

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2025] NZERA 236
3251919

BETWEEN	ROBERTS NZ LIMITED (IN LIQUIDATION) Applicant
AND	GAVIN PAYNE Respondent

Member of Authority: Marija Urlich

Representatives: Colin Roberts, representative for the Applicant
Digna Toresen, advocate for the Respondent

Investigation Meeting: 23 August, 27 November 2024 and 30 January 2025

Determination: 1 May 2025

DETERMINATION OF THE AUTHORITY

Employment Relations Authority

[1] Roberts NZ Limited (in liquidation) (Roberts NZ) employed Gavin Payne from 1 December 2021 until he resigned with an effective date of 5 June 2023. Roberts NZ says during his employment Mr Payne set up and worked in a competing business and in so doing breached express and implied terms of his employment agreement and the duty of good faith. It says further, that after his employment ended, he breached surviving express terms. Roberts NZ seeks orders against Mr Payne for damages and penalty for breach of the employment agreement.

[2] On 27 October 2023 Roberts NZ was placed in liquidation. On 3 December the liquidator consented to proceedings continuing and appointed Mr Roberts as the representative of the liquidator.

[3] Mr Payne denies the claims. He says the private work he performed during his employment was with the express agreement of Mr Roberts and that he has not breached any obligation owed Roberts during or after his employment.

The Authority's investigation

[4] The Authority has received evidence from Mr Roberts, the former managing director of Roberts NZ and Eve Goldsworthy and Tane Solomon, former senior employees of the business, Mr Payne, Alan Fruish, an electrical inspector who provided those services to Roberts NZ and Michael Pitt, a friend and former colleague of Mr Payne's. Mr Payne's application to dismiss Roberts NZ's claim on grounds it was frivolous and vexatious and that Mr Roberts was not duly authorised to represent Roberts was unsuccessful.¹

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, the Authority has carefully considered all the material before it, including all information received from the parties and the submissions of their representatives.

Issues

[6] The issues identified for investigation and determination are:

- (i) Did Mr Payne breach his employment agreement?
- (ii) If so, has Roberts NZ suffered a loss consequent to any established breach?
- (iii) If so, should damages be awarded and how should any damages award be calculated?
- (iv) Should a penalty be awarded for any established breach of the employment agreement?

¹*Gavin Payne v Roberts NZ Ltd (In liq)* [2024] NZERA 279.

- (v) Whether special damages should be ordered?
- (vi) Is either party entitled to an award of costs?

The parties' employment agreement

[7] Prior to being placed in liquidation Roberts NZ operated a construction company operating in the Auckland region. It is one of a number of companies under the Roberts' Group. Mr Payne is a registered electrician. He was employed by Roberts NZ as an "electrician – residential/commercial – Solar & Automation" and soon moved into a more senior role as operations manager overseeing installation of solar panels and related systems for customers. Other than a change in position and concomitant increase in salary the parties' terms of employment remained the same. Those terms are set out in a written individual employment agreement signed by Mr Payne and Roberts NZ on 20 October 2021. The terms of the individual employment agreement include Mr Payne would:

- (i) diligently and faithfully serve Roberts NZ and promote and protect its interest and reputation at all times (clause 1(a));
- (ii) devote himself exclusively to his Roberts NZ duties during normal working hours (clause 1(b));
- (iii) not use or divulge, or use to the detriment of the employer any confidential information which may come to his knowledge as a result of his employment including after termination (clause 6);
- (iv) seek prior approval for any secondary employment (clause 13);
- (v) not use the company provided vehicle for private use (clause 18);
- (vi) within 6 months of employment ending, not carry on, be connected, engage or have an interest in any business which competes or may compete with Roberts NZ and which is carried on within the Rodney District (clause 22(a)); and
- (vii) within 6 months of date of termination canvass, solicit or attempt to canvass or solicit, serve or act for, in respect of work of a nature undertaken by Roberts NZ or performed by Roberts NZ, clients, customers and suppliers of Roberts (clause 22(b)).

Discussion

Breaches of the employment agreement

[8] Roberts NZ says Mr Payne has breached the above express terms of the parties' employment agreement. In addition, it says Mr Payne has breached implied obligations of loyalty and fidelity and the statutory duty of good faith, which includes the obligation not to directly or indirectly do anything to, or is likely to mislead or deceive that other party to the employment relationship. The asserted terms, both express and implied, are accepted as binding and enforceable.

Did Mr Payne breach his terms of employment during his employment?

[9] There is no dispute Mr Payne undertook secondary employment while he was engaged by Roberts NZ. During this employment Mr Payne invoiced a total of \$24,019.44 for electrical work performed between 16 June 2022 and 16 April 2023 under the entity Dynamic Power Solutions Limited (DPS). The invoices have been provided in evidence as have DPS' annual accounts for the year ending 31 March 2023. DPS was incorporated on 4 July 2022. The registered office of DPS is an address within the Rodney District. Mr Payne is one of two directors of DPS with equal shareholding.

[10] Mr Payne says this secondary employment was not in breach of the obligations owed to Roberts NZ under his employment agreement because the work was performed with the knowledge and approval of Roberts NZ. He says he discussed doing small scale private work with Mr Roberts which was approved. Mr Payne said he used the work mobile phone and laptop for DPS work because he had Mr Roberts' approval and he had nothing to hide. There is no written record of such approval.

[11] Mr Roberts denied any such discussion took place or that he approved, impliedly or otherwise Mr Payne undertaking secondary employment. Mr Roberts said his business had no knowledge Mr Payne was performing this work until it had cause to investigate these matters further including after Mr Payne declined to provide undertakings sought on 19 June 2023 in respect of post-employment restraints. He said the full extent of Mr Payne's use of Roberts NZ resources including the company provided vehicle and fuel, mobile phone and laptop was not uncovered until a forensic analysis of his laptop, mobile phone, vehicle use and fuel card was completed.

[12] The evidence does not establish Roberts authorised Mr Payne's secondary employment with DPS. Mr Payne's claim an agreement was reached with Mr Roberts is not compelling. He was unable to recall with any degree of specificity when the agreement was reached or the detail of the agreement for example there is no suggestion Mr Payne disclosed to Mr Roberts the establishment of DPS, how he intended to use Roberts' resources to support the business including vehicle and fuel, mobile phone and laptop or how he was engaging with Mr Furish to develop the business.

[13] If I am wrong and clause 13 of the employment agreement is not activated by Mr Payne's involvement with DPS, the evidence supports a robust finding that his actions breached clause 1(a) and (b) of the employment agreement. He did not first check with Roberts if the work he did for DPS was consistent with the promotion of its interest and the forensic data shows work for DPS was carried out including contacting clients and providing quotes for jobs during his normal working hours.

[14] Mr Payne did not deny using Roberts NZ's resources, as is revealed by the forensic analysis, to complete work for DPS. He says the use was not unreasonable given there is no question he completed all his work requirements for Roberts NZ, Mr Roberts had approved his secondary employment and the use of Roberts NZ's resources and the work did not compete because it was not undertaken for any Roberts NZ customers and was not work Roberts NZ would do because it was too small scale - small residential jobs including maintenance with the exception of one commercial job for a pre-school in South Auckland.

[15] In his role Mr Payne had access to confidential information relevant to Roberts NZ's business and access to and connection with customers and suppliers. He connected a personal external device to Roberts NZ's laptop on six occasions between 21 February and 3 May 2023 during which he downloaded files from the company drop box file in which confidential information was securely stored. The downloaded information included customer details, pricing, system designs and other system design specifications including information about grid protection boards, their pricing and componentry. Roberts NZ says this information is confidential and is its intellectual property.

[16] Mr Payne said the only documents he downloaded were training course material and regulatory information on solar panel installation which is freely available from public sources. He said the grid protection board information may have been included with the training material because it had been shared at the training course he had attended at the direction of Roberts NZ. He said he was not aware of downloading any customer information and that any wiring diagrams he downloaded were available through electrical wholesalers and had been reviewed by him during the course of his duties.

