

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 161  
5624832

BETWEEN	H J ASMUSS & CO LIMITED Applicant
AND	PHILIP GARDINER First Respondent
AND	TASMAN PFV LIMITED Second Respondent

Member of Authority:	Robin Arthur
Representatives:	Matt McGoldrick, Counsel for the Applicant Sarah Sherwin, Advocate for the First Respondent Simon Greening, Counsel for the Second Respondent
Investigation Meeting:	On the papers
Determination:	24 May 2016

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**CONSENT DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] By joint memorandum of their representatives, lodged with the Authority on 23 May 2016, the parties advised they had resolved an employment relationship problem. They asked the Authority to issue a determination by consent recording the terms of their settlement.

[2] H J Asmuss & Co Limited (Asmuss) formerly employed Philip Gardiner as its sales manager under an individual employment agreement dated 21 December 2014 (the employment agreement). The employment agreement contained terms restricting Mr Gardiner's post-employment activity for a period up to 29 June 2016.

[3] Mr Gardiner now works as a sales manager for Tasman PFV Limited ("Tasman"), a commercial competitor of Asmuss.

[4] On 27 April 2016 Asmuss and Mr Gardiner had entered into a settlement agreement. On 3 May 2016 a Ministry of Business mediator certified that agreement (the settlement agreement) under section 149(3) of the Employment Relations Act 2000 (the Act).

[5] On 11 May 2016, Asmuss lodged a statement of problem in the Authority alleging Mr Gardiner had breached the settlement agreement. Asmuss said Mr Gardiner had attempted to solicit business from one of its suppliers between 4 and 7 May 2016. Asmuss also alleged Tasman incited, instigated, aided or abetted a breach by Mr Gardiner of his employment agreement.

[6] By the agreed terms appended to the parties' joint memorandum to the Authority Mr Gardiner admitted a breach of the settlement agreement and Tasman admitted it had incited, instigated, aided or abetted Mr Gardiner's breach of his employment agreement.

[7] The agreed terms, by consent and by this determination, have become the orders of the Authority in full and final settlement of all claims, rights or actions Asmuss has, or may have, against either Mr Gardiner or Tasman as of 23 May 2016 relating to the claims arising out of Authority file number 5624832 or relating to the employment of Mr Gardiner by Tasman.

**Compliance order: Mr Gardiner**

[8] Under s 137 of the Act Mr Gardiner must immediately comply with his undertaking that, for the period up to and including 29 June 2016, he will not:

- (a) Directly or indirectly canvas, solicit or attempt to solicit, serve or act for any person, firm or corporation that he knows or should reasonably know was a client, customer or supplier of Asmuss' in the period from 29 December 2015 to 29 March 2016; and/or
- (b) On his own or on any other person's account (including Tasman's) engage in any capacity, solicit, endeavour to entice away or discourage from being employed by Asmuss, any person who was an employee of Asmuss in the period from 29 December 2015 to 29 March 2016; and/or
- (c) On his own or on any other person's account (including Tasman's) directly or indirectly take any action which is likely to result in any of those of Asmuss'

client's, customers or suppliers referred to in a. above reducing or ceasing its business relations with Asmuss.

[9] Mr Gardiner must also comply with his ongoing obligation under clause 15 of his employment agreement with Asmuss and at common law to keep confidential the confidential information of Asmuss and not disclose it to or use it for the purposes of himself or any third party including Tasman.

**Compliance order: Tasman**

[10] Under s 137 of the Act Tasman must immediately comply with its undertaking that it will use its best endeavours to ensure Mr Gardiner will not, for the period to and including 29 June 2016:

- (a) Directly or indirectly canvas, solicit or attempt to solicit, serve or act for any person, firm or corporation Mr Gardiner knows or should reasonably know was a client, customer or supplier of Asmuss' in the period from 29 December 2015 to 29 March 2016; and/or
- (b) On his own or on any other person's account (including Tasman's) engage in any capacity, solicit, endeavour to entice away or discourage from being employed by Asmuss, any person who was an employee of Asmuss' in the period from 29 December 2015 to 29 March 2016; and/or
- (c) On his own or on any other person's account (including Tasman's) directly or indirectly take any action which is likely to result in any of those of Asmuss' client's, customers or suppliers referred to in a. above reducing or ceasing its business relations with Asmuss.

**Further orders**

[11] By no later than 5pm on 27 May 2016 Mr Gardiner must pay Asmuss (in cleared funds to the bank account of Asmuss advised to Mr Gardiner) the following sums:

- (a) \$4,000; and
- (b) \$1,500 plus GST as a contribution to Asmuss' legal costs.

[12] By no later than 5pm on 27 May 2016 Tasman must pay Asmuss (in cleared funds to the bank account of Asmuss advised to Tasman) the following sums:

(a) \$4,000; and

(b) \$1,500 plus GST as a contribution to Asmuss' legal costs.

[13] The claims of Asmuss pleaded under Authority file 5624832 are hereby discontinued.

[14] Costs have been resolved by parties under the terms of their agreement, confirmed by consent in this determination.

Robin Arthur  
Member of the Employment Relations Authority