Attention is drawn to orders recorded in this determination prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 389/10
5309736

	BETWEEN	ANDREW EDWARDS Applicant
	AND	ERS NEW ZEALAND LIMITED T/A TRANSPACIFIC INDUSTRIAL SOLUTIONS Respondent

Member of Authority:	Robin Arthur
Representatives:	Sherridan Cook and Gemma Mayes for Applicant Daniel Erickson for Respondent
Investigation Meeting:	5 and 6 August 2010
Determination:	27 August 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Andrew Edwards was employed as General Manager for the Transpacific Industrial Solutions division of ERS New Zealand Limited (TIS) in December 2006. His employment agreement included a "covenant not to compete" clause.

[2] He resigned from this position on 14 May 2010, giving three months notice as required by his employment agreement – a period which expired on 13 August 2010. He decided to leave the job because he considered he was underpaid in relation to the level of business he had generated in his role for TIS and he had a number of differences with the managing director about developments in the business. Missing

out on a promotion had also increased his dissatisfaction.

[3] Around the time of his resignation Mr Edwards signed an employment agreement to work for Spotless Services Limited (Spotless) as a national business development executive. He hoped to start that role on 16 August 2010.

[4] He has applied to the Authority for a declaration that the covenant not to compete in his previous employment agreement does not restrain him from taking up his new post with Spotless. He also seeks orders and remedies in relation to whether he was unlawfully suspended from work by being required to work from home or being placed on 'garden leave' during his period of notice.

[5] TIS opposes Mr Edwards' application. It says the restrictive covenants are enforceable for the period of six months in New Zealand. It seeks a declaration to that effect, or, modification of the covenants under the Illegal Contracts Act 1970 s8(1)(b) to the extent necessary to make those provisions reasonable and enforceable. It denies Mr Edwards was unlawfully suspended during his notice period.

[6] By way of counterclaim TIS also alleges Mr Edwards breached various duties in his role and seeks awards of penalties and damages.

The investigation

[7] This matter was heard under urgency due to the potential effect on Mr Edwards' employment with Spotless.

[8] Written witness statements were provided by:

(i) Mr Edwards; and

(ii) his wife Lisa Edwards;

(iii) Craig Forman, general manager – industrials of Transpacific Industries Group (NZ) Limited (TIGNZL), to whom Mr Edwards reported; and

(iv) Marion Franks, legal counsel of TIGNZL; and

(v) Phillip Ander, national tenders manager of TIGNZL; and

(vi) Mark Burns, general manager – cleaning services of Spotless; and

(vii) Richard Martin, managing director of Imajeo Media Group Limited, a

company which provided design and marketing services to TIS; and

(viii) John Finn, contract manager of New Zealand Steel Limited, a company to which TIS and Spotless provide services at its Glenbrook steel mill; and

(ix) Helen Evans, a consultant, who provided TIS with support on its tenders and bids; and

(x) Vesta Gribben, a business development manager for Downer EDI Works (Downer) since 2008 and previously a project manager for TIS; and

(xi) Joanna Tarlton, general manager of Eco Maintenance Limited, a contracting company providing maintenance services.

[9] Each witness attended the investigation meeting and confirmed their written evidence under oath or affirmation. No questions were asked regarding Mrs Edwards' written evidence but all other witnesses answered questions from the Authority member and additional questions from the parties' legal representatives. Counsel also provided detailed oral and written submissions in closing.

[10] In preparing this determination I have reviewed the witnesses' written statements, their answers to questions, relevant background documents, and counsels' submissions. As provided for under s174 of the Act I have not recorded here all evidence and submissions received but state findings on facts and issues of law and express conclusions on the issues for determination.

Orders prohibiting publication of certain information

[11] I record here orders made before and during the investigation meeting, under clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act), prohibiting publication of certain information and documents provided to the Authority:

(i) Paragraphs 7.1 to 7.9 of Mr Forman's witness statement (referring to a personal grievance raised by a former employee of TIS); and

(ii) Paragraph 8.8 of Mr Forman's witness statement (referring to certain commercial objectives of TIS); and

(iii) The documents under tab 8 of the Respondent's bundle of documents lodged with the Authority on 28 July 2010 and tab 9 of the agreed

bundle of documents, headed "TIS Segment Analysis FY0910"; and

(iv) The documents under tab 27 of the Respondent's bundle of documents lodged with the Authority on 28 July 2010 which refer to TIS customers and financial information ; and

(v) The document under tab 3 of the agreed bundle of documents (dated 9 October 2009); and

(vi) The document under tab 7 of the agreed bundle of documents and headed "Business strategies – Transpacific Industrial Solutions NZ, 8 January 2010"; and

(vii) The documents under tabs 8 of the agreed bundle of documents, headed "Facilities management research"; and