[17] Mr Payne had not sought or been granted permission to download the information from Roberts NZ's systems. He had access to the information as an employee of Roberts NZ and I am satisfied the downloaded information was Roberts NZ's property and had the necessary quality of confidentiality – it was either purchased by Roberts NZ and modified and/or used for its commercial purposes or was information directly relating to customers and pricing. The downloading of the identified information without authorisation was a breach of clause 6 of Mr Payne's employment agreement and the failure to comply with the statutory obligation of good faith which requires parties to employment relationships to be active and constructive and responsive and communicative.² Even if it was accepted Mr Payne inadvertently downloaded customer and pricing information, this resulted from his unauthorised accessing and downloading of Roberts NZ's property which has been found to be in breach of obligations he owed.

[18] By his own admission, and evidenced by text messages, Mr Payne has discussed with Roberts NZ's supplier, Mr Fruish, his intention to set up his own business and has pursued work referred to him and in so doing has, I find likely aroused interest in retaining his services during and after his employment with Roberts NZ.³ Even if he was not the initiator of these discussions he was bound, whilst employed by Roberts NZ to act in its best interests.⁴ Mr Payne's actions in undertaking work referred to him by a supplier of Roberts NZ whilst still in its employ breached duties owed under the employment agreement.

² Employment Relations Act 2000, s 4(1A)(b).

³ *Walden v Barrance* [1996] 2 ERNZ 598 at 617

⁴ *Ibid* at 617.

Post-employment breaches?

Restraints of trade

[19] Restraints of trade are prima facie unenforceable and invalid. Roberts NZ must establish the restraints are enforceable and reasonable at the time the agreement was entered into, in the interests of the parties and the public interest.⁵

Proprietary interest or trade secret to be protected?

[20] It is not sufficient that the former employee operates in competition. What must be established is some proprietary interest or trade secret to be protected.⁶ Proprietary interests include trade connections and confidential information. Roberts NZ says Mr Payne was introduced to key suppliers and established close relationships with them through his employment. He obtained knowledge of sensitive information including sales practices and pricing and knowledge about Roberts NZ's client base which it had built up over its years of operation.

[21] Mr Payne says his relationship with his new employer was long standing and pre-existed his employment with Roberts NZ, they were not a direct supplier of Roberts NZ and any relationship was with another entity under the Roberts group to which he had no legal obligation. He also says DPS was not a competitor with Roberts NZ.

[22] Roberts NZ provided evidence of the relationship with Mr Payne's new employer and it is accepted, as outlined above Mr Payne had access to information to Roberts NZ's confidential information which on his own evidence he downloaded for his own purposes and not that of Roberts NZ. It is also accepted this information had been built up by Roberts NZ over a period of time and that it was confidential. It was reasonable for Roberts NZ to seek to restrain that information.

Is the period of restraint reasonable?

[23] The restraints are for a period of six months after employment ends.⁷ Factors relevant to assessing the reasonableness of such a duration include adequate time to

⁵ *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97 [37] – [41].

⁶ *Ibid* [20].

⁷ Clause 22 employment agreement.

provide the employer an opportunity to meet the competition and how long it might take to train a replacement employee.⁸ Given the complexity of Roberts NZ's business, including commercial and residential installation of solar panels for a substantial national government agency and large scale residential development and the resourcing required to replace a role such as Mr Payne's, I am satisfied a six-month restraint was reasonable.

Is the geographical cover of the restraint reasonable?

[24] The geographical cover of the restraint at cl 22(a) is the Rodney district. The balance of the restraints do not have a geographical restriction. Given Mr Payne had access to all customer information and Roberts NZ's work was national the geographical scope of the restraints is reasonable.

Did Mr Payne breach the restraints?

[25] Mr Payne resigned from Roberts NZ with an effective date of 5 June 2023. On 12 June Mr Roberts wrote to him reminding him of the restraints and that it was Roberts NZ's view his new employment was in breach because his new employer was a supplier to the Roberts NZ group of companies which included Clear Energy Limited, with which Mr Payne was involved and his working of the supplier risked jeopardising Roberts NZ's confidential information and proprietary interests which are protected by the restraints. The letter proposed terms on which the restraints would not be imposed.

