

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 274
5602097

BETWEEN HORIZON SERVICES
 LIMITED t/a ELECTRISERV
 (FORMERLY t/a STEWART
 BROWNE ELECTRICAL)
 Applicant

A N D PETER MURFITT
 Respondent

Member of Authority: T G Tetitaha

Representatives: TL Clarke/EJ Coates, Counsel for Applicant
 D Jacobson, Counsel for Respondent

Investigation Meeting: 31 May and 1 June 2016 at Tauranga

Submissions Received: 1 June 2016 from both parties

Date of Determination: 12 August 2016

DETERMINATION OF THE AUTHORITY

- A. The application for determination of breaches of an employment agreement is dismissed.**
- B. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem

[1] Horizon Services Limited alleges a former employee Peter Murfitt breached his employment agreement in various ways. It seeks compensatory damages and penalties.

Relevant facts

[2] Horizon Services Limited (HSL) is a company providing electrical, mechanical and refrigeration contracting, servicing and advisory services.

[3] Peter Murfitt was employed as the Operations Manager. He signed an employment agreement that contained clauses requiring he protect the interests of the company whilst employed and restricting his post-employment solicitation of staff and clients.

[4] Prior to his employment Mr Murfitt owned a company known as ETC Solutions Limited (ETC). ETC provided various electrical services including thermo-imaging.

[5] During his employment, Mr Murfitt was approached by an HSL client, Bella Vista Homes Limited (BV) seeking to use his personal services.

[6] On 30 October 2015 Mr Murfitt resigned as the Operations Manager giving notice. He was subsequently placed on garden leave on 12 November 2015.

[7] A letter dated 12 November 2015 set out his contractual obligations and sought the signing of an undertaking. The following day (13 November) Mr Murfitt's salary and any other monetary entitlements owed to the end of his notice period were paid to him. Mr Murfitt sought legal advice.

[8] During this period ETC entered into an agreement with BV to provide electrical services.

[9] On 25 November 2015 BV wrote raising complaints about HSL's work and complaining about its inability to use Mr Murfitt's services.

[10] On 26 November 2015 Mr Murfitt's solicitors wrote to HSL. The first letter raised a personal grievance, payment in lieu of notice on 13 November, wage arrears and disputed any alleged breaches of post-employment obligations. The second letter was offered a signed undertaking to resolve matters. HSL accepted the undertaking on 30 November 2015.

[11] During this period of time ETC offered employment to a former employee of HSL, Paul Green and started working for BV.

[12] On 2 December 2015 HSL's lawyer wrote disputing any payment in lieu of notice, denied any personal grievances arose and raised allegations of breach of duties of fidelity, loyalty and good faith during employment.

[13] The parties were unable to resolve their dispute. They require determination of the application before the Authority.

Issues

[14] The issues for determination are:

- (a) What were the terms of Mr Murfitt's employment?
- (b) Did Mr Murfitt breach those terms of employment by:
 - (i) Entering into discussions with BV before 30 October 2015 in relation to undertaking work directly for BV;
 - (ii) Failing to tell HSL of the scope and nature of BV's concerns about the work performed for it by HSL;
 - (iii) Failing to tell HSL of his discussions about the possibility of contracting directly with BV;
 - (iv) Diverting the HSL's business opportunities by entering into an agreement with BV on 30 October 2015 where his company, ETC would perform BV's electrical contracting work from 1 December 2015;
 - (v) Failing to tell HSL he had entered into the 30 October 2015 agreement at any point;
 - (vi) Soliciting Paul Green to work for ETC before 27 November 2015; and
 - (vii) Entering into an employment agreement with Mr Green on behalf of ETC, while still an employee of HSL;

What were the terms of Mr Murfitt's employment?