(viii) The documents under tab 10 of the agreed bundle of documents and headed "Business strategies – Transpacific Industrial Solutions NZ, 5 February 2010"; and

(ix) The documents under tab 13 of the agreed bundle of documents beginning with an email dated 18 March 2010 and bearing the subject heading "FW: Strategic Objectives – NZ Industrial Services – Final ppt"; and

(x) The documents under tab 52 of the agreed bundle of documents and headed "Painting and Paint Sustainment Plan"; and

(xi) The documents under tab 53 of the agreed bundle of documents beginning with an email dated 1 March 2010 and bearing the subject heading "Strategy"; and

(xii) The documents under tab 54 of the agreed bundle of documents and headed "Pricing schedules only – electronic version"; and

(xiii) indicative figures stated by Ms Gribben during her oral evidence relating to services sought by Meridan Energy Limited.

Issues

[12] The issues for determination are:

(i) Whether clause 7.1 of the employment agreement – stating Mr Edwards "*shall not work for a Competitor*" – is effective and enforceable because:

(a) the clause applies to TIS; and

(b) Spotless is a "*competitor*" of TIS as that word is defined in the agreement; and

(c) TIS has proprietary interests capable of protection under this clause; and

(d) if so, the geographical coverage and temporal duration of the convenant are reasonable to protect such interests?

(ii) Whether clause 7.2 of the employment agreement – prohibiting solicitation of former customers or prospective customers – is effective and enforceable because:

(a) Spotless is a "*competing business*" and

(b) TIS has proprietary interests capable of protection under this clause; and

(c) if so, the geographical coverage and temporal duration of the convenant are reasonable to protect such interests?

(iii) Whether clause 7.3 of the employment agreement – prohibiting solicitation of TIS employees – is effective and enforceable because:

(a) TIS has proprietary interests capable of protection under this clause; and

(b) if so, the duration of the convenant is reasonable to protect such interests?

(iv) Whether Mr Edwards was unlawfully suspended on 1 June 2010 and further disadvantaged from 3 June 2010?

(v) Whether Mr Edwards breached certain duties to TIS?

(vi) What remedies are required, if any, including:

(a) Orders or declarations regarding the competition and non-solicitation clauses of the employment agreement; and

(b) Compensation or penalties regarding the alleged suspension; and

(c) Penalties or orders regarding alleged breaches of duty by Mr Edwards?

The employment agreement

[13] Mr Edwards' terms of employment with TIS were set out in a letter of offer and a written employment agreement presented to him on 4 December 2006. The agreement he signed included an acknowledgement of the opportunity to obtain

independent advice on the terms.

[14] The position he accepted was described as "*General Manager for Transpacific Industrial Solutions (a division of ERS New Zealand Limited, part of Transpacific Industries Group (NZ) Limited)*".

[15] The employment agreement defines the employer as "*ERS New Zealand Limited (trading as Transpacific Industrial Solutions)*". It was described as "*an environmental services company operating in, and from, a number of locations throughout New Zealand*". He was to report to the Managing Director of Transpacific Industries Group (NZ) Limited.

[16] The terms of employment are said to include policies which may be varied by decision of "*the management or directors of Transpacific Industries Group Limited*" (TIG). Although not described in the agreement, the latter company was at the time and remains an Australian company listed on the stock exchange in both Australia and New Zealand.

[17] A scope of employment clause refers to "*Transpacific Industries' business*".

[18] A confidentiality clause refers to "*non-public information about Transpacific Industries, its parent, subsidiaries and affiliates*" as including information on costs, profit margins, markets, sales, business contacts, customer details, plans and business strategies. At 6.2 it states:

> *You agree that you will keep secret all confidential information. You will not disclose confidential information to anyone outside the Company during or after the term of this Employment Agreement.*

[19] The covenant not to compete includes the following clauses:

> *7.1 You acknowledge that the services that you are to perform for us may be of a special, unique, unusual, extraordinary and intellectual character. You appreciate that we may suffer serious injury if you took the knowledge and skills acquired during your employment with us and applied them for the benefit of a competitor of ours. Accordingly, you agree that you shall not work for a Competitor either directly or indirectly for those periods of time, and in those areas, as set out in Schedule C after the termination of this*

Employment Agreement.

*For the purposes of this clause a "**Competitor**" is an individual (including you), business, organisation or enterprise that offers services of a similar nature to the services provided by Transpacific Industries Group Ltd, including but not limited to, those services described elsewhere in this Agreement; and "**directly or indirectly**" means you on your own account, or as a consultant or other contractor to, or a partner, joint venturer, agent, advisor, beneficiary, shareholder or director of, or equity participant with, any other person or entity.*

7.2 During the term of your employment with us and for the periods and areas set out in Schedule C following the termination of employment you shall not (except on behalf of or with the prior written consent of the Employer, which will not unreasonably be withheld), either directly or indirectly on your behalf or on behalf of others:

- *Solicit, divert, appropriate to or accept on behalf of any competing business; or*
- *Attempt to solicit, divert, appropriate to or accept on behalf of any competing business,*

any business from a customer or actively sought prospective customer of the Employer with whom you have dealt, whose dealing with us you have supervised or about whom you have acquired confidential information in the course of employment.

