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Design Engineering (SI) Limited v Kearins CA183/10 (Christchurch) [2010] NZERA 749 (17 September 2010)

Last Updated: 11 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 183/10 5295883

BETWEEN DESIGN ENGINEERING (SI)

LIMITED Applicant

A N D WARWICK KEARINS

Respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions Received:

Helen Doyle

Andrew McRae, Counsel for Applicant Charlotte Clifford, Counsel for Respondent

4 June 2010 at Timaru

15 June 2010 from Applicant 29 June 2010 from Respondent

Determination:

17 September 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Design Engineering (SI) Limited (Design Engineering) is an engineering specialist consulting firm based in Timaru providing design, certification, compliance, management and destructive testing to its customers. As part of its design services, it provides structural steel detailing. Steel detailing is the work Mr Kearins performed at Design Engineering initially as part of his duties when he commenced employment on 14 May 2001 and then exclusively from July 2003.

[2] Steel detailing is a process by which an individual prepares detailed working drawings of prefabricated building components. Such drawings may include detailed design plans, structural drawings and other construction documents for the production and erection of steel components such as steel beams, trusses, stairs, handrails, steel joists and metal decking. Design Engineering is the only employer of steel detailers in Timaru.

[3] Design Engineering say that Mr Kearins was in continuous employment with the company from 14 May 2001 until his resignation without notice by email dated 23 December 2009. Design Engineering says that Mr Kearins was party to an individual employment agreement signed on 31 October 2001 containing the following restraint of trade/non-solicitation and confidentiality provisions that it now seeks enforcement

of:

12 RESTRAINT OF TRADE/NONSOLICITATION

The employee shall not, at any time during the term of this agreement, or for a period of 18 months after termination of this agreement, for any reason:

- (a) Carry on, be connected, engaged or interested, either directly or indirectly, alone or with any other person, in any capacity in any business which competes, or may compete with the employer in the Engineering Inspection & Design industry within a radius of 50kms of the business premises of the employer situated at No 1 Wharf, Timaru, without the express written consent of the employer, which consent shall not be unreasonably withheld;*
- (b) directly or indirectly canvas, solicit or attempt to solicit, or act for, in respect of work undertaken by the employer's business, any person, firm or corporation which has been a client, customer or supplier of the employer during the period of 18 months immediately preceding termination of this contract.*
- (c) solicit or approach or endeavour to entice away or discourage from being employed by the employer, any person who is an employee of the employer, whether or not the employee is acting on his/her own account. The employer shall, on the employee's request, supply a list of names of other employees to whom the employer considers this clause applies.*

14. CONFIDENTIAL INFORMATION

14.1 During the course of employment, the employee may receive and handle knowledge and information relating to the employer's business that is considered to be confidential. The employee shall not, either directly or indirectly, use or disclose such information which has or may be acquired during the course of employment with the employer, concerning the business affairs, property or customers of the employer without the express approval of the employer.

14.2 This clause applies to all information whether or not it is recorded or memorised and includes information which is or may be of use to any competitor of the employer.

14.3 This restriction will apply throughout the employee's employment with the employer and after termination of employment without any limit in point of time. However, the restriction will cease to apply to such knowledge or information that may become publicly known other than by breach of this clause on the part of the employee.

[4] Mr Kearins says that he resigned from Design Engineering in September 2002 and was then re-employed in mid-2003 undertaking solely steel detailing work and not the other additional duties he had previously been undertaking. There was no further written employment agreement entered into between the parties in 2003.

[5] On 14 December 2009, Mr Kearins applied for annual leave from 24 December 2009 until 11 January 2010.

[6] On 15 December 2009, Mr Kearins incorporated a company, Aoraki Detailing Service Limited (Aoraki Detailing). Mr Kearins is the sole director and shareholder of that company that has its registered office in Timaru. Aoraki Detailing provides structural steel detailing and services in direct competition with Design Engineering.

[7] On 23 December 2009, the day before Design Engineering was to close for Christmas, Mr Kearins sent an email to the company that provided:

I am resigning, effective today.

[8] After he had forwarded the email, Mr Kearins then spoke briefly to Mr van Buuren, director of Design Engineering, and as a result of that discussion he was given a copy of the employment agreement that he had signed in October 2001. No real discussion took place.

[9] Mr Kearins returned on 11 January 2010 to Design Engineering for a handover including a discussion about his ongoing work.

[10] Following Mr Kearins' resignation, Mr van Buuren became aware that a significant client of Design Engineering, Chapman Engineering Limited (Chapman Engineering) had engaged Aoraki Detailing for detailing services in Timaru. Whilst employed by Design Engineering and particularly in the last two years of employment, a majority of steel detailing work Mr Kearins had performed was for Chapman Engineering.

[11] Mr van Buuren says that he also became aware that there was a breach of confidentiality on Mr Kearins' part particularly in terms of pricing. In 2009 Mr van Buuren was aware that Chapman Engineering was tendering for a job at Mitre 10 Timaru that would require 130 tonnes of steel to be detailed. He was confident that Design Engineering would be contracted to undertake the steel detailing work. Mr Kearins was also aware of the possibility of this work before his resignation because he was asked to enquire of the tender progress with Chapman Engineering by Mr van Buuren. Chapman Engineering was successful in obtaining this job but Aoraki Detailing was contracted to detail the steel from in or about early January 2010 for approximately half Design Engineering's rates. Mr Kearins denied that he used any confidential pricing

information to secure the contract for this work with Chapman Engineering.

[12] When he became aware that Chapman Engineering was using Aoraki Detailing for its steel detailing work Mr van Buuren telephoned Mr Kearins to advise him that he was in breach of restraint of trade and non-solicitation provisions. Mr Kearins declined to discuss the matter further with him.

[13] On 27 January 2010, Mr McRae wrote to Mr Kearins and asked, in light of the restraint of trade and non-solicitation provisions, that he cease trading in contravention of the restrictive covenants. Another solicitor from Ms Clifford's firm, responded in writing by letter to Mr McRae and advised that Mr Kearins had ceased employment with Design Engineering on or about September 2002 and when he was re-employed no written employment agreement entered into and therefore there were no restrictive covenants capable of being enforced.

[14] Shortly before the matter went to an investigation meeting, Mr McRae advised the Authority and Ms Clifford that a further ground was relied on by his client that there had been a breach of the implied duty of fidelity and confidentiality. No objection was taken to that new problem being introduced at a late stage.

[15] The parties attended mediation by agreement before the investigation meeting but the matter was not able to be resolved.

The issues

[16] The issues for the Authority are as follows:

(a) Is the restraint of trade and non-solicitation clause in the individual employment agreement enforceable:

- Did Mr Kearins resign in late 2002 from Design Engineering and was he then re-employed in 2003; or was he on unpaid leave by agreement?
- If the answer to that matter is that Mr Kearins did not resign and his employment was continuous, then the Authority will need to determine whether the restrictive covenants in clause 12 are reasonable in all the circumstances between the parties for the protection of proprietary interest and not in conflict with wider public interests and if not whether they should be modified.

(b) Was there a breach of the express confidentiality provision?

(c) In the alternative, if it is found that Mr Kearins resigned and was then re-employed, did Mr Kearins breach the implied duties of fidelity and confidentiality in securing the work of Chapman Engineering?

(d) If there are breaches, then what are the remedies?

The employment agreement

[17] I accept Ms Clifford's submission that if Mr Kearins is found to have resigned and then to have been re-employed in 2003, there is no basis to imply a restraint of trade clause into the employment agreement between the parties.

[18] Design Engineering does not accept that Mr Kearins resigned from his employment in late 2002. Its view is that there was a period of unpaid leave taken by Mr Kearins after which time he returned to work on the basis of the terms and conditions in the individual employment agreement he signed in October 2001.

[19] Before I turn though to resolve the dispute in the evidence whether Mr Kearins resigned or not, there are some matters in dispute about the employment agreement itself that I need to make findings about.

[20] The first of these is that, whilst Mr Kearins accepts he signed the employment agreement on 31 October 2001, there is a dispute as to when it was presented to him. Mr Kearins does not accept that it was before October 2001 and Mr van Buuren says it was on or about 17 May 2001, a few days after Mr Kearins commenced his employment.

[21] Mr van Buuren said that he obtained a precedent individual employment agreement from the South Canterbury Chamber of Commerce some time prior to 2000 that he used for all of his employees. He supplied a Word agreement properties document, Mr Kearins electronic employment agreement that supported the creation of a nine page document at 4.30pm on 17 May 2001. He relied on this in his evidence that he gave the agreement to Mr Kearins on or about that day. Mr van Buuren said that Mr Kearins took his employment agreement away and retained it in his possession for a period of approximately five months before he signed it in October 2001.

[22] Given the evidence as to when the document was created in its electronic form, I accept that it is more likely than not that Mr Kearins was handed the employment agreement shortly after he commenced his employment in May 2001.

[23] Mr van Buuren said that then, during an audit of Mr Kearins' employment file, it became apparent that he had not signed the agreement and he chased Mr Kearins up on or about 31 October 2001. Mr van Buuren said that Mr Kearins then copied his employment agreement and provided Mr van Buuren with a copy of the signed agreement. As Mr van Buuren already had a copy of the agreement, he asked Mr Kearins to simply give him a copy of the signed back page which he then stapled to the employment agreement he already had and put it away in Mr Kearins employee file in a locked file cabinet.

[24] The employment agreement that was provided to Mr Kearins on the day he resigned on 23 December 2009 is consistent with that evidence because there are two page 9s, the second only of which is signed. I accept that there is an acceptable explanation as to why there are two page 9s attached to the agreement.

[25] The thrust, however, of Mr Kearins' evidence and Ms Clifford's submissions is to put in doubt whether the agreement provided to Mr Kearins when he resigned and then to the Authority is in fact the employment agreement he signed. This is because of one additional matter within the agreement itself. On the signed second page 9, there is a clause with respect to a living away allowance that is not found on the unsigned page 9 but rather on page 8. Ms Clifford, in her submissions, says that the formatting of the document was never adequately explained by Mr van Buuren as to how two different page 9s exist. Mr van Buuren though, in his evidence, said that this could depend on the type format.

[26] There was no change to the wording itself in the clause but rather the way the wording was placed over the nine pages. The wording that was in the employment agreement retained by Mr van Buuren in his filing cabinet simply appeared on page 8 instead of page 9.

[27] I am not persuaded that this change, which could be explained by a type format, is sufficient for me to conclude that the employment agreement given to Mr Kearins on 23 December 2009 was not the one that he was given and subsequently signed in October 2001. Mr Kearins was given the employment agreement shortly after he resigned in December 2009. Mr van Buuren was unaware at that time of the fact Mr Kearins had incorporated a company that would be in competition with Design Engineering. It is less likely in those circumstances that he would have had the time and indeed the motivation to recreate a document as suggested by Mr Kearins.

[28] I am satisfied, therefore, that the employment agreement produced was the agreement signed by Mr Kearins, notwithstanding that some matters therein required explanation.

Did Mr Kearins resign from his employment in 2002?

[29] Mr Kearins says that he resigned from his position as an engineer with Design Engineering in September 2002 and had no intention of resuming employment. He did not accept Mr van Buuren's evidence that he thought Mr Kearins wanted to take time out to renovate a property and/or rental properties. He denies that was ever discussed although he did accept that he had property of that nature. Mr Kearins said in his evidence that he told Mr van Buuren that he intended to resign and that Mr van Buuren attempted to talk him out of it. He said that he recalls going out with Mr van Buuren to test a wool press and that, not wanting to upset him led Mr van Buuren to think he was having a mid-life crisis. Mr Kearins said the real reason for him leaving, being that he was not happy doing the work he was doing and felt there was little point trying to change things at Design Engineering

[30] Mr Kearins says that he had nothing further to do with Design Engineering until he heard, through a source in 2003, that it was now using the Pro-steel software.