[26] On 16 June Mr Payne, through his representative replied including:

- (i) accepting his new employer was a supplier to Roberts NZ but Mr Payne's new role did not engage with any activities directly competing with Roberts NZ within the Rodney District; and
- (ii) that Mr Payne had no intention to solicit any client, customer or supplier of Roberts NZ or breach his obligation of good faith.

[27] On 19 June Roberts NZ's lawyers wrote to Mr Payne's representative asserting Mr Payne was in breach of his restraint and sought written undertakings. The letter set

⁸ *Stenhouse (Australia) Ltd v Phillips* [1974] AC391 at 402.

out in detail the nature of the asserted breach and why the restraint was important to Roberts NZ. The breaches were detailed as:

- (i) Mr Payne had commenced work with a supplier;
- (ii) on 6 June Mr Payne spoke with a key customer contact, said he had left Roberts and provided his personal mobile number and he could be contacted; and
- (iii) also on 6 June, Mr Payne contacted Mr Furnish to advise he had left Roberts NZ, provided his personal number and that he would be in touch.

[28] On the same day, Roberts NZ wrote to Mr Payne's new employer setting out its concerns.

[29] On 23 June Mr Payne replied asserting he was not in breach of the restraint because his employment was not within the Rodney District and the written undertakings sought would not be provided. The claimed breaches were denied including in respect of Mr Furnish, the contact with whom was described as by way of a personal friendship.

[30] The parties continued to exchange correspondence including on 7 July Roberts NZ raised the breach allegations in respect of Mr Payne's work for DPS. The parties attended mediation in early September and on 20 September the application was lodged in the Authority.

[31] Mr Payne accepts his new employer was a supplier of Roberts NZ. The restraint at clause 22(b) of the employment agreement prohibits this without geographical restriction. The restraint has been found to be reasonable. Mr Payne was in breach of this part of the restraint.

Damages

[32] As stated above Roberts NZ seeks orders for damages and special damages.

[33] In respect of the damages claim Roberts NZ says Mr Payne's breaches are a substantial factor in causing it to lose customers and revenue. Revenue is the money

made from running a business before costs are removed. Goods and services tax is not payable on any damages awarded. An award of general damages is also sought.

[34] The general principles applicable in an assessment of damages are:

- a. damages are to compensate the injured party for the loss it has sustained;
- b. the injured party is not entitled to a windfall;
- c. the respondent can only be held liable for consequences which can convincingly be said to have been a result of the respondent's conduct; and
- d. the onus is on the applicant to prove loss, and the extent of loss on the balance of probabilities.⁹

[35] The objective of any damages award is to put Roberts NZ, as far as a calculation of money could, in the position it would have been in if Mr Payne had not committed the various breaches of his contractual duties.¹⁰ A claimant for damages arising from a loss must take all reasonable steps to mitigate the loss and cannot recover losses that can be avoided.¹¹ The revenue received from customer sales does not deduct any costs or expenses associated with operating the business. Profit is the amount of income that remains after accounting for all expenses, debts, additional income streams and operating costs.

Did Roberts suffer a loss caused by Mr Payne's breaches?

[36] The first consideration in an assessment of damages is whether Roberts NZ can establish Mr Payne's breaches were a substantial factor in causing it to lose customers and revenue.¹²

[37] Mr Roberts said in his evidence that Mr Payne's breaches of his terms of employment undermined Roberts NZ's relationship with a key, established customer and suppliers it has suffered loss as a result. He also said Mr Payne's actions caused

⁹ *Medic Corporation Ltd v Barrett (No2)* [1992] 3 ERNZ 977 at 983-984.

¹⁰ *Civil Remedies in New Zealand* (2003) Blanchard & Ors 1.3.1 at 9.

¹¹ *Rooney Earthmoving Limited v McTague* [2012] NZEmpC 63 at [113].

¹² *EIL Brigade Road Limited v Brown* HC Christchurch CIV-2001-409-733, 5 August 2004 at [203]-[204].

Roberts NZ to lose business and revenue because “it would never have turned away work”.

