**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

[2011] NZERA Christchurch 30
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| BETWEEN | PRO-SURE INSURANCE LIMITED and GLOBAL INSURANCE PLACEMENTS LIMITED<br>Applicants |
| A N D | STEVEN PRATT<br>First Respondent |
| A N D | VISION INSURANCE (SOUTH ISLAND) LIMITED<br>Second Respondent |

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| Member of Authority: | James Crichton |
| Representatives: | Tim Mackenzie, Counsel for Applicants<br>Phil James, Counsel for First and Second Respondent |
| Investigation Meeting: | 14 December 2010 at Christchurch |
| Date of Determination: | 21 February 2011 |

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## DETERMINATION OF THE AUTHORITY

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### Employment relationship problem

[1] The first respondent (Mr Pratt) was employed as an insurance broker by the applicants and he signed an individual employment agreement (the agreement) on 10 September 2007. That agreement contained non solicitation provisions which the applicants say were breached by Mr Pratt when the latter became employed by the second respondent (Vision) and subsequently. The applicants (Pro-Sure) also contend that Vision aided and abetted the breaches of the terms and conditions of Mr Pratt's employment agreement with Pro-Sure.

[2] Mr Pratt is an insurance broker of considerable seniority with many decades of experience in the insurance industry. As I noted above, he accepted employment with

the predecessor of Pro-Sure, a company called Insurer Services Limited, in 2007. Insurer Services Limited became Pro-Sure. On 22 May 2009, Pro-Sure announced it was considering downsizing, restructuring or selling its business. The business was subsequently sold to another entity (Rothbury). Mr Pratt became redundant pursuant to a letter dated 10 June 2009.

[3] Because of concerns that Mr Pratt had about the process used by Pro-Sure to effect the termination of his employment for redundancy, he progresses his personal grievance by counter claim and, in case that grievance is out of time, seeks the appropriate leave to bring the matter on out of time.

[4] The Authority directed the parties to mediation and, for various reasons, that proved difficult to arrange and was ultimately unsuccessful in resolving the employment relationship problems. The investigation meeting was itself delayed partly because of the difficulties in arranging mediation, but also because it was set down for hearing immediately following the Canterbury earthquake on 4 September 2010. Because of the unavailability of the Authority's Christchurch rooms because of damage occasioned by the earthquake, the investigation meeting was further delayed.

**Issues**

[5] The first group of issues for the Authority to determine concern the broad allegation that Mr Pratt solicited clients of Pro-Sure to his new employer, Vision, thus breaching the non-solicitation clause in his employment agreement with Pro-Sure. It follows that the Authority must determine whether the non-solicitation clause is enforceable and, if it is enforceable, whether there has been a breach of that clause or of a related provision concerning confidential information.

[6] The second group of issues for determination concerns the personal grievance brought by Mr Pratt against Pro-Sure for the way in which it brought his employment to an end for redundancy. Mr Pratt says that that grievance has been raised within time (although that view is disputed by Pro-Sure), and in the event Pro-Sure is correct in its assertion about the timeliness of the raising of the personal grievance, Mr Pratt seeks leave to bring his grievance out of time. It follows that the issues for the Authority to determine in this case are whether the personal grievance has been raised within time and second, if the grievance is live, whether the process used by Pro-Sure in terminating Mr Pratt's employment was the action of a fair and reasonable

employer. A subsidiary matter involved an allegation of a breach of the Privacy Act by Pro-Sure.

**Is the restraint enforceable?**

[7] The principal restraint relied upon by Pro-Sure is clause 34 of the agreement. It is in the following terms:

> *The employee shall not at any time during the term of his employment or for a period of 24 months from the termination of his employment, either on the employee's own account or for any other person, firm or company solicit, procure, direct or otherwise be instrumental in the diversion of any client from the employer's business to any other business providing competing services.*

[8] In addition, there are general provisions in the agreement which Pro-Sure also relies upon, in particular clauses 11, 12 and 13, which provide variously for client information remaining the property of Pro-Sure, client information remaining confidential to the employer and for the employer's purposes alone, and breaches of the covenants in the agreement constituting serious misconduct.

[9] Those covenants, if enforceable, bind the parties to the employment agreement. Those parties are or were Mr Pratt on the one hand and Pro-Sure on the other. While I note for the sake of completeness that Pro-Sure was not the name of the employer when the employment agreement was entered into, nothing turns on the name change. The new name is simply a successor in title to the old.

[10] However, what is important as a preliminary issue, is to deal with Mr James' submission that by virtue of the sale process undertaken by Pro-Sure, there is no ability for Pro-Sure to rely on the restraint.

[11] When Mr James originally advanced this argument, in the course of protecting his client Mr Pratt, he took the high ground by indicating to Rothbury (the purchaser of Pro-Sure's business) that it was not in a position to enforce the restraint because of the inability at law to assign a personal covenant: see, for example, *Post Haste Couriers Ltd v. Casey* (unreported, High Court, Invercargill, CP83/89, 24 October 1989 per Holland J).

[12] However, the present proceeding is not brought by Rothbury but by Pro-Sure whose argument, in essence, is that when it sold its business to Rothbury, it lost money as a consequence of the default perpetrated by the first and second respondents

in *diverting* clients from Pro-Sure to Vision. As a consequence, Mr Cormack gave evidence of having lost money in that Rothbury paid him less than it would otherwise have paid because of the clients being diverted to Vision.

[13] Mr James deals with this allegation by alleging that if Pro-Sure sold its client book to Rothbury, then it is difficult to see how Pro-Sure can proceed in the Authority against a former employee in reliance on a restraint when its real form of action, if any, must be in the wider civil jurisdiction rather than the specialist employment jurisdiction. This is because if Pro-Sure has sold its business to Rothbury *there are no clients to be solicited, because they are now the clients of Rothbury*.

[14] I must say I think this is a persuasive argument. In the Authority's opinion, if Mr Cormack, on behalf of Pro-Sure, has any claim at all against Mr Pratt and Vision, it is not a claim based on the employment agreement entered into between Pro-Sure and Mr Pratt. The Authority is satisfied that Pro-Sure sold its book to Rothbury and while Rothbury cannot sue on the restraint provision in the agreement with Mr Pratt (because a personal covenant cannot be assigned), Pro-Sure also cannot proceed against Mr Pratt in reliance on the non-solicitation clause because it is unable to show that Mr Pratt has diverted *any client from the employer's business*. The employer has no business; it has sold the business to Rothbury. So the evidence that it has gathered about the alleged diversion of clients, whatever it relates to, cannot relate to any client of the employer's business, namely Pro-Sure's business.

[15] In the alternative, the Authority would have little difficulty in striking down the non-solicitation clause. A 24 month term must be excessive, there was no consideration for the provisions in the clause and on those two bases alone, it seems inevitable that such a provision would not be able to be enforced.

**Did Mr Pratt solicit Pro-Sure's clients?**

[16] Although I have concluded that it is not available to Pro-Sure to enforce the provisions of its agreement with Mr Pratt, for the sake of completeness, I consider briefly whether the evidence before the Authority would have allowed the conclusion that Mr Pratt had solicited Pro-Sure's clients. I am satisfied on the evidence I have heard that Mr Pratt did not solicit Pro-Sure's clients.

[17] The first point that I think is relevant is that insurance broking is, by its very nature, a very personal business. Clients form relationships with their brokers in the

same way that they form relationships with other professional advisers such as accountants or lawyers. Those relationships endure over the years for similar reasons to the enduring nature of longstanding professional solicitor/client relationships for instance. The purpose of a non-solicitation clause is to discourage the persistent, assiduous importuning to acquire repeat business in a new employment environment. Clearly, the initiative for the contact is not the issue. It is the substance of the nature of the exchanges between the parties and a proper analysis of those exchanges that makes the difference: *Deloitte & Touche Group-ICS Ltd v. Halsall* (unreported, Employment Court, Auckland AEC4/97 per Colgan J).

[18] In the particular circumstances of this case, I am satisfied on the evidence that Mr Pratt was contacted from time to time by his longstanding clients, either because a renewal was due or a claim had to be made, and that he quite properly told them that he had moved to another employer. In those circumstances, if the client then indicated their wish to transfer their business so that they could remain having their insurance work done by Mr Pratt, I am satisfied that that is in conformity with the law.

[19] In reaching that conclusion, I rely particularly on the decision of the Court of Appeal in *Graphic Holdings Ltd v. Dunne* (1988) 2 NZELC 95, 721 (CA). That case involved a printing business. Mr Dunne had introduced a significant percentage of the clients of the business when he was involved with it. When he left the business to work elsewhere, some of the business that he had introduced (and one client in particular) left with him. The Court of Appeal was satisfied that that client preferred to deal with Mr Dunne, wherever he was located. The Court held that the employee was not obliged to refuse to do work for that customer in those circumstances.

**Has Mr Pratt breached his obligations concerning confidential information?**

[20] In *Peninsula Real Estate Ltd v. Harris* [1992] 2 NZLR 216, Mr Justice Tipping, sitting in the High Court, having identified the principles governing the common law relating to competition between the former employee and his former employer and then enunciating the general principles regarding the employer's confidential information, observed that a former employee may do business in competition with his former employer, by doing work for a former client of the former employer, but what the former employee may not do is deliberately copy client lists or take steps to memorise those lists in order to make use of them in the future. Nor may

an ex-employee contract with a former client of the ex-employer during the course of a current transaction.

[21] This then I hold is the common law applicable to the present transaction, given that I have declined Pro-Sure's application seeking to rely on the non-solicitation clause. So the question is, given this is the applicable law in the present case, was Mr Pratt in breach of it? I hold he was not.

[22] The most telling of the reasons that I think Mr Pratt is not in breach is the very fact that the records of the employer were not retained in Mr Pratt's own office. Mr Pratt serviced clients in Christchurch. Pro-Sure was based in Auckland. For a significant part of the short period of the employment, Mr Pratt had no office at all and worked from home. To facilitate this, he had business cards printed which included his home telephone number. A collateral consequence of that early decision was that his former clients were able to get in touch with him after he left Pro-Sure, but for the purposes of this section of the determination, the only relevance of the issue is to point up the fact that Mr Pratt was, for a significant period, not even in office facilities provided by Pro-Sure.

[23] Even when he was, it is common ground that the hard copy files were retained in Auckland and that the process that was followed was that when a renewal was due, the Auckland office would send Mr Pratt the file, he would process the renewal, visit the client and do all the necessary work and then return the file completed to Auckland.

[24] It follows that Mr Pratt had no access to a list of clients and there were no records retained in the South Island which would have facilitated Mr Pratt memorising a list of clients. Mr Pratt freely acknowledges knowing most of his clients personally, but that is hardly surprising given he had acted for many of them for some little time. On the final day of his involvement with Pro-Sure, Mr Pratt handed to Rothbury a complete file of everything that was in the office, including his work mobile. Mr Pratt is adamant in his evidence that he retained nothing from his involvement with Pro-Sure.

**Has Mr Pratt raised his grievance within time?**

[25] I am satisfied Mr Pratt has raised his grievance within time. First, the statute requires that the grievance must be raised within 90 days of the events complained of

which give rise to the grievance. The statute is specific that the 90 days must run either from *the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the latter …*. Clearly, the relevant provision is disjunctive, that is, the 90 days either runs from the date of the events complained of, or the date on which the events complained of came to the notice of the employee, whichever is the later. The relevance of the second leg of the provision will be of importance in the present case.

[26] Mr Pratt was given notice of his termination on the grounds of redundancy by letter dated 10 June 2009. That letter referred to the notice in terms of the agreement which provides for two weeks' notice. In broad terms, this would have taken Mr Pratt to the end of June 2009 as the effective date for the termination of the employment.

[27] However, Mr Pratt continued in the employment until 31 July 2009. Pro-Sure relies on *van Kampen v. New Zealand Business Telephone Co Ltd* (unreported, ERA Auckland, 205/04) which held that the employment (for the purposes of the raising of a personal grievance) ceased at the end of the notice period. It cannot be fair and equitable for Mr Pratt to be denied access to the potential remedy of personal grievance because he works an extra month beyond his notice period particularly if, as he claims, he did this to suit his employer's needs. I am satisfied therefore that Mr Pratt has raised his grievance within time for that reason alone.

