Are the non-competition provisions of the employment agreement enforceable?

[46] Wright Tanks has the onus of showing that the restraint provisions in Mr Irwin's employment agreement are reasonable in all the circumstances and in the public interest.⁴ Mr Irwin submits the provisions are not enforceable as they are anti-competitive; do not protect a legitimate proprietary interest; and are unreasonable in the circumstances. He has a further objection to the provisions which I shall address shortly.

[47] Counsel for Wright Tanks accepts that covenants restricting the activities of employees after termination of employment are as a matter of policy regarded as unenforceable unless they can be justified as reasonably necessary to protect proprietary interests of the former employer and in the public interest. In his view the facts of the current case justify the restrictions.

[48] Mr Mason cites the factors of Mr Irwin having actively sought employment with Wright Tanks, which created a role for him at his request. He also refers to Mr Irwin's lack of qualifications or any experience in waste water systems until his employment with Wright Tanks when Mr Wright and others taught him about the industry and about aspects of waste water system design.

[49] He submits Mr Irwin would have had no ability to compete with Wright Tanks at the outset of his employment because of his lack of knowledge of the industry. Notwithstanding that, he says it was crucial for Wright Tanks to have restraint provisions in his employment agreement because, in creating a position of customer liaison for Mr Irwin, it was creating vulnerability for the company. Mr Mason submits this is the very vulnerability Mr Irwin now claims the right to exploit and says that when Mr Irwin left his employment with Wright Tanks he had sufficient business to start out on his own.

[50] I accept Wright Tanks' submission that it has a proprietary interest in its trade and customer connections as well as its patented processes.

[51] The further objection Mr Irwin has to the non-competition clause is that he had signed the employment agreement containing the clause without having it specifically drawn to his attention. He had also signed and returned the agreement within a very

⁴ *Hally Labels Ltd v Powell* [2011] NZEmpC 63 at [92]

short time of having been given it. Under questioning Mr Irwin acknowledged, however, it had been his choice to return the signed agreement quickly. He confirmed there had been no pressure on him to do so and he had the time and opportunity to take advice on it if he had wished.

[52] I note that when Mr Irwin signed the agreement, he also signed a declaration separately on the same document to the effect that he had read and understood the conditions of employment detailed in the employment agreement and accepted them fully. He acknowledged in the declaration he had been advised of the right to seek independent advice in relation to the agreement and had been allowed reasonable time to do so.

[53] Mr Wright's evidence, which I accept, is that if Mr Irwin had expressed any unhappiness with the terms of the employment offer, he would have been willing to negotiate with him over those terms. Mr Wright was clear, however, that he would not have employed Mr Irwin without the safeguard of confidentiality, intellectual property and non-competition provisions.

[54] I find it was appropriate for non-competition provisions to be included in Mr Irwin's employment agreement and will now consider the reasonableness of the restraints with regard to their duration and scope.

[55] Mr Mason acknowledges three years is a longer non-competition period than those generally upheld by the Court. He refers to *Hally Labels* where Judge Travis, in upholding a one year restraint, accepted that it was "*at the higher end of what has been found to be reasonable*".⁵

[56] Mr Mason submits the factual reason for the three year restraint is related to the length of time some contracts took to be finished, and says there is a good faith basis for the term. He notes the limited geographical area within which the restraint operates. He submits that the term and scope of the non-competition provision is reasonable but that, if the Authority finds three years to be an unreasonable period, the Authority should modify the term to two years.⁶

⁵ n2 at [99]

⁶ In accordance with s.162 of the Act and s. 83 of the Contract and Commercial Law Act 2017

[57] When Mr Irwin was asked in cross-examination whether an 18 month restraint period would have been reasonable, he rejected it saying a three month restraint clause would have sufficed.

[58] After considering the submissions of the parties I am not persuaded that three years is a reasonable or necessary period for the non-competition clause to operate. I find a one year period can be justified on the grounds put forward by Wright Tanks.

[59] Mr Irwin submits I should not modify the restraint provision on the grounds of it being unreasonable and designed simply to protect Wright Tanks from competition. I have considered, but reject that submission, having already found Wright Tanks has legitimate proprietary interests to protect and that it is appropriate and reasonable for a restraint clause to be included in his employment agreement. I also take into account the view expressed orally by Mr Irwin that a three month restraint would have sufficed.

[60] I find a modification of the three year duration in clause 10.4 of Mr Irwin's employment agreement to one year to be appropriate and I order that modification under s.162 of the Act and s.83 of the Contract and Commercial Law Act 2017. The modified clause takes effect as of the commencement of Mr Irwin's employment with Wright Tanks.

[61] It became clear during the proceedings that the parties disagree over the interpretation of the geographical area within which the non-competition clause operates. Wright Tanks submits the clause means Mr Irwin is restricted from being based, or working in competition with it, within a 50 kilometre radius from its premises. This would include the premises at which Mr Irwin was based.

[62] While Mr Irwin made no specific submissions on this point he made it clear in the course of the Authority's investigation that he considered the restriction related to where the work was physically carried out for clients. In written submissions he said he had lived in the Manawatu all his life and that his family had lived there for 150 years. It was undisputed that he resides within the 50 kilometre restriction zone.

[63] In support of its interpretation Wright Tanks refers me to *Vector Gas Ltd v Bay of Plenty Energy*⁷. I have considered the principles set out in that case and their

⁷ [2010] 2 NZLR 444

summary by the Employment Court in *New Zealand Professional Fire Fighters Union & ors v New Zealand Fire Service Commission*⁸ where, at paragraph 17, the court said:

In summary, it would appear from Vector that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text. It is nevertheless, a valid part of the interpretation exercise for the Court to "cross-check" its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve. If the language used is, on its face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties. Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear. Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time. [footnotes omitted]

[64] In this instance the parties did not negotiate clause 10.4 of Mr Irwin's employment agreement and Mr Irwin claimed not to have paid any attention to the restraint provision at the time. Mr Wright's evidence is that Ms Wright prepared the employment agreement and they did not take legal advice on it. In his view the clause covers physical work done within the 50 kilometre radius as well as work taken from within that area even though the jobs were at a distance. He cited the example of a job for a Palmerston North customer where the work was done in New Plymouth.

[65] I have considered the evidence and submissions of the parties and find Mr Irwin's view accords more with the most natural and ordinary meaning of the words of clause 10.4. To use Mr Wright's example, Mr Irwin would not be in breach of clause 10.4 if he undertook work in New Plymouth for a customer, regardless of whether the customer lived within a 50 kilometre radius of Wright Tanks' premises.

[66] I conclude the provisions of clause 10.4 are enforceable with the timeframe modified from three years to one year.

⁸ [2011] NZEmpC 149 at [17]

Did Mr Irwin breach the non-competition provisions?

[67] As noted above Mr Irwin acknowledged undertaking work for some of the nine clients cited by Mr Wright who had previously accepted quotes from Wright Tanks. He maintained he had not approached the clients: they had approached him either because of their personal relationships with him and/or their dissatisfaction with Wright Tanks and its inability to complete work in a timely manner. In submissions, Mr Irwin said he did not steal the work: Mr Wright lost it due to laziness and because the clients could not get hold of him. Mr Wright unsurprisingly rejected this submission.

[68] The work carried out for three of the nine clients cited by Wright Tanks took place on sites outside the 50 kilometre geographical restriction and I will not consider those instances further. To protect the privacy of the owners of the properties I will refer to them by the street and/or town in which the work was carried out. The three properties are in New Plymouth, Whanganui and Mangaweka respectively.

[69] For the remaining six clients cited by Mr Wright, work was carried out on sites in Ashhurst, Tokomaru, County Heights (Palmerston North), Levin, Bulls and Tutaki Road (Palmerston North). Mr Irwin acknowledged undertaking some work for those clients. His accounts reveal that between 24 November 2016 and 15 February 2017 he received payment in excess of \$120,000 in respect of five of those clients.

[70] Evidence was given by several witnesses for Mr Irwin who had provided him with work after he resigned from Wright Tanks. They all had personal relationships with him and these relationships, as well as their confidence in Mr Irwin, appeared to be the basis for offering him work. A theme of their evidence was that they saw it as their right to offer work to Mr Irwin if they chose to do so.

[71] I accept they have that right, subject of course to any contractual arrangements they may have entered into, which are not within my jurisdiction. It is not the offering of the work that is the issue in this instance but the acceptance of the work by Mr Irwin in breach of the non-competition provisions of his employment agreement.

[72] There is considerable evidence, including Mr Irwin's own acknowledgements of work he has undertaken, to support the claim that he breached those provisions.

The result of those breaches has been financial loss to Wright Tanks which seeks damages in respect of the work undertaken by Mr Irwin for those and other clients within the restraint period. As previously noted, that is a matter to be addressed separately following this determination.

Did Mr Irwin breach his employment agreement by destroying or attempting to destroy confidential information?

[73] Wright Tanks claims that following the termination of his employment Mr Irwin returned his work phone and computer with all emails deleted. Mr Irwin acknowledges returning the equipment but denies having deleted emails.

[74] Mr Greenwood is the Managing Director of a company Wright Tanks engages for its website and email maintenance. He gave evidence of contacting Mr Wright on 23 September 2017 to inform him he had noticed that Mr Irwin's email account was empty. Mr Wright contacted Mr Irwin about the matter. Mr Greenwood's evidence to the Authority was that there was a short time frame within which the emails could be restored before their deletion became irreversible. On Mr Wright's instruction he said he was able to restore them.

[75] Mr Greenwood said he had an angry telephone call from Mr Irwin shortly after he had informed Mr Wright of the email situation, in the course of which Mr Irwin threatened him with defamation proceedings. In oral evidence Mr Greenwood said he could not say it was Mr Irwin who deleted the emails: he had made an assumption that Mr Irwin kept his password private, as most people did.

[76] Mr Irwin denied having deleted the emails. He acknowledged having a heated telephone conversation with Mr Greenwood which he attributed to his frustration at being accused of something without evidence. He said his password was known to other employees in the Wright Tanks office who had occasion to use his computer. He implied, but fell short of asserting, that someone in the office had deleted the emails in his account and there was no evidence to support that had occurred.

[77] The evidence was not conclusive on this matter. Texts between Mr Wright and Mr Irwin on 23 September suggest Mr Wright was annoyed that Mr Greenwood had not backed up Wright Tanks' systems and he acknowledged under questioning that was correct. He also acknowledged Mr Irwin had shown him more than 200 emails on his phone and tablet after Mr Greenwood had contacted him about their

deletion. However, Mr Wright said that when Mr Irwin handed back his work phone and tablet, which happened approximately a week after he had left his employment, all data had been deleted and had to be forensically restored.

[78] Mr Irwin said under questioning that he had used his personal iCloud account on his work phone. By his account approximately 20 to 30 percent of the content of his iCloud account comprised Wright Tanks' business information and the rest was his personal information. He conceded the business information included confidential information and that he retained access to that information.

[79] Mr Irwin said he had not wished to leave his personal information on work devices and that was why he deleted information. He denied deleting the email account and said that remained on his tablet and on the company's server.

[80] It is clear from Mr Wright's evidence that he had sighted emails on Mr Irwin's devices on the day Mr Greenwood had told him they had been deleted. Whether they were subsequently deleted is unclear. What is evident, however, is that if it did occur it was after Mr Irwin's employment had ended and could not have been in breach of his obligation of good faith to Wright Tanks, as that obligation had ceased upon termination.

[81] The provisions of Mr Irwin's employment agreement relating to confidential information are expressed as surviving the termination of employment. However, those provisions make no reference to the destruction of confidential information: their focus is on the use, disclosure and distribution of such information. This leads me to find, therefore, that Mr Irwin's actions did not constitute a breach of his employment agreement.

Did Mr Irwin breach his employment agreement by copying his employer's confidential information including photographs?

[82] Mr Irwin acknowledged using, after the termination of his employment, some photographs taken during his employment with Wright Tanks. He claimed to have taken the photographs himself and said he used them without considering them to be Wright Tanks' property. His evidence was that the photographs were on his iCloud account, which he owned.

[83] Under questioning he conceded the use of the photographs had been an error of judgement on his part. However, in his submission the photographs are of a site, and consist of the section, land and dirt. He said he could easily have retaken the photographs, and any member of the public could have taken them. He submits they therefore come within the category of information so trivial that it cannot be regarded as confidential. In his view it is

“...information which because of its trivial character or its easy accessibility from public sources of information cannot be regarded by reasonable persons or by the law as confidential at all. The servant is at liberty to impart it during his service or afterwards to anyone he pleases, even his master’s competitor”⁹

[84] As noted earlier, Mr Irwin also acknowledged he had retained other information belonging to his employer as he had used his iCloud account on his work phone during his employment. Evidence produced by Wright Tanks revealed that Mr Irwin had set up an iCloud work account on 19 September 2016, two days before the end of his notice period. Mr Irwin said he had had a personal iCloud account “forever” and could not recall having set up a new account on that date. He blamed the service provider, Spark, for erroneously attaching his Wright Tanks’ email account to his personal iCloud account.

[85] I do not find Mr Irwin’s evidence on these matters to be credible, and am not persuaded by his attempt to minimise his retention, or use, of Wright Tanks’ information. I find he breached his contractual obligation of good faith under clause 4.2 of his employment agreement, and his implied duty of fidelity to his employer, in copying to his iCloud account its confidential business information, including photographs and emails. Those actions also constituted a breach of clause 10.1 of his employment agreement, which barred the disclosure or distribution of such information other than as necessary for the proper performance of his duties and responsibilities.

Did Mr Irwin breach his employment agreement by attempting to copy trade secrets belonging to Wright Tanks, namely its waste water filter process?

[86] The evidence put forward by Wright Tanks for this was the similarity of Mr Irwin’s waste water system designs to those of Wright Tanks. This related to plans prepared for council consents in instances where plans had initially been drawn up and submitted by Wright Tanks. The work had been undertaken, after the termination

⁹ *Faccenda Chicken Ltd v Fowler* [1985] 1 All ER 724 (QB) at 731-732

of his employment, by Mr Irwin on his own account after he had submitted plans for council consent.

[87] Mr Irwin acknowledged under questioning that he had access to Wright Tanks' reports through having that information on his iCloud account. He denied accessing any of that information, other than photographs as referred to above, and attributed any similarity in his plans to having received training in such matters from his former employer.

[88] There was some evidence to support Wright Tanks' claims, one example being the weather conditions cited in a set of plans submitted by Mr Irwin. These contained the same notes about the weather on the day of reporting as had been made on the earlier Wright Tanks' plans for the same property. Weather reports produced by Wright Tanks showed significantly different weather conditions on the day of Mr Irwin's plans. Mr Irwin's response was that weather reports can be wrong and conditions can change.

[89] Mr Irwin had access to Wright Tanks' confidential information, including its waste water filter process, after the termination of his employment through having retained it on his iCloud account. I have already found he was not entitled to that information. His retention of it gives rise to the suspicion that he used Wright Tanks' waste water system design when undertaking work for its former clients, but I find insufficient evidence to find that he did so. I dismiss this claim.

Summary of findings

[90] Mr Irwin did not start a business in competition with Wright Tanks while still employed by it. Nor did he direct work to himself during his employment. He did undertake work for some of his employer's clients after his employment had terminated.

[91] This did not breach his obligation of good faith to Wright Tanks as it occurred after his employment ceased but it did breach the non-competition provisions of his employment agreement. Those provisions are enforceable as modified, with the duration of the restraint being amended from three years to one year.

[92] Mr Irwin did not breach his employment agreement by destroying or attempting to destroy confidential information belonging to his employer. He did

breach his obligation of good faith, his implied duty of fidelity, and the confidentiality provisions of his employment agreement by copying and retaining his employer's confidential information. There is insufficient evidence that he copied his employer's waste water system design when undertaking work on his own account for clients for whom Wright Tanks had previously provided plans.

Determination

[93] The duration of the non-competition clause of Mr Irwin's employment agreement with Wright Tanks is modified from three years to one year pursuant to s.162 of the Employment Relations Act 2000 and s. 83 of the Contract and Commercial Law Act 2017. The modification is effective from the commencement of Mr Irwin's employment.

[94] The one year period of the non-competition clause, as modified, expired on 21 September 2017. Accordingly no orders are required to enforce the restraint.

[95] In light of the findings in this determination the parties are directed to further mediation and are urged to make best endeavours to resolve the issues. If they are unsuccessful, the Authority will hold a telephone conference with them to progress the next stage of the proceedings.

Costs

[96] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority