NOTE: Orders for payment of penalties
appear at p 23 of this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 1/08
5035340 and 5048075

	BETWEEN	KEITH SMITH Applicant First Respondent (5048075)
	AND	ENGINEERING & TECHNICAL RECRUITMENT LIMITED Second Respondent (5048075)
	AND	CAREER ENGINEER LIMITED Respondent Applicant (5048075)

Member of Authority:	R A Monaghan
Representatives:	T Skinner, Advocate for Applicant/Respondents P Akbar, Counsel for Respondent
Investigation Meeting:	10 October 2007
Submissions received:	26 October 2007 from Applicant/Respondent 29 October 2007 from Respondent/Applicant
Determination:	7 January 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Keith Smith says his former employer, Career Engineer Limited ("Career Engineer") dismissed him unjustifiably on 14 March 2006. Career Engineer says Mr Smith was dismissed justifiably on the ground of his poor performance.

[2] Reinstatement was sought, but has since been abandoned.

[3] Career Engineer says also that Mr Smith was in breach of certain terms of his employment agreement, including obligations of confidentiality, a restraint of trade and a non-solicitation provision. In its statement of problem it sought compliance orders, penalties for breach of agreement and an inquiry into damages. During the investigation meeting the requests for compliance orders and an inquiry into damages were withdrawn, so that the only outstanding matter is the claim for penalties.

[4] Career Engineer's application in respect of Mr Smith's alleged breaches of agreement cited Engineering & Technical Recruitment Limited ("ETRL") as second respondent. ETRL is the company through which Mr Smith conducted business in the circumstances forming the basis of the alleged breaches. It was registered on 22 March 2006 with Mr Smith as the sole director and holder of 50% of the shares. Career Engineer says ETRL aided and abetted Mr Smith's breaches of agreement and seeks penalties under s 134(2) of the Employment Relations Act 2000.

[5] All matters have been heard together.

The events leading to the dismissal

[6] Career Engineer operates as a recruitment consultancy focussing on the professional engineering industry. Mr Smith is an electronics technician who said he has specialised in the maintenance of meteorological sensors.

[7] Although Mr Smith had no prior experience as a recruitment consultant, Career Engineer employed him in that position commencing on 19 September 2005. The company's sole director, Darren Hatton, appointed Mr Smith because of his relevant technical background, positive attitude and confident manner. Mr Hatton planned to provide training in identifying and obtaining clients, assessing the availability of roles for candidates and the needs of those roles, and sifting through candidates and matching them with roles.

[8] Training was to take the form of weekly sessions conducted by Mr Hatton and another recruitment consultant who worked in the office. A written training plan

listed a series of 9 topics to be covered during those sessions, which were scheduled from late October 2005 to 21 December 2005. The topics began with the steps involved in the recruitment process, and moved through questioning and interview techniques, cold calling, managing and marketing candidates, building relationships and networking. Mr Smith accepted that the sessions occurred, except that he said the parties had reached the 7th topic by late February 2006.

[9] In addition, during the first week of Mr Smith's employment Mr Hatton went over Career Engineer's administrative and recruitment forms and processes with Mr Smith, as well as the code of conduct of the recruitment industry's representative body, the Recruitment and Consulting Services Association (the "RCSA"). From his observations during that week Mr Hatton quickly developed a concern about Mr Smith's telephone manner, so also used role play as a training technique. During the role play Mr Hatton would act as a client and Mr Smith would act as the consultant.

[10] More generally, the office was an open plan one, and issues could be and were discussed as they arose. Career Engineer also had an intranet, on which company information, tips and techniques and other material could be viewed.

[11] Mr Hatton sat in on an interview Mr Smith conducted with a candidate 'J' on 8 February 2006. Mr Hatton was concerned about the way Mr Smith conducted the interview, in particular with Mr Smith's questioning of the candidate. He believed Mr Smith had failed to ask some important questions, and had not asked adequate follow up questions in other respects. He was concerned, too, that Mr Smith had not demonstrated the professional approach he wanted candidates and clients to associate with Career Engineer.

[12] This caused him to consider Mr Smith's performance in more depth. There was a lengthy discussion on 9 February 2006, which was not completed at the time and continued on 10 February 2006. The matters set out in the letter of warning issued a week later reflected the subject matter of the discussions.

[13] Mr Hatton concluded Mr Smith's performance was so far below the required standard that a disciplinary meeting was necessary, and the meeting was conducted on

15 February 2006. The issues already discussed on 9 and 10 February were discussed in detail again in that context.

[14] A letter to Mr Smith dated 17 February 2006 advised Mr Smith he was being issued with a final written warning. Although I do not set out the specifics of the concerns which were listed in the letter, the specifics were discussed in detail during the parties' meetings and at the investigation meeting. There was little material dispute about the underlying facts, although there was disagreement about how seriously some of the concerns should be viewed. I accept that some were more serious than others, but overall I find Mr Hatton's concerns were genuinely held and were relevant to the standard of performance and presentation he was entitled to expect from the company's consultants. He was entitled to raise the concerns, and it was appropriate that he do so in the way he did if he wished to improve Mr Smith's performance.

[15] The concerns about Mr Smith's performance, together with the remedial action required, were:

(a) not placing sufficient notes on PRS (Personnel Recruitment Software) files: all conversations, information and progress about placements to be noted on PRS;
(b) completing a placement without either completing a reference check or advising client prior to interview that no reference check had been undertaken: client to be advised when no reference check has been conducted prior to interview and advice to be noted on PRS;
(c) unconvincing tone and approach during conversation with client regarding payment for advertising: work through and complete job sheet with each new order received from a client;
(d) sending random unsolicited email seeking business from large organisation: when dealing with clients, first ascertain who is responsible for employment, speak to the person directly, then send directed email introducing yourself;
(e) incorrectly categorising and summarising the company's business to potential new clients: plan telephone conversations in advance;

(f) below standard candidate interview with J: further training in interview process to be provided, with failure to effectively conduct a professional interview by 15 March 2006 being deemed misconduct which will result in the termination of employment.

[16] More generally the letter said:

> "These specific recent examples of interviews, meetings and discussions you've had with clients, candidates and myself are well below the reasonable standards of professional business consulting practice I expect …
>
> Similar such behaviours in the future will be deemed gross misconduct which could lead to your employment being terminated.

[17] The letter also expressed a concern about Mr Smith's attempting to 'blag' his way through a difficult or compromising situation by offering feeble excuses and failing to take responsibility for mistakes. The concern appeared to have been prompted by Mr Smith's response to concerns about the interview with J, in particular where he replied that he had not asked J all of the questions on the standard candidate interview sheet because 'time was marching on'. Accordingly the letter said:

> "Future attempts at deliberately deflecting responsibility for your mistakes or to cast blame elsewhere by providing nonsense reasons/excuses for your behaviours will be deemed gross misconduct which could result in your employment being terminated."

[18] Yet another aspect of the warning referred to the expectation that Mr Smith take some initiatives of his own to improve his business consulting skills, without relying solely on on-the-job training and experience. Regarding on-the-job training, the letter advised that further telephone and interview skills training would continue until the end of February, when Mr Smith would be expected to demonstrate an ability to conduct and maintain professional levels of consultancy.

[19] On or about 2 March 2006 Mr Hatton found a standard and completed 'new placement form' for vacancy number KS4794 (re: candidate 'S') in Mr Smith's in-tray. S had approached Career Engineer for work in January 2006, and gave an oral

indication he would accept vacancy KS4794 on 24 February 2006. Accordingly the new placement form was dated 24 February 2006, and it noted the candidate was to start work on 17 April 2006. The form also recorded basic details of the placement, and incorporated a brief checklist of actions for the consultant to complete.

[20] One of the actions was to place on file a signed affidavit of the candidate. The affidavit was also in a standard form and was intended to address privacy issues. Accordingly it contained various consents by the candidate regarding personal information. It also confirmed the truth and accuracy of the contents of the candidate's CV. Mr Hatton considered the affidavit a critical document, as he was entitled to. He expected the affidavit to be obtained before any CV was sent to a client. Mr Smith had ticked that action as completed, as well as the others on the checklist, and signed off his part of the form.

[21] The second part of the form was for the office manager to complete and sign for invoicing purposes.

[22] As at 2 March the affidavit had not been received. The PRS note in respect of S indicated that, the same day, Mr Smith called to remind him to provide the affidavit. It also noted that attempts had from time to time been made to obtain the affidavit before that date as well as afterwards.

[23] Mr Hatton subsequently found a second, similar failure in respect of vacancy KS4840 (re: candidate 'F'). The relevant new placement form was dated 10 February 2006, and the candidate's start date was noted as 13 February 2006. Again Mr Smith had ticked the box showing 'affidavit on file', but there was no affidavit on file. A second area of dissatisfaction was that the box relating to the completion of formal references was crossed out (showing the references were not obtained), with a handwritten note saying merely 'OK with client'. This was unsatisfactory because details of the arrangement with the client, including the dates and content of any relevant discussions, should have been noted in the associated PRS record.

[24] Messrs Hatton and Smith discussed these matters at a meeting on 7 March. Again the meeting was relatively long. Mr Hatton did not accept Mr Smith's

characterising of the problems as a ‘clerical error’. He advised Mr Smith that a disciplinary meeting would be necessary.

[25] The meeting went ahead the next day, 8 March. Again the discussions covered the matters already discussed on 7 March.

[26] By letter dated 14 March 2006 Mr Hatton confirmed the decision to dismiss, with four weeks’ pay in lieu of notice. The letter said Mr Smith had failed to put into effect remedial action set out in the written warning in that he:

> (a) failed to take and place notes on PRS files for later information/retrieval; and
> (b) completed a placement without being aware he had forgotten to complete a reference check or inform the client no check had been undertaken.

[27] The failures to obtain affidavits at the appropriate time from both S and F appear to have been treated as failures covered by (a) above. On the evidence provided to me the 14 March letter erred in that the problem regarding the completion of a reference check was attributed to vacancy KS4794, instead of vacancy KS4840.

[28] The letter was long and set out Mr Hatton’s position very fully. It detailed the implications of the above failures as far as commission payments and billing were concerned, as well as the possible exposure to litigation from which the affidavits in particular were intended to provide some protection.

[29] The letter also recorded the content of the discussions of 8 March as Mr Hatton saw it. Again there was relatively little dispute about the facts during the investigation meeting, rather the dispute was about the seriousness of Mr Hatton’s concerns and the acceptability of Mr Smith’s explanations. In particular, Mr Smith believed the office manager had a responsibility to follow up on the provision of affidavits, and he repeated his explanation that the problems were a ‘clerical error’. He also explained that he had only just realised the importance of the affidavits.

Finally, he believed Mr Hatton was being overly picky and was seeking 'retribution' for previous mistakes.

[30] Mr Hatton did not accept these explanations. He did not agree that the office manager had responsibility for obtaining the affidavits, and noted in any event that Mr Smith had marked the actions as being completed when that was not the case. He did not accept that the errors were 'clerical', and did not agree that he was being picky or seeking retribution from Mr Smith. Nor did he find it acceptable that Mr Smith was only then realising the importance of the affidavits, as their purpose had been explained and Mr Smith had been using them since his employment began. Mr Hatton concluded:

> "Your comments, coupled with your apparent inability to accept responsibility for a situation you created and to learn from it, rather than cast aside blame, dissolved my confidence in your ability or willingness to perform written instructions, even on documentation where signing your name attests that requirements and standards required have been met when clearly they hadn't. … It also confirms ongoing issues with your ability or desire to complete accurate paperwork/notes – as clearly demonstrated in this instance and with prior shortcomings that led to a written warning to that effect.
>
> As such, and with your completely unfounded, red herring allegation that I was out to seek 'retribution', I believed it was in both our best interests to end your employment as amicably and quickly as possible – hence 4 weeks' pay in lieu of notice.'

Justification for the dismissal

[31] Mr Smith's warning was not itself the subject of a personal grievance and it was open to Mr Hatton to take the warning into account when deciding to dismiss Mr Smith. Nothing in the circumstances of the warning suggested that the substantive basis for it was, nevertheless, tainted with any unfairness that in itself calls into question the justification for the dismissal. The terms of the warning, however, are relevant to the justification for the dismissal.

[32] Mr Skinner submitted that Mr Smith did not receive enough time between the warning and the dismissal to show the necessary improvement in his performance.

The submission is a reference to some of the basic elements of fairness in a performance-related disciplinary procedure.

[33] The Employment Court has identified the elements as follows:

> . did the employer inform the employee of its dissatisfaction with the employee's performance and require the employee to achieve a higher standard?
> . was the information readily comprehensible in that it was an objective criticism of the work so far and an objective statement of the standards to be met?
> . was a reasonable time allowed for the attainment of those standards?
> . following the expiry of such a reasonable time and following reasonable information of what was required, did the employer turn its mind fairly to the question of whether the employee had achieved or substantially achieved what was expected?[1]

[34] Mr Smith's warning was comprehensive and wide-ranging. Regarding time limits, it said a satisfactory standard of candidate interview was to be achieved within a month, and that Mr Smith had, in effect, a little under two weeks in which to 'demonstrate an ability to conduct and maintain professional levels of consultancy.'

[35] However it also said that any further, similar behaviour would be deemed to be 'gross' misconduct, as would future attempts to deflect responsibility for mistakes. The references to gross misconduct went too far and led Career Engineer into error. That is because the overall terms of the warning intertwined and confused what was essentially a performance-related disciplinary procedure - which should have been guided by the elements set out above - with a procedure applicable to misconduct other than conduct related to performance. Moreover, if I interpret all of the concerns listed in the warning as illustrating what is meant by conducting and maintaining 'professional levels of consultancy', then on the one hand Mr Smith had some 10 days in which to demonstrate an improvement, while on the other he was at risk of

[1] **Trotter v Telecom Corporation of New Zealand Ltd** [1993] 2 ERNZ 659, 681

committing ‘gross misconduct’ if there was a single instance of ‘similar behaviour’ whether during that period or afterwards.

[36] Even that conundrum does not mean Mr Smith was protected from the consequences of any act that was capable of standing alone as an act of ‘gross misconduct.’ However I have not been asked to find that any of the matters relied on to justify the dismissal amounted to acts of gross misconduct in their own right or independently of the warning. I doubt that I would have accepted a submission to that effect in any event.

[37] Returning to Mr Skinner’s submission, to the extent that timeframes for improvement can be identified in the warning, the failure to obtain the affidavit required in association with vacancy KS4794 began prior to the warning and was a continuing failure after the warning. Mr Smith should at least have corrected the problem, but he had not done so by the ‘end of February’. His only explanation was that the matter was the office manager’s responsibility.

[38] I do not accept that the unsatisfactory documentation associated with vacancy KS4840 can in itself be invoked to justify the dismissal, since that matter pre-dated the warning.

[39] More importantly, however, the timeframes indicated in the warning were far from straightforward for the reason I have indicated. The warning could have said something like: ‘all of the above concerns (being those listed in the 17 February letter) are examples of failures to maintain the professional standards I expect. I expect you to take the remedial action identified and will assist you by … . There will be a meeting in one month (being, arguably, a reasonable timeframe in which the required improvement could be achieved) during which we will review and discuss your performance. If I am not satisfied that you are maintaining the standards required, you may be dismissed.’

[40] As also indicated, there was a significant departure from that model. Moreover, only the failure to obtain an affidavit in association with vacancy KS4794 is capable of falling within the terms of the warning. I do not accept that the

circumstances are sufficient to demonstrate a failure to improve which is sufficient to justify a dismissal.

[41] I acknowledge that Mr Smith's attitude was just as important in the decision to dismiss. I accept Mr Smith's attitude was unsatisfactory not just because of the evidence about what happened at the time, but because he exhibited a similar attitude during the investigation meeting. Variously, the matters of concern to Mr Hatton were trivial, Mr Smith was not responsible for any errors or problems, and such errors or problems that arose were associated with the adequacy of the training available.

[42] Regarding training, much was made of its alleged inadequacy in evidence and submissions on behalf of Mr Smith. I do not accept those submissions or Mr Smith's assertions. Mr Hatton's approach to training was painstaking and, if anything, he over-explained his requirements. Mr Smith simply did not grasp or pay due attention to the points Mr Hatton tried to convey. Both at the time and when giving evidence he was often dismissive, when he should have accepted at least in principle that Mr Hatton was entitled to impose the standards he did, and expect that they be met.

[43] Standing back and applying the test of whether Mr Hatton did what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred, I find the performance-related disciplinary procedure was too flawed to justify the dismissal. Mr Smith did not receive sufficient time to demonstrate an improvement in his performance, and his failure in respect of vacancy KS4794 was not sufficient to demonstrate an overall failure to improve. In effect it was treated as an act of misconduct, when it should not have been.

[44] I therefore conclude the dismissal was not justified. Mr Smith has established a personal grievance in terms of the Employment Relations Act.

Remedies

1. Reimbursement of lost remuneration

[45] Mr Smith lost remuneration as a result of his personal grievance. He has claimed 5 months' lost remuneration quantified at $18,927.00. The remuneration comprised a retainer of $30,000 per annum, plus commission. The figure of $18,927.00 was obtained by referring to the total earnings for the period of employment at Career Engineer, deducting PAYE tax, deducting the payment in lieu of notice, and deducting $5,000 for 'income received in August 2006'. I observe that the calculation mixes nett and gross figures, but it is not necessary to pursue that matter.

[46] Although I was told no claim was being made in respect of lost commission, Mr Smith's calculation incorporates such a component anyway because it takes into account commission earned to the date of dismissal. However if no claim is being made in respect of lost commission, the calculation should be based on the retainer of $30,000 per annum.

[47] The circumstances raise several further issues regarding the method of calculating the reimbursement of remuneration lost.

[48] The first concerns Mr Smith's obligation to mitigate the loss. He made a very limited effort to seek alternative employment in the field in which he was trained, or an associated field. Instead he moved almost immediately to establish his own recruitment consultancy, being a business activity in which he had only the brief experience obtained at Career Engineer. He was entitled to make that choice, but I do not accept that it amounts to an attempt to mitigate his loss to the extent that Career Engineer should make good the entire loss or even a substantial part of it.

[49] The second concerns the quantification of the loss. According to ETRL's monthly cashflow to March 2007, Mr Smith's deduction of $5,000 reflects the income ETRL received in August 2006. However the record indicates income was received in May and July 2006. The relevant total is $5,550. Mr Smith asserted that the figures were payments for advertising, but the accounts do not show that. I do not accept the assertion. I note, too, that income in excess of $5,000 was achieved in September, November and December. I am not prepared to accept such an apparent upswing sprang from groundwork commenced after August. Commercial practice

suggests that is unlikely, and it is more likely that the groundwork began during the period in respect of which lost remuneration is claimed. Some account must be taken of that.

[50] Thirdly, whether and to what extent Mr Smith contributed to the circumstances of his personal grievance are relevant. His attitude to Mr Hatton's attempts to secure an improvement in his performance lead me to conclude he did so contribute, and that a reduction in the amount otherwise to be awarded is warranted.

[51] The above factors do not allow a straightforward calculation of lost earnings. Taking all of them into account I conclude that reimbursement of a further month's retainer is appropriate. Career Engineer is therefore ordered to pay to Mr Smith the sum of 1/12 x $30,000 = $2,500 (gross).

[52] Mr Smith also seeks compensation for injury to his feelings resulting from the dismissal. To an extent I consider it likely that the injury included Mr Smith's sense that he had done nothing wrong. However his refusal to accept his performance was below standard, particularly when his shortcomings were pointed out to him, was part of what caused the difficulty in the employment relationship and contributed to the decision to dismiss. This limits the compensation available to him.

[53] A further factor was raised on behalf of Mr Smith. By letter dated 10 August 2006 Mr Hatton wrote to the RCSA questioning Mr Smith's suitability for membership of that organisation. Mr Hatton referred to the alleged breaches of the restraint of trade, complained that Mr Smith's conduct in setting up his own business was unethical for reasons he identified, and alleged various breaches of the RCSA's code of professional practice. Mr Smith responded in a letter dated 18 August 2006, effectively denying the allegations. I was told the RCSA is awaiting the outcome of this investigation before it decides what action to take.

[54] The Authority cannot compensate Mr Smith directly for the making of a complaint of this kind to an industry representative body like the RCSA. Moreover, if the complaint had addressed matters relevant to the personal grievance there might have been some ground for arguing that it aggravated the injury to Mr Smith's

feelings, but that was not the case. The complaint was concerned with Mr Smith's actions in setting up a competing business.

[55] Accordingly I do not take it into account when assessing compensation for injury to Mr Smith's feelings.

[56] Career Engineer is therefore ordered to pay to Mr Smith the sum of $3,500 as compensation for the injury to feelings resulting from the dismissal.

Breach of employment agreement

[57] The following are the provisions of the parties' employment agreement which Career Engineer says were breached:

> "19. Confidentiality
>
> 19.1 The employee, during the term of employment and after its termination, however the termination is brought about, shall:
>
> (i) not, other than in the course of the employee's duties, disclose any confidential information to any person other than a Director or another employee of the employer authorised to use it;
>
> (ii) not use any confidential information to the employee's own benefit or which may cause loss or injury, whether directly or indirectly to the employer;
>
> (iii) not use, or attempt to use the employee's personal knowledge of any suppliers or customers of the employer to the employee's personal benefit.
>
> 19.2 For the purposes of this clause, confidential information means any information relating to the business, technical or financial affairs of the employer, other than information which is in the public domain and shall include but not be limited to:
>
> (i) any trade secrets, specialised know how, formulae, contracts, documents' client lists, client requirements, financial information, accounts or reports or technical information.
>
> 20. Restraint of trade
>
> In order to protect the employer's business interests, for six months after the termination of this agreement the employee shall not undertake or carry on or work for or on behalf of an organisation in direct competition with the employer, nor establish the employee's own business in direct competition with the employer within the Auckland region.
>
> 21. Non-solicitation

> The employee shall not at any time during the employment or for a period of six months after the employment has terminated, for whatever reason, either on the employee's own account or for any other person, company or organisation solicit, endeavour to entice away or discourage from being employed by the employer any other employee or prospective employee or any customer or client, either actual or prospective of the employer."

1. Confidentiality

[58] Career Engineer's evidence about Mr Smith's alleged breach of clause 19 was based largely on pages from ETRL's website. The pages were opened by clicking on the 'company profiles' entry on the left hand side of the home page. I was provided with a printout of the pages, dated August 2006, showing the names and brief profiles of 6 companies. Four of them were clients of Career Engineer's when Mr Smith's employment terminated. However there was nothing to suggest that the material on those pages was obtained other than from publicly available information.

[59] Mr Smith said further that he used an ACE New Zealand directory to identify details and contact information in respect of companies that might employ engineers. Using the email addresses thus obtained, he sent out advertising material.

[60] Based on information of this kind Mr Hatton made the broad allegation that Mr Smith had Career Engineer's client list. However I accept Mr Smith's evidence and find there was nothing to suggest he had used confidential information of Career Engineer's in the form of client lists.

[61] I was advised at the investigation meeting that nothing else was being pursued in respect of the alleged breach of clause 19. I conclude that there was no breach.

2. Restraint of trade

[62] In principle, clause 20 is not enforceable unless the restraints it contains are reasonable.

(i) Restrained activities

[63] ETRL is a business which Mr Smith has established, and is in direct competition with Career Engineer. It is also an organisation in direct competition with Career Engineer and on behalf of which Mr Smith undertakes or carries on work.

[64] Further specific activities relied on in support of the allegation that Mr Smith breached clause 20, and ETRL aided and abetted the breach, centred on four companies which were clients of Career Engineer's when Mr Smith's employment terminated. The companies were: BWP; CW; FTS and ST. Mr Smith's and ETRL's business dealings with those companies were:

(a) BWP: responded to Mr Smith's advertising, and in turn ETRL advertised positions on its behalf;
(b) CW: the Auckland branch manager contacted Mr Smith by his mobile phone on 22 March 2006, concerning an assignment he had available for Mr Smith in his capacity as an employee of Career Engineer's. When Mr Smith advised he was no longer an employee of Career Engineer's, discussions proceeded anyway. CW's requirements were discussed at a meeting on 23 March, and Mr Smith indicated he could offer a competitive price. He subsequently submitted a fixed price proposal for recruitment services to CW;
(c) FTS: made an enquiry but no business was transacted;
(d) S & T: paid Mr Smith to advertise 3 jobs on the Seek website, but no placement was made and no further business was transacted.

[65] On the face of the matter all of the above fall within the scope of the clause. There was no suggestion that it was unreasonable in principle to restrain Mr Smith from carrying out activities of this kind.

(ii) the temporal restraint

[66] The reasonableness of a temporal restraint for as long as six months is open to challenge, but it is not necessary to determine that matter here because actions proscribed by the restraint - namely the establishment of ETRL, the carrying out of

work on behalf of ETRL and the meeting with CW in particular - occurred within mere days of the termination of Mr Smith's employment. They occurred within the limits of a reasonable restraint period.

(iii) the geographical restraint

[67] Clause 20 does not define the geographical boundaries of 'the Auckland region', but no-one addressed whether the restraint was void for uncertainty in that respect. There was some discussion about whether the area of Auckland north of the Auckland harbour bridge might amount to a reasonable geographical restraint, but I do not consider that to be realistic. In the absence of any more appropriate definition, I interpret the relevant area as being the same as that covered by the Auckland Regional Council. The area includes Orewa, where ETRL is based. It also includes the Auckland offices at least of BWP and CW, with whom Mr Smith and ETRL conducted or attempted to conduct business.

[68] Career Engineer did not address why it was reasonable to restrain Mr Smith's (and through him ETRL's) activities over the area corresponding with the coverage of the Auckland Regional Council or any other area. Again, that is at least open to challenge.

[69] Also, there appeared to be an assumption that the mere fact ETRL was based in Orewa placed Mr Smith in breach of the geographical restraint. Aside from the unsatisfactory definition of the boundaries of the restraint, in the absence of any evidence or argument to the contrary I do not accept that in itself meant Mr Smith was restrained from recruiting for positions CW had available in Wellington (for example). Indeed Mr Smith was offering a nationwide service to CW. I am not persuaded that clause 20 could reasonably restrain Mr Smith and ETRL from offering a recruitment service in respect of positions outside the Auckland Regional Council area.

[70] Otherwise the companies with which Mr Smith attempted to do business had offices in the Auckland CBD or Newmarket, and CW even had a sub-office in Orewa.

I consider it reasonable to restrain Mr Smith and ETRL from doing business with those offices.

(iv) whether clause 20 was breached

[71] Drawing all of the preceding strands together, I find Mr Smith was in breach of clause 20 in that he established ETRL and undertook work for it in direct competition with Career Engineer, doing so well within any reasonable temporal restraint and also within a reasonable geographical restraint. More particular activities in breach of the clause concerned Mr Smith's discussions and the arrangements he made with CW, except to the extent that any recruitment activity was to occur outside the Auckland Regional Council area and did not involve CW offices within that area.

3. Non- solicitation

(i) customers or clients of Career Engineer's

[72] The contents of Career Engineer's statement of problem, as well as the brief of evidence Mr Hatton filed in advance of the investigation meeting, suggested that the breach of clause 21 being relied on concerned the solicitation of Career Engineer's customers or clients rather than the solicitation of any of the company's own employees.

[73] In turn, it was submitted that Mr Smith's research on the internet, regarding organisations he could approach, was targeted advertising and resulted in Mr Smith soliciting business from Career Engineer. However, in general Mr Smith was entitled to search the internet to identify potential clients, and approach them. He was not entitled to solicit business from Career Engineer's clients. The emails he sent out advertising his services were in breach of clause 21 to the extent that they solicited business from those organisations which received the emails and were clients of Career Engineer's at the time of his dismissal.

[74] Secondly, it was submitted that Mr Smith enticed CW away from Career Engineer by offering it a better price than was available from Career Engineer. With reference to the wording of the clause I find this amounted to an 'endeavour to entice' CW away from Career Engineer 'for any other company'. I make this finding regardless of which party made the initial approach. To avoid a breach of the clause the parties should not have continued to deal with each other once it became clear Mr Smith was no longer an employee of Career Engineer. Mr Smith was in breach of clause 21 in that respect.

(ii) Career Engineer's employees

[75] In a further allegation made without notice at the start of the investigation meeting, Career Engineer said Mr Smith had solicited a senior consultant of Career Engineer's, Steven Freymark, to join him in his new business. Even if it had not been possible to obtain a statement from Mr Freymark, the Authority and the other party should have been formally advised in advance of the allegation in respect of Mr Freymark.

[76] Nevertheless, as the Authority's role is investigative oral evidence was taken from Mr Freymark. It was common ground that he and Mr Smith spoke on the telephone on 13 and 16 March 2006. It was also common ground that the first conversation covered Mr Smith's view of his unfair dismissal, and what Mr Smith would do next. The two men's evidence diverged over the nature of the ensuing conversations about the possibility of entering into a business arrangement together.

[77] Mr Smith denied offering Mr Freymark a job, or encouraging Mr Freymark to leave Career Engineer. He said the conversation was just a discussion between two people about an imaginary company.

[78] Mr Freymark did not interpret the conversation that way. According to Mr Freymark Mr Smith advised that he wanted to establish his own business, but felt he would struggle unless Mr Freymark came on board. He acknowledged that Mr Freymark had better consultant's skills and indicated his focus would be on operating and managing the business instead. Mr Smith suggested that Mr Freymark would

receive better commissions from a more streamlined business. Mr Freymark said his response was that he thought the idea was poorly advised and that Mr Smith was acting on the rebound.

[79] The conversation of 16 March covered the same issues. Mr Freymark said Mr Smith picked up where he left off, seemed more resolute, and applied pressure on him to become part of the new company. Mr Freymark considered the approach unethical and unprofessional, and said so to Mr Smith. Mr Freymark was adamant that Mr Smith was doing more than just discussing possibilities. He denied there was anything conditional about the tone of the discussion.

[80] In assessing that evidence I take into account that Mr Freymark's participation in the Authority's investigation was unexpected. I take into account, too, that Mr Smith recalled having the conversations in question although he did not recall some of the detail alleged by Mr Freymark. Even so he recalled enough of the content to confirm his dismissal was discussed and be able to say the conversations were about an 'imaginary company', a characterisation with which Mr Freymark strongly disagreed. The matter was canvassed thoroughly during the investigation, and I did not find Mr Smith's explanation convincing. On the balance of probabilities, I consider it more likely than not that Mr Smith was considering entry into his own business and was soliciting Mr Freymark to join him. This was contrary to clause 21.