7.3 During the term of your employment by us, and at any time following the termination of employment, you shall not (except with our prior written consent) either directly or indirectly, on behalf or on behalf of others, solicit, divert or hire, or attempt to solicit, divert or hire any person employed by us.

7.4 You acknowledge that the above restrictions are reasonable for the following reasons:

7.4.1 The periods, and areas, specified are appropriate to the nature and/or seniority of your position with us.

7.4.2 In respect of Clause 7.1, your knowledge and skills are easily transferable to positions with companies that do not compete with us.

…

[20] A clause on "*termination and suspension*" requires written notice of resignation three months in advance and includes the following provision:

21.3 At our discretion we may suspend you from the performance of all or any of your duties or for such periods and on such terms as we consider expedient, including a term that you are excluded from all or any of our premises, and/or that we will not assign you any duties or provide you with any work, and/or that you will have no contact with any of our suppliers, distributors, customers or employees.

21.3.1 If we invoke clause 21.3 then unless and until your employment is terminated under this Agreement:

- *your remuneration will not cease to be payable by reason only of the suspension or exclusion from work;*
- *the employment relationship will continue; and*
- *you will continue to be bound by this agreement.*

[21] A construction clause states each provision of the agreement is severable in whole or in part. If the Authority held any provision, or part of a provision, was illegal or unenforceable for any reason, such a determination would not affect the enforcement of the remainder of the agreement.

[22] Schedule C included a term on the period and areas of restraint. This included a 'cascading' list for periods from 18 to three months and areas from as wide as Australasia to as narrow as Auckland. TIS seeks to enforce the restraint for six months in New Zealand only.

Entering the restraint

[23] Mr Edwards' evidence about entering his employment agreement with TIS in December 2006 confirmed he had done so after seeking and obtaining independent legal advice from an experienced employment lawyer and negotiating over the terms offered by TIS. Those negotiations resulted in him securing a significant increase in his base salary and adding substantial share options to his remuneration. He took no issue with the restrictive covenants at the time.

[24] Before being offered the job he was also asked to confirm he had no restraint of trade with his current employer and confirmed he did not.

[25] In the light of that question, the legal advice he had obtained and the results of his negotiations, he clearly had some bargaining strength and can be taken to have understood the restrictive covenants at clause 7 of his agreement.

The non-competition clause

Does it apply to TIS?

[26] Mr Edwards submits the clause does not apply to TIS because the words refer

only and specifically to TIG – that is the publicly listed company. TIG, which is ultimately the parent company of TIS through its TIGNZL subsidiary, does not itself directly provide services to any customers. On that basis TIG cannot then be said to be providing "*services of a similar nature*" to Spotless and, in Mr Edwards' submission, the clause is therefore unenforceable.

[27] He submits no evidence may be admitted of the parties' intentions as to whether the clause was to apply to TIS rather than only TIG itself, and any ambiguity should be applied on a *contra preferentum* basis against TIS as the drafter of the covenant. This is said to be appropriate because such restraint provisions are to be interpreted strictly because of their restrictive nature.

[28] I do not accept an objective reading of the whole of the employment agreement supports the conclusions suggested by Mr Edwards' submissions.

[29] Rather I agree, as submitted by TIS, that in accordance with business common sense and taking account of the surrounding circumstances,[1] the benefit of the covenants was clearly intended for the whole group, including its subsidiary TIS. The agreement refers at different places to TIG, TIGNZL, TIS and sometimes just "*Transpacific Industries*". TIG does not itself trade in New Zealand and, if Mr Edwards' interpretation of the clause were correct, the clause would have been of no effect whatsoever. That cannot have been TIG's intention in entering the agreement nor, objectively assessed at the time at which it was made, Mr Edwards' understanding as to what he had agreed.

[30] That conclusion is consistent with the business practice of TIS and TIGNZL. The two companies operated jointly out of the same premises, with the same office support, and a single senior executive team of which Mr Edwards was a member.

[31] It is also consistent with the tendency of the law to accept the reality of integrated business activity by a commercial group and its subsidiaries rather than limiting the protection of restraints on the basis of technically separate legal entities.[2]

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[1] *ASTE Te Hau Takitini O Aotearoa v Hampton* [2002] 1 ERNZ 491 at [19] and [24].
[2] *Littlewoods Organisation Ltd v Harris* [1977] 1 WLR 1472, at 1482 (per Denning MR) and *Stenhouse Australia v Phillips* [1974] AC 391, 404.

Is Spotless a "competitor"?

[32] Mr Edwards submits Spotless does not come within the scope of the term "*competitor*" as defined in his agreement with TIS on several grounds:

(i) Spotless did not provide "*services of a similar nature*" as TIS at the time at which he entered the restraint (December 2006); and

(ii) Mr Forman had referred to Spotless as only a potential rather than actual competitor of TIS; and

(iii) An analysis of the two businesses showed the services offered were not of a similar nature; and

(iv) The two businesses had not actually tendered for business against one another; and

(v) The recently-prepared Five Year Strategic Plan of TIS did not identify Spotless as a current or future competitor.

[33] This particular issue must be resolved in relation to the specific definition of 'competitor' in the agreement rather than any ordinary meaning. That definition contrasts what services TIG "*provides*" with what "*services of a similar nature*" that (in this case) Spotless "*offers*". It does not refer to the actual degree of success between both businesses in competing to win contracts to provide those services – that is the competitive situation – but simply what is offered by Spotless.

[34] While it was acknowledged in the Authority investigation that Spotless and TIS have never competed at the tendering stage of any commercial contract, Mr Edwards' submissions referred to "*one or two*" occasions where TIS had submitted expressions of interest on tenders Spotless ultimately either won or became a shortlisted contender. While both offer services such as painting, water blasting, road maintenance and lawn mowing – which superficially appear to be the same activity – there was much debate expressed through the evidence of various witnesses as to the extent which such services were of a similar nature, or differed because they were either 'heavy' or 'light' activities and because of the 'environment' in which they were delivered.

[35] As the result of the acquisition in 2008 of a maintenance services company in Taupo, TIS operations in that region now include the facilities management of an

industrial site (Laminex) and provision of other services similar to services that Spotless provides on a national basis, such as cleaning. Also, as a result of acquiring the environmental services operations of Excell in 2008, TIS offers municipal street cleaning and grafitti removal services arguably similar in nature to some municipal cleaning services provided by Spotless.

[36] I need take that point no further at this stage. The contractual definition does not state any minimum level to which similarly natured services are offered. Having established there is some overlap in at least what is offered, Spotless meets the definition of a competitor given in clause 7.1. That question of degree however would be relevant to the reasonableness of the restraint and the extent to which it could be enforced.

Can TIS proprietary interests be protected under this clause?

[37] The law protects the genuine proprietary interests of a former employer from unfair competition by its former employees. It does not protect that employer from mere competition.

[38] Yet the wording of clause 7.1 does no more than prohibit Mr Edwards from working for a competitor for the proscribed period. It purports to do so on the basis that use of "*the knowledge and skills acquired during your employment*" with TIS could seriously injure his former employer. His skills are his to use.

[39] To the extent knowledge gained is confidential information (which includes trade secrets, costing and margin information, business contact and TIS plans and strategies), it is protected by the confidentiality clause which survives the end of the employment. However that clause prohibits Mr Edwards disclosing such information to anyone outside TIS. It does not expressly prohibit him using such information in the course of his work for his new employer and thereby, as clause 7.1 puts it, applying that knowledge for the benefit of Spotless.

[40] However I consider the weight of the case law supports the appropriate measure to control the misuse of such knowledge to be reasonable restraints in respect

of solicitation of customers rather than simply preventing Mr Edwards from working.[3] To prevent him working would, on balance, be contrary to public policy on the right to use his skills and experience. For that reason I find clause 7.1 to be unenforceable. Because of the conclusion reached on this point, I need not consider the purported geographical coverage and temporal duration asserted for this non-competition provision.

The customer non-solicitation clause

Is Spotless a "competing business"?

[41] This clause purports to prohibit soliciting or accepting any business from a customer or "*actively sought prospective customer*" of TIS if Mr Edwards dealt with that customer or supervised dealings with that customer or acquired confidential information about that customer during his employment with TIS.

[42] However the solicitation or acceptance is said to be limited only if done on behalf of a "*competing business*". This reprises the issue of whether TIS and Spotless are in competition but in this context is not limited to a defined term in the agreement. Rather, the term "*competing*" is to be construed according to its ordinary meaning of striving to gain or win something by establishing superiority over others.[4]

[43] In this sense both TIS and Spotless are in the business of competing to win contracts to provide services to clients. However there was a significant contest in the evidence of the parties as to the extent to which, if at all, they compete with one another to provide services.

[44] For TIS the argument is that there is an overlap of the type of services which both entities can offer to customers and both also have active interests in competing for contracts on facilities management which can include providing some or all of the services required under such contracts.

[45] For Mr Edwards the argument is that while TIS and Spotless may have some

[3] *Airgas Compressor Specialists v Bryant* [1998] 2 ERNZ 42, 53.
[4] *Concise Oxford English Dictionary* (11th edition, 2004).

of the same customers, they are providing different types of services to those and other customers, such that they are not really competing. He also contends that TIS management expressly rejected the notion of competing on facilities management when he had promoted the idea while working for TIS.