Individual Employment Agreement

[15] The express terms of Mr Murfitt's employment agreement included the following:

3. **Obligations of the parties**

3.1 You agree to act diligently, lawfully, faithfully and to the best of your abilities at all times while in our employment, using your best efforts to promote and protect the interests of the Company. You agree to promptly and fully comply with, and carry out, all reasonable directions given to you by the Company.

3.2 Both parties are expected to deal with each other in good faith and are required to take all practicable steps to ensure that work is undertaken in a safe and healthy environment.

19. **Conflict of interest/secondary employment**

19.1 While you are employed by us you are expected to devote all of your energy to your position and to remain free of interests activities or relationships, which are, or may appear harmful or detrimental to the Company's best interests.

19.2 You must not enter into any contracts or business interests or engage in any activity, paid or unpaid, which in the Company's opinion:

(a) Impinges upon, or may impinge upon, the proper performance of your duties and responsibilities under this agreement;

(b) Conflicts or may conflict in any way with the interests of the Company or your responsibilities to it;

...

19.4 Should you wish to take up or continue in secondary employment, engage in or be otherwise interested in other business activities, you must first seek the written permission of the company.

Implied terms of employment

[16] Every party to an employment agreement owes a duty of fidelity and good faith to the other. The duty of fidelity may be broken "... when there is conduct

which undermines the relationship of trust and confidence which must exist between employer and employee”¹.

[17] The duty is breached where an employee directs the employer’s custom to a proposed business.²

[18] If a manager or senior employee observes actions that are harmful to the employer the duty of fidelity or trust and confidence requires that employee to report that conduct to the employer. The duty does not require disclosing either one's own or one's fellow employee's intention to simply leave and compete.³

[19] The duty of good faith includes obligations an employee or employer must not do anything which would or which would be likely to mislead or deceive the other. Employers and employees are also required to be active and constructive in establishing and maintaining a productive employment relationship. This requires them to be responsive and communicative.⁴

Undertaking

[20] A formal undertaking is an undertaking by a party to do or abstain from doing some specified thing.⁵ The undertaking dated 25 November 2015 signed by Mr Murfitt is replicated below:

Undertaking of Peter Murfitt

I, Peter Murfitt of Tauranga, undertake that:

Confidentiality

1. I have complied and will continue to comply with clause 24 of my employment agreement which relates to confidentiality. A copy of clause 24 is attached to this undertaking.
2. I do not have any property belonging to [HSL]⁶ (including any confidential information) in my possession, custody or control.

¹ *Big Save Furniture v Bridge* [1994] 2 ERNZ 507, 517.

² *Space Industries (1979) Ltd v McKavanagh* [2000] 1 ERNZ 490; *EIL Brigade Road Ltd v Brown*, HC Christchurch Civ 2001-409-00073, 5 August 2004.

³ *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 at [141] – [142].

⁴ Section 4(1)(b) and (1A)(b) of the Employment Relations Act 2000 (the Act)

⁵ Rule 5.74 Interpretation High Court Rules.

⁶ HSL has been substituted for the former name of the company noted in the undertaking Stewart Browne Electrical.

Post employment obligations

3. I accept that in place of the obligations set out in clause 34 of my agreement which I signed on 21 October 2014, for a three month period from 13 November 2015 to 13 February 2016, I will not:
 - a. On my own account or on behalf of any person, interfere with the supply of goods or services to [HSL], or induce to cease to decline the supply of goods or services to [HSL] by any person, firm or corporation who or which is, or has been, a supplier of [HSL]. This includes those suppliers listed in my letter of offer of employment dated 20 October 2015; and
 - b. Either on my own account or on behalf of any other person, canvass, solicit, attempt to solicit, or act for any person, firm or corporation who or which has been a client or customer of [HSL] during the period of 12 months immediately preceding the termination of my employment on 13 November 2015, and with whom I have had contact or for whom I was responsible during that 12 month period, provided that I am not prevented from doing any work for Bella Vista Homes Ltd; and
 - c. Either on my own account or on behalf of any other person, induce, solicit or endeavour to entice away, or encourage any person to induce, solicit, or endeavour to entice away, any person who was employed or contracted by [HSL] at the date of the termination of my employment on 13 November 2015.