[81] It is not necessary to determine the reasonableness of the temporal restraint in clause 21, because the relevant action occurred within days of the termination of Mr Smith's employment. That was so soon as to fall within any reasonable restraint period.

[82] Accordingly, Mr Smith's conversations with Mr Freymark were conducted in breach of clause 21.

Penalties against Mr Smith

1. Confidentiality

[83] Since I am not persuaded there was a breach of clause 19 of the employment agreement, there will be no order for the payment of a penalty.

2. Restraint of trade

[84] I was not addressed on the level of penalty(ies) that should be awarded in respect of clause 20, or why. However Mr Smith's immediate establishment of a competing business, and his actions in respect of CW in particular, amounted to a blatant breach of clause 20.

[85] I would in the normal course of events have ordered a significant penalty in respect of such a breach. However I take into account that Mr Smith had been dismissed unjustifiably, and that the resulting lack of income led him to grasp the opportunity to set up his own business. In those circumstances I exercise the discretion to decline to award a penalty.

3. Non-solicitation

[86] Again I was not addressed on the level of penalty(ies) that should be awarded in respect of clause 21, or why.

[87] I have found Mr Smith breached clause 21 to the extent that email messages advertising his and ETRL's services were sent to clients of Career Engineer's. I do not regard the breach as wilful, and it was associated with Mr Smith's attempts to earn income following his unjustified dismissal. In those circumstances I decline to award a penalty in respect of that breach.

[88] I have found a further breach in respect of the discussions with CW. My willingness to take account of his unjustified dismissal does not extend to these circumstances. Mr Smith took inappropriate advantage of an approach CW made to him in his capacity as a Career Engineer employee. I might have taken a more lenient view if CW sought to deal with Mr Smith because of an established relationship with Mr Smith himself, and a wish to continue to deal with him rather

than Career Engineer, but that was not the case. Mr Smith was pressing for a business relationship on the basis of the more favourable price he was offering.

[89] The breach was blatant and should attract a penalty. I apply a modest discount because of the unjustified dismissal, and order Mr Smith to pay a penalty of $750 in respect of the breach.

[90] Similarly my willingness to take account of Mr Smith's unjustified dismissal does not extend to the circumstances of his approach to Mr Freymark, which I have also found to be in breach of clause 21. Even Mr Smith's need to obtain income from somewhere does not warrant that kind of approach.

[91] Mr Smith is ordered to pay a penalty of $1,000 in respect of the breach.

Penalties against ETRL

[92] There is little judicial authority in respect of s 134(2) of the Employment Relations Act, although the Employment Court considered the provision in **Credit Consultants Debt Services NZ Limited v Wilson & Anor**[2]. CCDS alleged its former employee, Wilson, had breached certain restraints in the parties' employment agreement and that Wilson's new employer aided and abetted the breaches. Penalties were sought against the new employer. The court said:

> "[75] To warrant the imposition of a penalty under s 134(2) of the Employment Relations Act 2000, the plaintiff must establish that there was an act of incitement, instigation, aiding or abetting and that this act was wilful."

[93] However the new employer was an established company, with a managing director unrelated to Wilson. In other words Wilson was not the prime mover, or brains behind the new employer. The court found the acts of the managing director met the tests of knowledge of the existence of the terms in question and wilfulness (or omission) in respect of the breaches, so that the new employer aided and abetted two of the alleged breaches. Penalties were ordered against the new employer.

[2] Unreported, 1 May 2007, Shaw J, WC 12B/07

[94] Here Mr Smith was the prime mover and brains behind the new employer, ETRL. His own actions have given rise to claims for penalties against him personally, as well as the claim for penalties against ERTL. Although he and his company are separate legal entities, in those circumstances there will be no order for any further penalty against ETRL.

Summary of orders

[95] Career Engineer is ordered to pay to Mr Smith:

(a) $2,500 (gross) as reimbursement of remuneration lost as a result of his personal grievance; and
(b) $3,500 as compensation for the injury to feelings arising from the personal grievance.

[96] Mr Smith is ordered to pay into the Authority the sum of:

(a) $750 by way of penalty for the breach of clause 21 associated with his discussions with CW; and
(b) $1,000 by way of penalty for the breach of clause 21 associated with his discussions with Mr Freymark.

Costs

[97] Costs are reserved. If the parties seek a determination from the Authority on the matter they are to file and serve memoranda by the close of business on 15 February 2008. If either wishes to reply to the other, there shall be a further 7 days from the date of receipt of the relevant memorandum in which to file and serve the reply.

R A Monaghan
Member of the Employment Relations Authority