

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 138/09
5155347

BETWEEN	ERS NEW ZEALAND LIMITED TRADING AS TRANSPACIFIC INDUSTRIAL SOLUTIONS Applicant
AND	MICHAEL KNIGHT First Respondent
AND	BOB MORGAN DRAINAGE LIMITED Second Respondent

Member of Authority: G J Wood

Representatives: Diane Harvey for the Applicant
Ian Hard for the Respondents

Investigation Meeting: 10 August 2009 at Wellington

Determination: 18 September 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The first respondent, Mr Michael Knight, worked for the applicant, TIS, between 1 October and 24 December 2008, when he left to take up employment with the second respondent, Bob Morgan Drainage. TIS claims that Mr Knight, during and after the course of his employment with TIS, breached terms of his employment agreement relating to confidentiality, return of company property and non-competition, as well as not acting towards TIS in good faith and breaching his implied duties of loyalty and fidelity to TIS.

[2] At the time of the investigation meeting, the remedies sought by TIS against Mr Knight were compliance orders ordering him to return all confidential information and prohibiting him from using that information, damages for breaches of his employment agreement, penalties in respect of breaches of the agreement and good faith, plus costs.

[3] TIS also claims that Bob Morgan Drainage incited, instigated, aided and/or abetted Mr Knight in the above breaches and therefore seeks penalties against it as well.

[4] Mr Knight and Bob Morgan Drainage deny all claims against them.

The Facts

[5] In 2008 TIS bought a business doing drainage contracting in the Wellington region from Excell Corporation. Mr Knight was the drainage manager, specialising in CCTV camera work, at that time.

[6] As a result of the buy-out, Mr Knight was offered employment with TIS on 2 September 2008. He was informed by letter that the terms of his employment were outlined in an attached individual employment agreement and that this was intended to create no reduction or enhancement in his current terms and conditions.

[7] Mr Knight stated that he took this on face value. However, a perusal of the terms of the two individual employment agreements show a substantial change in the terms relating to the covenant not to compete with TIS and the restraint of trade clause with Excell. The essential differences between the two employment agreements are that the restraint of trade clause in the Excell contract restricted Mr Knight from dealing with clients of Excell or pursuing business interests that arose during his employment, or soliciting any other staff from its employment, for three months. By contrast, the TIS agreement prohibits Mr Knight from working for a competitor either directly or indirectly for six months in New Zealand, in addition, in substance, to the matters in the Excell agreement.

[8] It is clear from the offer that no consideration was provided to Mr Knight for the more stringent covenants placed on him by TIS and, as noted above, he was informed in the letter of offer that it was TIS's intention to, in effect, not change his current terms and conditions either to his advantage or detriment.

[9] Mr Knight signed the employment agreement. TIS has operated since on the understanding that Mr Knight was bound by the terms and conditions of its employment agreement.

[10] During the course of his employment with Excell, Mr Knight had a great deal of contact with Mr Bob Morgan, the principal of the second respondent, to whom Excell had contracted out a lot of drainage work. TIS took most, if not all, of this work in-house after it bought that part of Excell's business.

[11] Mr Knight had become dissatisfied with several aspects of TIS's systems and operations and approached Mr Morgan for work, which he subsequently obtained. Mr Knight explained his new job to his manager at TIS, Mr Alan Simmons, as work *on the tools*, but I conclude that the work he did for Bob Morgan Drainage went further than that. While Mr Morgan is clearly the principal and final decision-maker for the second respondent, I conclude that he relies on Mr Knight's expertise as well as him being, in effect, his *2IC*.

[12] Mr Knight tendered his resignation on 4 December 2008 and gave one month's notice, in line with his employment agreement. Although his employment ended on 2 January 2009 he stopped work before the Christmas holidays.

[13] After he started work for Bob Morgan Drainage, it came to Mr Simmons' attention that he was doing more work than *on the tools*, such as perusing CCTV footage. A search of the computer Mr Knight used at TIS was then made by TIS. It was discovered that Mr Knight had sent Mr Morgan, during the course of his employment, information recommending the purchase of certain drainage camera equipment. TIS claims that Mr Knight had taken its confidential information and used it to the advantage of Bob Morgan Drainage while still an employee of TIS.

[14] I do not accept this claim for two reasons. First, I accept Mr Morgan's and Mr Knight's evidence, as experienced drainage personnel, that information on equipment is general industry information shared widely within it. More importantly, the information provided by Mr Knight was about the sort of equipment Mr Knight would recommend if he were in Mr Morgan's position. Mr Morgan did not take this advice, but instead bought alternative equipment better suited, in his opinion, to his company's needs.

[15] Further investigations by TIS showed that Mr Knight, before he left, had emailed a number of documents (the ownership of which was held by TIS) to his external email address. These documents were said to have included price lists, customer lists and tender information. TIS's view was that this could only have been done for the benefit of Bob Morgan Drainage. It also noted that since Mr Knight had left TIS lost a contract by a narrow margin to Bob Morgan Drainage, which it considers was due to Mr Knight's misuse of confidential pricing information.

[16] TIS subsequently obtained full access to Mr Knight's personal computer, the contents of his email address and Bob Morgan Drainage's computer. It chose, for reasons of cost, not to have that data analysed. Given this situation, it is not possible for the Authority to determine that Mr Knight is not telling the truth when he states that he downloaded that information for work purposes (particularly as it was accepted that he did a lot of work at home because of his personal family circumstances).

[17] Furthermore, TIS has chosen not to pursue through the Authority the tender information from the contractor, which may or may not have shown that Bob Morgan Drainage used TIS's confidential information to undercut it for that contract. There is therefore no reason to contradict Mr Morgan's evidence that he tendered for the contract on the basis of his own extensive experience in drainage work in the Hutt Valley.

[18] TIS also claimed that Mr Knight had approached its customers with a view to obtaining work for Bob Morgan Drainage. No evidence of this was provided, however.

[19] These findings are made despite the fact that Mr Knight's response to TIS's raising of its concerns about what it said were breaches of the covenant not to compete and the confidentiality clauses in his employment agreement could be said to be dismissive. He was certainly less than responsive and communicative. I accept that this was because Mr Knight did not believe that he could be required to not work for Bob Morgan Drainage for six months after he left TIS and because he did not believe he had breached any of his other responsibilities over non-solicitation and confidentiality.

[20] Mr Knight did, however, confirm to TIS that he had not been passing on confidential information and had either returned or destroyed all company property such as documents. There is no evidence to the contrary.

[21] Finally, another employee of TIS resigned in January 2009 and took up work with Bob Morgan Drainage. That worker did not give evidence, but provided a letter denying TIS's claim that he had been headhunted by Mr Knight. There was no opposing evidence other than Mr Simmons' contrary advice from a third party, who also did not give evidence. Mr Knight gave evidence that the worker in question had worked with him with a number of previous employers, liked working with him and had chosen to leave TIS of his own accord. I have no reason to doubt this explanation and therefore accept it.

Determination

[22] Covenants in restraint of trade are contrary to public policy and may not be enforced unless they are reasonable. They are also enforced strictly and where there is an absence of consideration, will not be enforceable at all (*Fuel Espresso Ltd v. Hsieh* [2007] ERNZ 60 (CA)).

[23] Here the misleading of Mr Knight, where TIS told him in writing that there was no reduction in his terms and conditions with Excell intended, demonstrates a lack of consideration by TIS for the imposition of a new restraint on Mr Knight taking up any employment in the drainage industry for six months. Therefore I determine that the new covenant not to compete can not be enforced by TIS for lack of consideration and/or misrepresentation.

[24] There is documentary evidence, which may strongly tend to prove or disprove TIS's allegations, over breaches of confidentiality, available to it. It was its choice not to incur the expense to retrieve that information from a forensic computer specialist that was engaged to clone Mr Knight's and Bob Morgan Drainage's computers. In the absence of such evidence, responsibility for which must lay with TIS, I have no reason to doubt the consistent evidence of Mr Knight and Mr Morgan.

[25] As a result, I conclude that Mr Knight has returned all confidential information belonging to TIS that he had held on leaving his employment, unless it had been destroyed. I also conclude that there is no evidence of breaches of Mr Knight's employment agreement relating to his approaching TIS's clients or undercutting TIS

in contracts, and therefore no loss of revenue to TIS. Neither is there sufficient evidence to conclude that Mr Knight breached his employment agreement when the other employee came to work for Bob Morgan Drainage.

[26] There is therefore similarly no evidence that Mr Knight had acted in breach of his duties of good faith to TIS.

[27] It therefore follows that all claims against Mr Knight must fail. As a result, Bob Morgan Drainage can not be found to have incited any breaches.

[28] I note here that although there was evidence of Mr Knight sending what may have appeared to be confidential information, such as price lists, to his own email address, which was of legitimate concern to TIS, there was no such evidence against Bob Morgan Drainage. The claims against it were simply brought on the basis of supposition by TIS.

[29] It therefore follows that all the applicant's claims must be dismissed.

Costs

[30] Costs are reserved.

G J Wood
Member of the Employment Relations Authority