What effect does the undertaking have on the terms of the employment agreement?

[21] On its face the undertaking does more than merely promise that Mr Murfitt may abstain from action. It purports to replace clause 34 of his employment agreement with the terms set out therein. If HSL did not accept the replacement of clause 34 with the terms set out therein, it was incumbent upon it to advise this.

[22] Instead HSL advised through its lawyer that it accepted the written undertaking “on the basis that **both parties** may rely upon the undertaking for enforcement purposes” [Emphasis added].⁷ This acceptance was not limited in anyway. It purported to bind HSL as well as Mr Murfitt to the terms of the undertaking for enforcement purposes. This enabled Mr Murfitt to prevent enforcement of any express terms of the original employment agreement that were inconsistent with the undertaking. The undertaking became an agreed written variation to the employment agreement.

⁷ Annexure 25 Brief P Schnell Letter E Coats to T Marshall dated 30 November 2015.

[23] There is evidence Mr Murfitt acted to his detriment in reliance upon HSL's acceptance of the undertaking. He relied upon HSL's acceptance of his undertaking when his company ETC employed Paul Green and accepted work for BV. The elements of equitable estoppel⁸ would also apply here to defeat any claim by HSL contrary to the undertaking.

[24] Therefore the termination of Mr Murfitt's employment occurred on 13 November 2015 and through ETC was able to work for BV and employ any employee who was not employed by HSL as at 13 November 2015.

Did Mr Murfitt enter into discussions with BV before 30 October 2015 in relation to undertaking work directly for BV?

[25] It is accepted BV approached Mr Murfitt with an offer of work around 30 October 2015. Mr Murfitt replied "*I will think about it*" but took no other steps. At the time the offer was made, Mr Murfitt a senior HSL employee. HSL submits that Mr Murfitt was under a duty of fidelity to advise it about BV's approaches to staff.

[26] There is little to indicate this approach on its own would have been harmful to HSL. To require employees to report each and every approach by prospective employers would be overly onerous. Many of these 'approaches' can be mere 'puffery' and never result in harm. The 'approach' here was not instigated by Mr Murfitt. There was no certainty about any offer. BV's director, Mr Cancian stated he had no knowledge of this 'approach' and had not decided to remove BV's business from HSL until early November. At that stage he started drafting a services agreement for ETC to consider.

[27] As determined below, the agreement between ETC and BV was presented and signed on or around 20 November 2015 well after Mr Murfitt's employment terminated. I am not convinced upon the balance of probabilities there was any failure by Mr Murfitt to advise HSL about the approach from BV prior to 30 October.

Did Mr Murfitt fail to tell HSL of the scope and nature of BV's concerns about the work performed for it by HSL?

⁸ *Harris v TSNZ Pulp and Paper Maintenance Ltd* [2015] NZEmpC 43 at [75]-[76].

[28] HSL submits Mr Murfitt failed to notify it of BV's concerns about workmanship.

[29] BV's director, Danny Cancian gave evidence he complained to several HSL employees including Paul Green, electrical inspector/estimator and John Forsyth, sales manager. He particularly recalls telling Mr Forsyth about his concerns regarding workmanship and cost overruns. Mr Murfitt's evidence also referred to a meeting at the HSL boardroom involving Mr Cancian and Mr Forsyth in August 2015 where the concerns were raised. Mr Forsyth was not available at hearing for examination.

[30] The evidence of HSL's general manager, Peter Schnell suggests Mr Murfitt did little or nothing about the concerns during his employment. It is accepted Mr Murfitt had a very high workload. There was evidence of a high staff turnover during this period. There was also evidence BV would not sign HSL's supply and services agreement. Given the lack of contractual agreement, workload and staffing, there appeared little Mr Murfitt could do about BV's concerns other than to negotiate completion of the work in progress which he says he did.