[46] On the basis of the evidence of Mr Anders and Mr Burns I understand their industry to include a wide range of activities on a spectrum ranging from 'light' or 'soft' services – such as commercial cleaning and catering which comprises a large proportion of Spotless' business – to 'heavy' services which comprises the bulk of TIS' business. Such 'heavy' services include road sweeping, sump cleaning, landfill operations, sewer maintenance, and industrial painting and coating for tanks, bridges and pylons.

[47] While both companies may have contracts with clients in 'heavy' industry that does not define the services each provides to such clients. Spotless would typically provide 'light' services such as staff catering and cleaning offices and staff rest areas while TIS would provide heavy water blasting, waste management, and road sweeping. The New Zealand Steel plant at Glenbrook is an example where both companies provide services with such a division between 'soft' and 'heavy' activities.

[48] However both companies also seek to provide customers with facilities management services where a range of services are provided under a single contract. Increasingly there is an emphasis on integrated facilities management contracts where the successful tenderer provides a 'single invoice' or 'one stop shop' for the customer. The contractor's role under such agreements is to provide a full range of services, including where necessary, subcontracting other providers to provide some of those services. Such arrangements may see companies such as Spotless and TIS compete for the head contract but then subcontract to one of their unsuccessful competitors to provide particular services for which the head contractor does not have the capacity. And companies which compete with one another to get a head contract from one customer will also sometimes co-operate in tendering for a contract from another customer. In the TIS business plan, which Mr Edwards was instrumental in developing shortly before his departure, Spotless was identified as a party with which TIS could "*develop strategic alliances*".

[49] While Mr Edwards hotly disputed whether TIS had any real commitment to competing for integrated facilities management contracts – beyond heavy facilities management contracts where it bundled only the services it could itself provide – I prefer the thrust of Mr Forman's evidence that this was a sector where TIS intended competing and on that basis Spotless was a competing business. This was supported by Ms Franks' evidence on a 2007 assessment she wrote which referred to Spotless as one operator which would compete with TIS for facilities management contracts.

What are the proprietary interests of TIS capable of protection?

[50] Mr Edwards submited TIS has no legitimate proprietary interest to protect, asserting its confidential information is adequately protected by his former confidentiality clause and he has no sufficient influence to disrupt TIS' connections with its customers, suppliers or distributors.

[51] I accept there was no detailed evidence of Mr Edwards having such real personal sway in TIS customer connections – a recognised proprietary interest – that would warrant the restraint.[5] However I find the evidence adequately established TIS' proprietary interests in its long-term business strategy; financial information such as key operating costs and pricing; knowledge of key contracts and renewal timelines; and so-called 'sales pipeline information' on which tenders were approaching, the success of previous pitches and key terms negotiated with customers. Such information gained at senior executive level, for the period for which it is current, is of significant value and Mr Edwards' recent knowledge, developed at the expense of TIS, is something in which the company retains a legitimate proprietary interest. This is, I find, particularly so because the poorly-drafted term on confidentiality in his employment agreement prohibits only disclosure of information to others but does not expressly refer to personal use of that information.

Is the purported length and scope of the restraint reasonable?

[52] TIS asserted the appropriate scope of the restraint was throughout New Zealand. There is no real issue that this is reasonable given the nature of its business through most regions in the country.

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[5] *Airgas*, above, at 54.

[53] Mr Edwards submitted the restraint should be no longer than the period of garden leave, or if any longer, extend for only one month. He also submitted it could apply only to the services and customers of TIS at the time that the restraint was entered and not the considerably expanded business which he was leaving. The importance of the latter point is that the clause would effectively prevent him (in his new role with Spotless) from dealing with or accepting business from those former customers for whatever period of restraint was found reasonable, if any.

[54] He also submitted the last three months of his employment – served either on 'garden leave' or under suspension – should be taken account of in determining the reasonableness of the restraint period.

[55] For the purposes of clause 7.2, I find a restraint period of any longer than three months after the end of Mr Edwards' employment would not be reasonable.

[56] To protect its proprietary interests TIS is entitled to restraint for the time reasonably necessary to give it an *opportunity* to prepare to meet the prospect of competition from its former employee, but not so long as to make doing so a certainty.

[57] One factor in determining how long is reasonable to resecure those business opportunities is what period is needed to let TIS recruit a replacement to the role formerly held by Mr Edwards, establish a relationship between the replacement and its clients, and prove the replacement's competence.[6]

[58] In this case Mr Forman said TIS did advertise for a replacement but has decided not to fill the role at the moment. Meanwhile he and his regional managers have taken up work previously done by Mr Edwards. Mr Forman also said he had the opportunity to meet key customers. Having already had the opportunity to recruit a replacement and to meet those customers, a full six-month post-employment period is not reasonable.

[59] In terms of an opportunity to resecure business, the evidence was that as much of one third of TIS contracts to provide services are for less than six months and some

[6] *Tullet Prebon (Australia) Pty Ltd v Simon Purcell* [2008] NSWSC 852 at [53].

of its longer term contracts will be expiring in that period.

[60] I accept Mr Edwards' submission that the three month notice period which he spent away from work should be taken into account in determining the reasonableness of the restraint period. He was not, legitimately, able to be in contact with customers from 1 June without express permission from TIS (under a direction given in a letter to him that day). In that way TIS effectively already had Mr Edwards restrained for the three months served as garden leave, and only a further three months of restraint post-employment is reasonable to shore up its business opportunities, not six.[7]

[61] Mr Edwards cannot complain this three month period is unreasonably long given that he has agreed to a six-month "non solicitation" restraint in his new employment agreement with Spotless.[8]

[62] I do not accept Mr Edwards' submission that the subject matter of the restraint "*cannot be amplified over time (from when it was entered into) due to the employer subsequently modifying its services and clients*". The effect of that submission would be that a restraint could only apply to the customers and services of the employer as of the date of entering the agreement.

[63] It is a proposition which I do not understand to be supported by legal principle or precedent. Neither would it accord with business reality – particularly in a dynamic sales environment – that existing customers and business may be lost while new customers and business are won, developed and maintained during the period of service by the employee to whom a post-employment restraint may later apply. In my determination, while the reasonableness of the restraint is to be assessed at the time of being entered into (a well-established principle), what is being assessed is the reasonableness of its application to a nominated type, category or subject (such as competitors, customers and employees) rather than to the specific, particular and actual competitors, services, customers and employees of the business at the time at which the restraint is entered into. To hold otherwise would negate any real effect of such a provision (to the extent it was reasonable). One example will suffice. Assuming there were an enforceable restraint on the basis of customer connections,

[7] *Tullet Prebon*, above, at [68] is an example of taking the period of garden leave into account.
[8] A factor regarding the reasonableness of a term of restraint considered in *Credit Consultants Debt Services v Wilson* [2007] ERNZ 252 at [54].

Mr Edwards' submission would mean a restraint would apply in respect of a customer lost to the business in the first week of his employment several years ago, but not apply to a customer gained in the first week of his employment and with which he then developed an extensive and persuasive relationship (on behalf of his employer) over several years. Its effect would be to deny the employer any reasonable protection of a proprietary interest in a relationship it paid an employee to develop on its behalf with that latter customer. Rather, the proper proposition is that a restraint intended to apply to customers, clients and services of the employer with whom the employee will have knowledge and contact during the course of her or his employment may be reasonable at the time at which it was entered into.[9]

[64] Accordingly, Mr Edwards is subject to a restraint, for the period of three months from the last day of his employment with TIS, from trying to solicit or accept business from customers and actively sought prospective customers with whom he dealt or supervised contact with or about whom he has confidential information.

The employee non-solicitation clause

[65] TIS has a legitimate proprietary interest in maintaining the stability of its workforce, including of employees who previously worked with Mr Edwards and whom he might seek to recruit to work with him at Spotless. However a post-employment period of no more than three months for such a restraint is reasonable on the same rationale applied to the customer non-solicitation clause, and taking into account the three month notice period he served. I accept and follow the rationale given in a Victorian case cited in Mr Edwards' submissions, that if other TIS employees are not happy with new arrangements there after a period of three months (with TIS having effectively a combined total of six months to establish a new regime), Mr Edwards should not be prevented from seeking to persuade them to join him at Spotless, if he wished to do so.[10] Provided such employees complied with whatever confidentiality and reasonable restraint obligations they had to TIS, this would be consistent with the free movement of labour upheld as a matter of public policy in the case law.

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[9] See for example *Condor Insurance Group Limited v Fraser Bridgeway Insurance Brokers Limited* (unreported, EC Auckland, AC 27/99, 4 May 1999, Travis J).
[10] *Bearing Point Australia Pty Limited* [2008] VSC 115 at [160].

Was Mr Edwards unlawfully suspended?

[66] Mr Edwards submitted TIS acted with a lack of good faith and in an unjustified manner by suspending him on 1 June and then removing his laptop computer, Black Berry smart phone and company email access by 4 June. He disputes TIS' assertions that he agreed to be placed on garden leave on 1 June and that removing electronic access was necessary because of suspicious deletions of documents from his computer and unauthorised transfers of large numbers of electronic files to his home email addresses.

[67] Mr Forman had formally accepted Mr Edwards' notice of resignation on 20 May and on 25 May reminded him of the restraint covenants. By email of 31 May Mr Edwards denied Spotless was a "*legitimate competitor … of Transpacific in the New Zealand market*", stated he did not consider the restraints relevant and asked TIS to "*consider an earlier termination date*".

[68] At a meeting with Mr Forman on the following day Mr Edwards was informed in writing that he was not required to attend the office for the remainder of his notice period and that "*all further work conducted on behalf of the company will be completed from your place of residence*". He was also advised he would remain on full pay with use of his BlackBerry, laptop and company car but with TIS reserving the right to remove those "*tools*" if they were used inappropriately.

[69] By 3 June Mr Forman had information about the transfer of what appeared to be a significant number of company files by Mr Edwards and deletion of other material from his computer. He then authorised steps to block Mr Edwards email access and retrieve his work tools.

[70] Mr Edward's submissions cite English case law warning of the dangers of abusing garden leave.[11] However one of those cases clearly expresses the justification for TIS' actions in the present case. A decision of the English Court of Appeal confirms the principle that where there is an express contractual term to that effect, an employer may direct an employee who has given notice to stay away from work, on

[11] *Provident Financial Group v Hayward* [1989] ICR 160 at 165 and *William Hill Organisation Limited v Tucker* [1999] ICR 291 at 301.

full pay, for the duration of notice period, on what is known colloquially as 'garden leave'.[12] An Australian case, also cited by Mr Edwards, makes the same point:[13]

> *It goes without saying that if the employment contract contained an express term permitting [the employer] to direct [the employee] to go on garden leave then it would not be a breach of that contract to have given that direction.*

[71] Mr Edwards' employment agreement had exactly such a term at clause 21.3. While that discretion to suspend was subject to good faith obligations, I prefer Mr Forman's evidence that Mr Edwards initially agreed with and welcomed the arrangement to work from home from 1 June. It was also practical as a way of minimising physical inconvenience arising from a serious knee injury he had suffered on 1 May playing club hockey. In those circumstances I find no breach of good faith.

[72] By 3 June TIS had identified what it perceived as a threat to its intellectual property with the apparent surreptitious electronic transfer of information and was, I find, entitled to act as it did.

[73] Mr Edwards' explanation for moving the documents was that it related to work he was doing and also assembling documents necessary for his argument about whether Spotless was a competitor. In this respect it was he who failed to act in good faith. As he conceded during the Authority investigation, if he had sent an email or made a telephone call to Mr Forman explaining what he was doing, his actions (assuming they were as innocent as he subsequently described) would not have caused such consternation.

[74] Mr Edwards later had to return many boxes of company documentation he had amassed at home. I consider this confirms, albeit on a post facto basis, that TIS was not unjustified in its concerns about the extent of its information he held.

Did Mr Edwards breach certain duties to TIS?

[75] TIS submitted Mr Edwards, prior to the end of his employment, breached his duties to the company in four ways:

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[12] *Tucker*, above, at 293.
[13] *Bearing Point Australian Pty Ltd v Hillard* [2008] VSC 115 at [85].

(i) Misuse of its computer system for the benefit of Spotless and himself, breaching his duty of fidelity;

(ii) Breaching express and implied terms of confidentiality;

(iii) Misusing delegated authority;

(iv) Failing to cooperate and comply with lawful and reasonable requests, breaching duties of trust and confidence.

[76] Mr Edwards denied breaching duties to TIS in respect of the various instances given in evidence by Mr Forman. In closing submissions the allegations were described as "*all quite petty*". It is a description which is apt for many but not all of these claims made by the company. Some instances of alleged misuse of delegated authority are plainly of a 'makeweight' character, resulting from a belated review of his actions as a manager over many months. Activities such as approving a $500 sponsorship payment for a staff member competing in a national sports event and signing off a pay advance of $1000 around Christmas to a new staff member cannot realistically be outside the discretion normally exercised by a general manager of a multi-million business. Commissioning and approving marketing material without following internal procedures would be of concern if Mr Forman had ordered the preparation of that material to stop once he found out about it – but not having done so, the company's complaint lacks persuasive weight.

[77] However four identified activities do warrant further scrutiny:

(i) the transfer of information to his home computer;

(ii) an email forwarding information to Spotless; and

(iii) delays in responding to a direction from Mr Forman to provide information to assist with dealing with a personal grievance raised by another staff member; and

(iv) asking a customer and supplier to make a donation to a private concern in return for credit on a company account.

(i) transferring files to home computer

[78] On 2 and 3 June 2010 Mr Edwards sent to his home email address a number of documents with information about business opportunities for TIS in the form of calls for tender, some internal staff correspondence about those opportunities and some

details on TIS performance of certain contracts. He also deleted some material from his computer files.

[79] He says this was for the purpose of preparing a response to Mr Forman on the issue whether Spotless was a competitor. Deleted material was simply clearing up out-of-date files.

[80] His explanation is unconvincing as to why he did not seek permission to transfer those files to a home email address at a time when he could still access such material through his company email account and laptop. His actions were for a personal purpose and not consistent with his duties of fidelity and trust with TIS.

(ii) forwarding information to Spotless

[81] In April 2010 Mr Edwards sent Mr Burns an email identifying two opportunities for tenders which had been publicly notified. It included a note saying this was something Mr Burns "*might want to follow up on*".

[82] The concern of TIS was that Mr Edwards had fed business intelligence and opportunities to Spotless around the time he was also exploring the prospect of getting a job with that company.

[83] I am not satisfied the evidence really goes that far. Rather there was evidence of frequent co-operation between those two, and other, companies about upcoming opportunities for tender. This email, on its own, goes no further than that.

(iii) responding to a request for information

[84] On 18 May 2010 Mr Forman formally advised Mr Edwards than an investigation was to be conducted into a personal grievance application made by a former staff member. The application included allegations against Mr Edwards.

[85] On 27 May Mr Forman directed Mr Edwards to provide a range of information which would assist the company in preparing its response to the claims made. Mr Edwards was told the matter was urgent, asked to provide information in a "*candid*

and complete manner" and respond by no later than 31 May.

[86] There was an email exchange between the two men on whether Mr Edwards could meet that deadline with commitments to other work and medical appointments. Mr Forman asked Mr Edwards to advise what assistance he needed to get this task done on time.

[87] The evidence of the two men differs on what was said on this topic during a meeting on 1 June however I consider Mr Forman's account to be more likely to be accurate on this point. At that time Mr Edwards said his written response was "*ninety per cent done*" but was not in fact provided until 28 June. He had earlier described the personal grievance claim, including allegations about his conduct as a manager, as "*bullshit*".

[88] In the circumstances I agree to make the inference that TIS suggests should be made that Mr Edwards' delayed response was really passive resistance intended to apply pressure in his dispute over the issues of the restraint and period of notice.

[89] He submits that for 13 working days of this period he was on sick leave. That explains part of the delay but not all of it. I find his conduct on this particular matter was, for a senior manager of his level, less than co-operative and reasonable discharge of his duties, and consequently a breach of his duty of trust and confidence.

(iv) seeking a private donation

[90] In May 2010 Mr Edwards was involved in following up an unpaid account to a Hawkes Bay winery where TIS carried out cleaning work and from which TIS also purchased wine as gifts for its customers. He agreed with the winery's query on the account and offered a credit of $2500 on four conditions. One of those four conditions was that the winery "*donate*" five cases of wine to a kindergarten fundraising event. Mr Edwards' wife was a member of the kindergarten committee.

[91] I accept TIS' submission that this proposed transaction was unorthodox and offering credit to a customer in return for provision of goods to another organisation was an inappropriate use of delegated authority.

[92] Mr Edwards' evidence was that the winery was owned by TIG's executive chairman and that the kindergarten was also a customer of TIS. Neither explanation is, I find, satisfactory. His email to the winery's representative gave an entirely personal explanation for his request, that was to "*get my wife off my back*", rather than any legitimate commercial purpose.

[93] The business of TIS – and for that matter Spotless – involves seeking contracts in both the public and private sectors where internationally and domestically there is an increasing emphasis on accountability and ethical practice by senior managers. Seeking private donations is outside the reasonable expectations of that environment. Accordingly I find Mr Edwards conduct on this account was a breach of his duties of fidelity and to act within delegated authority.

Determination

[94] For the reasons given above, I find that:

(i) The purported restraint at clause 7.1 of Mr Edwards' employment agreement with TIS is not reasonable and not enforceable; and

(ii) Clause 7.2 of that agreement is reasonable and enforceable only for the period of three months from the expiry of his notice period; and

(iii) Clause 7.3 of that agreement is similarly reasonable and enforceable for the same period; and

(iv) Mr Edwards was not unlawfully suspended by TIS during his notice period; and

(v) Mr Edwards did breach duties owed to TIS by transferring files to his home, delaying provision of requested information and seeking a private donation; and

(vi) Mr Edwards' breaches were deliberate and wilful actions for which a penalty is warranted under s133 of the Act.

[95] In respect of these findings I make the following orders:

(i) Under the s8 Illegal Contracts Act 1970 Mr Edwards' employment agreement with TIS is modified to the extent found reasonable in this determination and remains enforceable to that extent.

(ii) Under s135 and s136 of the Employment Relations Act 2000 Mr Edwards is to pay to TIS a penalty of $3000.

Costs

[96] Costs are reserved. The parties are encouraged to agree any issue as to costs between themselves, having regard to the extent to which Mr Edwards was successful in his application and the extent to which TIS was successful in its counterclaim. If they are not able to do so and seek a determination of costs by the Authority, Mr Edwards may lodge and serve a memorandum as to costs by no later than 28 days after the date of this determination. TIS will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this timetable unless prior leave has been sought.

Robin Arthur
Member of the Employment Relations Authority