[28] Moreover, that conclusion is further given weight by consideration of the second leg of the disjunctive provision in the statute. The evidence suggests that during the additional month that Mr Pratt worked (or at least for much of it), he assumed, with some good reason, that he would be offered employment by Rothbury. All of the indications, both from Rothbury and from Pro-Sure, were that that would be the position. In the result, on 17 July 2009, Rothbury announced that it was not in a position to offer Mr Pratt employment. Accordingly it follows that even if my first ground for allowing the personal grievance within time is not preferred, this second ground gives further credence to the Authority's original view. This is because it could be argued that Mr Pratt was not determined on the personal grievance course until after 17 July 2009 when it became apparent that he had lost his position in the new order (despite all the previous indications to the contrary), and that therefore put into sharp relief Mr Pratt's concerns about the process adopted by Pro-Sure in the redundancy.

[29] For these reasons then, the Authority determines that Mr Pratt's grievance was brought within time and it is now available to be considered.

**Is the personal grievance made out?**

[30] Given my finding that the personal grievance was raised within time, the next question for the Authority to determine is whether that grievance is made out. I find that it was.

[31] Even in a redundancy situation, there is still an obligation on an employer to act fairly and reasonably and for the statutory duty of good faith to inform the process. In *Coutts Cars Ltd v. Baguley* [2001] 1 ERNZ 660 (CA), the Court of Appeal concluded that the Court was able to find unfair treatment of Mr Baguley even although the redundancy was itself genuine. Case law has established the principle that a redundancy can still result in a personal grievance even where the redundancy is genuine but that personal grievance is often categorised as an unjustifiable action of the employer causing disadvantage to the redundant employee: *Aoraki Corporation Ltd v. McGavin* [1998] 1 ERNZ 601; [1998] 3 NZLR 276 (CA).

[32] This situation must be contrasted with the situation where the adoption of a fair procedure by the employer would have resulted in a different outcome, that is to say, no declaration of redundancy with regard to the subject employee. In that situation, the termination of the employment would itself have been unjustifiable and thus could ground a personal grievance for unjustified dismissal. In the words of Thomas J giving the minority judgment in *Aoraki*:

> *Where adherence to a fair procedure, however, would have resulted in a decision not to make the position or job filled by the employee redundant, it cannot then be said to be a genuine redundancy. For example, if the duty of fair dealing would in the circumstances have required the employer to consult with the employee, and the employer does not do so, and it can be shown that if such consultation had taken place the employee's position would not have been made redundant, the termination of the employee's employment will constitute unjustifiable dismissal and compensation will be recoverable on the basis that there was no true redundancy.*

[33] In the present case, there is no suggestion that the redundancy was not absolutely genuine. The practical reality was that Pro-Sure had sold its business. It followed that it had no reason to, or indeed ability to, offer continued employment to Mr Pratt. In truth, his position had genuinely disappeared.

[34] But the process adopted by Pro-Sure was grossly defective. Mr Pratt describes what happened in his brief of evidence. The first thing that happened was his receipt of a circular letter dated 22 May 2009 which indicated the employer was contemplating sale of all or part of the business and/or a restructuring and that some positions may be ongoing, albeit with a new employer, some positions might have their hours reduced, and there might be redundancies, both compulsory and voluntary. The memorandum sought the submission of ideas. The prospect of a meeting was referred to in the circular memorandum.

[35] The evidence before the Authority confirms that there was in fact a meeting, but that meeting took place in Auckland and Mr Pratt was based in Christchurch. There were no arrangements made for Mr Pratt to travel to Auckland for that meeting and Mr Cormack, the director of Pro-Sure who gave evidence to the Authority, confirmed that Mr Pratt was not specifically invited to the meeting, nor were there any practical arrangements made to enable Mr Pratt to attend. Mr Cormack maintains that there were telephone discussions between himself and Mr Pratt, but Mr Pratt has no recollection of that.

[36] By letter dated 10 June 2009, just 19 days after the circular memorandum first raising the restructuring issue, Mr Pratt was advised that his position had been made redundant. It is self-evident from the foregoing brief analysis that there was no consultation whatever in respect of the redundancy. There simply was no proper opportunity for Mr Pratt to have input into the end of his employment with Pro-Sure. Had he been offered that opportunity, it is conceivable that he might have advanced some propositions to Pro-Sure that may have been of interest to it. Pro-Sure clearly was primarily interested in exiting the business and, in that context, Mr Pratt may have been interested in making some proposals to his employer. That opportunity was not provided. It is clear that mere notification of the right to engage with the employer does not constitute consultation.

**Was there a breach of the Privacy Act?**

[37] Mr Pratt complains that Pro-Sure breached his privacy and therefore breached the Privacy Act protections by disclosing to NZI some terms of Mr Pratt's employment agreement. Of course, the Authority has no jurisdiction in terms of the Privacy Act, but Mr Pratt's claim is that in disclosing the information that it did to NZI, Pro-Sure breached his rights.

[38] I think it is simplest to analyse this matter in terms of the statutory duty of good faith required by s.4 of the Employment Relations Act 2000 and it would seem axiomatic to the Authority that a good and fair employer would not disclose to a third party the terms and conditions of an employee's employment agreement without having first obtained that employee's consent to that release.

[39] In the present circumstances, it is clear that Pro-Sure provided to Rothbury details of Mr Pratt's employment agreement (specifically the non-solicitation provision) and that information relating to the non-solicitation clause was then on-sent from Rothbury to NZI.

[40] It is apparent that Pro-Sure has no right to assign to Rothbury the personal covenants as between itself and any employees (including, in particular, Mr Pratt). However, in the course of the sale negotiations between Pro-Sure and Rothbury, it is not difficult to see how the employment agreements of affected staff might be disclosed by one party to the other.

[41] Pro-Sure, as a good and fair employer informed by the good faith principle, ought to have made sure that Rothbury understood that the terms and conditions of the employment of individual staff (and particularly Mr Pratt), ought not to have been publicly revealed or disclosed to third parties and in fact that is precisely what has happened here.

[42] On the face of it, the breach may have been inadvertent rather than deliberate and may well have happened in the context of perfectly proper commercial negotiations. Arguably, the real breach of Mr Pratt's rights was a breach made by Rothbury rather than by Pro-Sure. However, I hold that Pro-Sure had a duty to ensure that the information it provided to third parties (including Rothbury) was treated with the degree of confidentiality which was required. I intend to include this breach in the conclusions that I reach concerning the applicable remedies for Mr Pratt.

**Determination**

[43] I am not persuaded, for reasons I have made clear in this determination, that Mr Pratt is subject to an enforceable non-solicitation clause but nor am I persuaded that, even if the clause were enforceable, he would have been guilty of breach.

[44] I am satisfied that Mr Pratt has brought his personal grievance within time and that he has a personal grievance because he has suffered disadvantage by the unjustified actions of his employer Pro-Sure in its failure to adequately engage with him during the redundancy process. I have considered whether Mr Pratt has contributed in any way to the circumstances giving rise to his grievance, and I am satisfied that he has not so contributed in any way.

[45] The law requires me to determine remedies for the loss which Mr Pratt has suffered. Mr Pratt cannot, under the terms of this decision, be compensated for the loss of his office and can only be compensated for the unjustified action of his employer in its failure to adopt a proper process. Mr Pratt is also entitled to have consideration taken of the failure of his employer to act in good faith in revealing to a third party relevant terms of his employment agreement. Taking both of those matters together, I think an appropriate payment to remedy those two matters is a compensatory payment of $6,000 for hurt, humiliation and injury to feelings paid pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000. I am satisfied on the evidence before the Authority that Mr Pratt has suffered compensatory loss in relation to the two matters identified.

[46] Because I have not been persuaded that there have been breaches of Mr Pratt's duties it follows that the question of Vision aiding and abetting any such breaches does not arise.

**Costs**

[47] Costs are reserved.

James Crichton
Member of the Employment Relations Authority