[31] The onus is upon HSL to establish this breach occurred. I am not convinced upon the balance of probabilities there was any failure by Mr Murfitt to advise HSL of BV concerns or to properly address those.

Did Mr Murfitt divert HSL's business opportunities by entering into an agreement with BV on 30 October 2015 where his company, ETC would perform BV's electrical contracting work from 1 December 2015?

[32] HSL submits Mr Murfitt's company ETC entered into an agreement with BV while employed diverting its customers to his own business in breach of his duty of fidelity. This was evidenced by the signed agreement dated 30 October 2015 (the agreement) and comments made to Peter Schnell that he had two years' worth of general contracting work.

[33] Mr Murfitt submits he raised and it was agreed with HSL he could continue to operate ETC during his employment. He was supposed to have received written consent allowing ETC to continue this work. This appears consistent with HSL's evidence. Karla Meharry, former HSL contracts manager, accepted it was discussed when he was employed ETC's continued operations on the basis the work was to be restricted to thermo-imaging.

[34] Peter Schnell, HSL General Manager's evidence was of a conversation with Mr Murfitt he had "two years' worth of work". This occurred around the time of the resignation (30 October – 7 November). At the time Mr Schnell had no concerns Mr Murfitt was doing anything adverse to HSL's business. HSL notes this statement is consistent with 2 year term in the agreement.

[35] One of the signatories to the agreement and BV director, Daniel Cancian stated ETC could not rely upon BV to provide all of their work over the two year period in the agreement. BV was also negotiating prices with other electrical contractors.

[36] Mr Cancian also alleged the date of 30 October 2015 on the agreement was incorrect. He did not know how the date came to be typed on the agreement. The agreement was a standard supply agreement template they used for many contractors they were considering at the time. He believed he presented Mr Murfitt with the agreement around 20 November. He produced a printout from his computer showing the agreement was created on 2 November 2015. He admitted he did not have the skills to find or alter the document properties. Even if he did it seems more likely that he would have altered the creation date to a time closer to 20 November 2015 if he was motivated to assist Mr Murfitt. The creation of the document on 2 November still placed it during a period of time Mr Murfitt was employed. Mr Cancian's evidence was he never raised with Mr Murfitt removing business from HSL until 20 November when he presented the agreement.

[37] It is more probable the comment by Mr Murfitt referred to ETC's thermo-imaging work as opposed to BV work. There is probable doubt the agreement was created any earlier than 2 November. There is no evidence to show Mr Cancian was motivated to lie about the date the agreement was signed. His evidence corroborates Mr Murfitt's about the signing occurring sometime later.

[38] HSL has failed to prove the balance of probabilities that there was a breach by Mr Murfitt entering into an agreement on or before 30 October 2015.

Did Mr Murfitt fail to tell HSL he had entered into the 30 October 2015 agreement at any point?

[39] Given my above findings regarding the undertaking and the date the agreement was entered into, there cannot have been a breach of any terms of employment by Mr Murfitt failing to disclose the existence of the agreement.

Did Mr Murfitt solicit Paul Green to work for ETC before 27 November 2015?

[40] HSL submits Mr Murfitt offered employment to Paul Green while still employed. This was on the basis his employment did not terminate until 27 November 2015.

[41] I accept Paul Green's evidence he approached Mr Murfitt after he believed his employment had terminated on 13 November. He was given a copy of an employment agreement on 30 November and signed it on or about 1 December 2015.

[42] Given my above findings regarding the undertaking, this conduct was not a breach of the terms of Mr Murfitt's employment.

Did Mr Murfitt enter into an employment agreement with Mr Green on behalf of ETC, while still an employee of HSL?

[43] The short answer to this is no given my above findings about the undertaking and my acceptance of Mr Green's evidence.

[44] The application for determination of breaches of an employment agreement is dismissed.

[45] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority