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**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 32/10  
5099195

BETWEEN                      COOK EXECUTIVE  
   RECRUITMENT (2005)  
   LIMITED  
   Applicant

AND                              CHRISTOPHER HUW LEWIS  
   First Respondent

   NEW ZEALAND TERTIARY  
   COLLEGE LIMITED  
   Second Respondent

Member of Authority:        Dzintra King

Representatives:             Stephen Langton, Counsel for Applicant  
   First Respondent in Person  
   Selena Fox, Advocate for Second Respondent

Investigation Meeting:      13 February 2009

Additional Evidence  
Received:                        13 March 2009 and 10 April 2009

Submissions Received        15 April 2009 from Applicant  
   16 September 2009 from First Respondent

Determination:                25 January 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant, Cook Executive Recruitment (2005) Limited (“Cook” or “the company”) says that the first respondent, Mr Christopher Lewis, has breached express terms of his employment agreement, breached the obligation of good faith and breached the implied obligations of loyalty and fidelity. The company says Mr Lewis failed to use his best endeavours to promote the applicant’s interests, failed to keep confidential the company’s confidential information, took on other business during

the course of his employment in direct or indirect competition with the applicant, and breached his restraint clause by soliciting clients and carrying on a competing business.

[2] The company seeks penalties and an inquiry into damages or an account of profits.

[3] The claim against the second respondent was that it incited, instigated, aided and/or abetted the first respondent in his breaches of good faith and obligations of loyalty and fidelity.

[4] On the basis of evidence gathered from the second respondent the applicant does not now seek any remedies against the second respondent and withdraws the claim.

### **Background**

[5] Mr Lewis was employed as an Associate Director in a recruitment role in March 2006. His duties included building relationships with new and existing clients, prospecting for business and carrying out recruitment assignments for clients.

[6] Mr Lewis had previously carried out recruitment services for NZ Tertiary College (“NZTC”) and brought that company with him as a new client. NZTC became a client of Cook from around July 2006 through to the time Mr Lewis’ employment was terminated in April 2007.

[7] Mr Lewis signed an individual employment agreement on 21 March 2006. The agreement provided that he was to devote the whole of his time during normal business hours to the duties of his position and also such additional hours as might be necessary to perform his duties effectively.

[8] Clause 27 dealt with other employment. It provided that:

*During the period of employment, you will not without our prior written consent:*

*a. Engage in any other employment; or*

*b. Hold a financial interest in a business which competes with us or with any of our related companies; or*

- c. *Take on any business or other interests which may have the effect of infringing to any significant degree on your attention and commitment to your duties under this agreement or which may be in direct or indirect competition with us.*

[9] The agreement also contained a restrictive covenant which provided that during his employment or for a period of three months after it terminated he was not to solicit clients or contactors, nor to compete with the company.

#### **Discovery of personal work carried out by Mr Lewis**

[10] Mr Timothy Cook, the Managing Director of the applicant, said that on 27 March 2007 he picked up a document from the printer and found another document, which was an invoice issued by Mr Lewis which was not a Cook invoice. It had the header "*Chris Lewis*" and contained personal bank account and contact details for Mr Lewis. The address on the invoice was that of Mr Lewis' mother, not Mr Lewis' home address. The invoice was addressed to Ms Selena Fox, General Manager of NZTC and was for consulting and recruitment placement of a person named Winnie Guan with NZTC. The amount invoiced was \$2,300.

[11] His suspicions understandably roused, Mr Cook instructed Paragon Forensics to search Mr Lewis' computer. The invoice Mr Cook had found on the printer was found together with email communications regarding the placement of Ms Guan and a copy of her CV and covering letter.

[12] A second invoice issued by Mr Lewis for placement of Mr Ashwini Datt for \$3,800 was also found, also addressed to Ms Fox. Two Outlook calendar appointments with Mr Datt were found plus an employment agreement, letter of offer and email communications regarding Mr Datt.

[13] A third invoice was located, issued for Mr Tom McIvor and Ms Karen Du Plessis for the sum of \$6,000. This was also addressed to Ms Fox at NZTC. There was an Outlook appointment with Ms Du Plessis as well as email communications regarding the placement of Mr McIvor.

[14] In all instances payment was requested to be made to Mr Lewis' personal bank account.

**Disciplinary Meeting**

[15] Mr Cook met with Mr Lewis on 2 April and gave him a letter dated 2 April which attached the invoices. He was asked to attend a meeting and was suspended.

[16] The meeting on 3 April was attended by Mr Cook, Mr Lewis and Mr Cook's secretary, Ms Jenny Hope, who took notes.

[17] I accept Mr Cook's account of what took place at the meeting. Mr Lewis told him it was the stupidest thing he had done in his life and he was wrong but he was not running a parallel recruitment business. He had been forwarding CVs and interviewing applicants during work hours. He had not sought Cook's permission to carry out the business but his actions did not amount to stealing because the work he had done for NZTC was not work that Cook was have obtained in any event. This was because Cook's fees were greater than those NZTC was willing to pay for positions at those levels. On that basis, Mr Lewis had thought he would help out and keep control of the client for Cook. He said the money for the work had been paid into his bank account.

[18] Mr Cook dismissed Mr Lewis. Mr Lewis has not contested the dismissal nor did he challenge the validity of the restraint. The dismissal was effected because Mr Lewis had breached his employment agreement, concealed the breaches and benefited personally from them, carried out the breaches in company time with company resources and directed revenue away from the company.

[19] Mr Cook said that after termination of his employment Mr Lewis started his own recruitment business with his brother. I examined the bank statements that were provided to me and could find no evidence that Mr Lewis had derived from this source.

[20] Cook also obtained two copies of online advertisements that Mr Lewis had placed with the job website SEEK. Mr Cook said these indicated that Mr Lewis was carrying on a recruitment business and was doing it specifically for NZTC. These two emails are addressed to Mr Lewis, dated 16 July 2007, and inform him that two advertisements he has placed, one for a Lecturer and one for Lecturer (ESOL) are due to expire. The user name is NZTC.

[21] Mr Lewis said that as his email account with Cook would have been either terminated or would have come under Cook's control the day his employment finished he could not have added or updated roles after he left. Furthermore, replies were to go to the Cook email which he could not access.

[22] The evidence regarding this is insufficiently clear to show that Mr Lewis was carrying on business after employment ended and prior to the expiry of the restraint on 4 July.

[23] Mr Cook said he had been contacted by Mr Steve Haines, the National Sales Manager of Komatsu, a client of Cook. Mr Haines said Mr Lewis had contacted him after his employment with Cook ended to ask if they had any recruiting business he could do in his personal capacity.

[24] On 2 April Mr Langton wrote to Ms Fox outlining the situation, saying that Mr Lewis had been asked for an explanation and expressing concern that NZTC may have aided and abetted Mr Lewis.

[25] Ms Fox said that Mr Lewis had told her that he could carry out recruitment for staff members below a certain salary range and that his employer had agreed that he could do so. She said the letter from Mr Langton was the first indication she had had that Mr Lewis may not have revealed matters to Cook. She had spoken to Mr Lewis immediately after receipt of the letter and he told her he had revealed the nature of his relationship with NZTC to Cook from the outset. I accept the veracity of Ms Fox's evidence.

### **Breaches and penalties**

[26] Mr Lewis breached the express and implied terms of his employed agreement.

[27] Mr Lewis did not devote the whole of his time to the duties of his position. This is a breach of clause 4.

[28] Mr Lewis did not use his best endeavours to promote the company's interests and not to do anything to harm those interests in breach of clause 10.1.

[29] Mr Lewis did not have consent, either oral or written, to engage in other employment. His actions constituted a breach of clause 27.1 a.

[30] Mr Lewis took on other business which impinged on his attention and commitment to his duties and which was in competition with Cook. This is a breach of clause 27.1 c

[31] As regards the restraint, I find that Mr Lewis contacted a client of Cook's. There was a breach of the restraint.

[32] Mr Lewis' actions were in breach of his implied duty of loyalty and fidelity. His conduct was inimical to his employer's interests. Mr Lewis was under an obligation to disclose to his employer that NZTC was interested in looking at positions below a certain salary level and give Cook the opportunity to decide whether or not this was work it wished to carry out, rather than undertaking the work without his employer's knowledge or consent and to his own benefit.

[33] Mr Lewis breached the duty of good faith in s.4 (1). Section 4A provides for the imposition of a penalty. I find the breach was deliberate, serious and sustained and therefore open to the imposition of penalty.

[34] Mr Lewis, having breached his employment agreement, is liable to a penalty pursuant to s 133 (1) (a).

[35] I have considered whether to apply the totality principle where one penalty may be imposed for multiple breaches. I impose the maximum penalty of \$5,000 on the totality principle. This amount is to be paid to the applicant.

### **Other remedies**

[36] I have considered the issue of damages. I have not found that Mr Lewis secured customers of Cook for his own recruitment services, or that he was running his own recruitment service.

[37] The remedy for Cook is, as submitted by Mr Langton, an account of profits. Mr Lewis gained the sum of \$12,100 that should have been monies paid to Cook. Mr Lewis is to pay this amount to the applicant.

**Costs**

[38] If the parties are unable to agree on this matter, the applicant should file a memorandum within 28 days of the date of this determination. The respondents should file a memorandum in reply within 14 days of receipt of the applicant's memorandum

Dzintra King  
Member of the Employment Relations Authority