[38] There is no compelling evidence before the Authority that the work DPS performed, that is minor residential work and one small commercial job, was work Roberts NZ would have undertaken. Roberts NZ had sufficient opportunity to provide information to the Authority about the type of work it performed, it has done so, and that information does not align with the work DPS did. For the sake of clarity this is not a situation where Mr Payne performed work for an existing customer. The claim for damages for lost profit does not succeed because it has not been established to the necessary threshold that the work DPS invoiced would likely have been work DPS would have undertaken.

[39] With respect to the restraint of trade breach, while it is accepted Roberts NZ’s view is Mr Payne did not complete a reasonable handover during his notice period this is a different matter to whether any loss can be established arising from the breach of the restraint. Roberts NZ claimed at the investigation meeting that there had been a loss of a key customer consequent to Mr Payne’s breach. This is a serious claim which would require compelling evidence in support. No such evidence was provided. The claim is not established.

[40] The claim for general damages to recognise the concern and resources required by Roberts NZ in this claim overlaps with matters to be dealt relevant to the Authority assessment of penalty.

Special damages

[41] A claim of special damages requires rigorous proof and is capable of objective calculation.

(i) Executive time

[42] Roberts NZ seeks to recover time of Mr Roberts, Ms Goldsworthy and Mr Soloman in dealing with the issues arising from Mr Payne’s found breaches. I accept they have spent time dealing with matters arising from Mr Payne’s employment including the found breaches and that this has been a challenging situation. It is not so

clear, however, if Roberts NZ has suffered a loss overall in relation to their day to day work or if this use of their time was reasonable particularly given potential external the resources available to Roberts NZ. For these reasons I decline to make an award for executive time.

(ii) *Laptop forensic analysis report*

[43] Roberts NZ seeks an award of special damages to recover the fee incurred for the digital forensic analysis of Mr Payne's laptop. The report is dated 3 July 2023 for which Roberts NZ was invoiced following day the sum of \$2,645.00 (including GST). Ms Goldsworthy confirmed Roberts NZ paid the invoice.

[44] Mr Payne is ordered to reimburse Roberts NZ the full cost of the forensic report \$2,645.00 because the cost was incurred by Roberts NZ in dealing with matters arising from his found breaches of the employment agreement. The payment is to be made within 28 days of the date of this determination.

(iii) *Legal fees*

[45] Roberts NZ seeks an award of special damages to recover legal fees totalling \$15,324.94 (excluding GST) incurred up to 28 August 2023. Supporting evidence has been provided including itemised invoices detailing the work provided. The timeframe involves the period Roberts NZ had started to form concerns about the employment relationship with Mr Payne beyond the issue of her company invoices, the basis of the found breaches and which are the focus of this investigation. I am satisfied the fees have been paid.

[46] The fees incurred cover issues beyond the found breaches, including a claim for profits which has not been successful. The fees also include reasonable attempts to resolve the breach and restraint issues with Mr Payne including by way of written undertaking. Mr Payne is ordered to pay Roberts NZ \$7,000 towards the legal fees within 28 days of the date of this determination.

(iv) *Fuel, mileage, laptop and cell phone*

[47] Roberts NZ calculated fuel usage of \$2,030 and mileage of \$3,143.30 consequent to Mr Payne's use of its vehicle to perform DPS work. Ms Goldsworthy

outlined the basis of the calculation which was based on vehicle location and fuel transaction reports. The sums claimed are accepted as accurate and reasonable. Mr Payne did not challenge the calculation or basis of such. Mr Payne is to pay Roberts NZ within 28 days of the date of determination \$2,030 and \$3,143.30 to reimburse vehicle and fuel usage.

[48] Roberts NZ's witnesses fairly conceded Mr Payne's use of the laptop and cell phone was difficult to calculate. No award is made for this aspect of the claim.

(v) *Immigration and training costs*

[49] This claim for special damages is not allowed because there is insufficient evidence of a link to the found breaches and the costs incurred which relate to Mr Payne's employment.

Penalties

[50] The Authority has found Mr Payne's conduct during and after his employment ended breached the parties' employment agreement. Roberts NZ seeks penalties against Mr Payne. It submits an award of penalties is warranted against Mr Payne for breaches of his obligations both during and after his employment ended and for breach of good faith. The maximum penalty against a person per breach is \$10,000.

Breach of employment obligations

[51] Mr Payne's actions in working without approval during his employment for the benefit of DPS, dealing with a Roberts NZ's supplier not in its interests and using Roberts NZ's confidential information without approval during his employment are serious breaches. The breaches are interrelated and should be globalised.

Breach of good faith

[52] The objects of the Act include building productive employment relationships through the promotion of good faith. Mr Payne's actions have been found to amount to a breach of those obligations. The breaches arose from Mr Payne's failure to appraise Roberts NZ of the business he was building for DPS with the support of one of its

suppliers. Given the many months over which Mr Payne was undertaking work for DPS the breaches, as found, must be seen as deliberate, serious and sustained.

[53] The objects of the Act include building productive employment relationships through the promotion of good faith. Mr Payne's actions have been found to amount to a breach of those obligations. The breaches were serious, deliberate, sustained and prolonged over the four-month period before his employment ended. The submission is accepted that this action has undermined the employment relationship.

Restraint of trade

[54] Given Mr Payne's acceptance his new employer was with a supplier of Roberts NZ, there is no reasonable basis for Mr Payne to assert he was not, at least prime facie, in breach of the restraint at clause 22(b) freely entered. His assertion of a geographical limit was incorrect on the clear wording of the restraint. The breach of the restraint must be seen as deliberate and serious.

Penalties - analysis

[55] There are three penalties including a globalised penalty. The starting point is \$30,000. In considering whether a penalty is warranted and, if so, at what level, I have had regard to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd* and determinations of the Authority which deal with similar matters.¹³

The nature and extent of the breaches

[56] The nature of the breaches is serious - Mr Payne set up in business whilst employed by Roberts NZ without its approval, used confidential, proprietary information gained during his employment, used a Roberts NZ supplier to support the business and took up employment with a supplier. The breaches were blatant.

¹³ *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

The nature and extent of any loss or damage suffered

[57] There was little evidence of direct loss of business suffered by Roberts NZ resulting from Mr Payne's breaches. There was however a significant amount of time and resources expended to protect its rights as well as the legal cost all of which may not be recoverable through this claim.

Intentional, inadvertent or negligent

[58] Ms Payne's breaches must be seen as intentional. The parties entered a comprehensive employment agreement which particularised matters of significant importance to Roberts NZ to protect. Mr Payne entered the agreement and it taken to be fully cognisant of his obligations. His breaches during his employment must therefore be seen as intentional. In respect of the restraint, Roberts NZ reminded him of his obligations and their significance soon after his employment ended and his repeated assurances that he would not compete with it and would abide with his obligations including after his employment ended. A further relevant factor is Mr Payne did not surrender Roberts NZ's confidential information after his employment ended and did not compromise or seek to assess the enforceability of his post-employment obligations through an application to the Authority.

Steps in mitigation

[59] Mr Payne does not appear to have taken any steps in mitigation. He has denied any breach, refused to sign undertakings and did not propose undertakings.

The circumstances of the breach and any vulnerability

[60] There is no relevant previous conduct of Mr Payne's before the Authority to consider. There is no specific information before the Authority that the payment of a penalty is likely to create a financial strain for Mr Payne though I accept he works for a salary and DPS no longer operates.

[61] Standing back, looking at all the circumstances of this matter and, in comparison to other cases I conclude that a fair penalty is \$15,000. Mr Payne is ordered to pay the

penalty to Roberts NZ towards the inconvenience of and resources expended in pursuing this matter.

Outcome

[62] Gavin Payne must pay Roberts NZ Limited (in liquidation) \$14,818.30 in special damages within 28 days of the date of determination.

[63] Gavin Payne must pay a penalty of \$15,000.00 for his breaches of employment obligations during employment, of the duty of good faith and of post-employment obligations within 28 days of the date of this determination. All this sum is to be paid to Roberts NZ Limited (in liquidation).

Costs

[64] Mr Payne is to reimburse Roberts NZ Limited (in liq) the filing fee of \$71.55. Roberts has not incurred costs of professional representation in addition to the matters dealt with above under special damages.

Marija Urlich
Member of the Employment Relations Authority