[31] The evidence supports that between September 2002 and July 2003, Mr Kearins did not continue to receive payments from Design Engineering. He did accept though that he asked for certificates of earnings on occasion from Design Engineering because he did his own tax return and, amongst other certificates produced for the purpose of the Authority's investigation meeting, is one for the period from 1 April 2002 to 31 March 2003 which certificate confirmed that Mr Kearins was employed by Design Engineering between those dates, such certificate being issued on 18 April 2003. His earnings though, given that he did not work for a significant part of that period, were only \$3,231.86.

[32] It is accepted that there was no written notice of resignation. It is also clear that the payroll information and the records pertaining to Mr Kearins' employment record the anniversary date or start of employment consistently as 14 May 2001 and there was no termination report produced.

[33] The evidence supports that, at least from Mr van Buuren's perspective, the anniversary date of 14 May 2001 was relied on after Mr Kearins returned to physically working at Design Engineering in July 2003 for performance reviews required under the employment agreement and clause 4.2. There was also evidence that in 2007 an increase in the hourly rate was backdated to the anniversary day of 14 May rather than a date in July and on 14 September 2007 there is a record of Mr Kearins asking and being granted an increase to five weeks' annual leave. There is reference in the employment agreement to an extra week's leave after five years' continuous service. Mr Kearins said in response to that that he simply asked for the leave as he felt that he was due it, but I accept that Design Engineering relied in part on the granting of such a request on the provision in the employment agreement.

[34] There was evidence of flexibility in this employment relationship. Mr Kearins felt that the flexibility changed after 2003 but that was not Mr van Buuren's view. In short, the flexibility was described in evidence as Mr Kearins working when there was work to be done and taking time off when he wanted to without the need to obtain approval. Both Mr Kearins and Mr van Buuren described the relationship as casual, however, as the relationship in other respects did not fit with the legal definition of casual, I prefer to use the term flexible.

[35] It is also clear that both parties were quite comfortable with that arrangement because Mr van Buuren said in his evidence that Mr Kearins always got the work done that was required.

[36] I am satisfied that Mr Kearins was never regarded by Design Engineering as having resigned as an employee and it simply accepted that the extended period that he was away from the workplace was to enable him to undertake other activities. No written notice of resignation was given as required under the employment agreement which was expressed to be two weeks'/months' written notice to the employer.

[37] Against a background where there was an element of flexibility, I find, on the balance of probabilities, it more likely than not, Mr Kearins did not resign from his employment in 2002. When he returned to work in July 2003, he solely undertook detailing work but I am not satisfied that he was re-employed to do that but rather expressed a preference to confine himself to that role at the end of his leave.

[38] In conclusion therefore, I do not find that Mr Kearins resigned from his employment and therefore I find that on his return in July 2003 he continued to be employed on the terms and conditions contained in the employment agreement signed in October 2001.

Reasonableness of restrictive covenant

[39] A covenant in restraint of trade is prima facie unlawful but it may be upheld if it is reasonable in the interests of the parties to the contract and with reference to the interest of the public. In *Medic Corporation Ltd v. Barrett & Ors* [1992] 3 ERNZ 523, Chief Judge Goddard stated:

... covenants in restraint of trade, by their very nature, suppress competition and this is seen as potentially harmful to the public interest and as potentially unfair because at the time when such a provision is negotiated it is often the case that the party demanding the covenant is in a stronger bargaining position than the party on whom it is enforced. Therefore the law starts with an assumption that a covenant in restraint of trade is unenforceable unless the party seeking to enforce it can show that the covenant was reasonable with reference to the private interests of the parties concerned and the interests of the public at large.

[40] Design Engineering says that if the restraint of trade and non-solicitation clauses are not considered reasonable, then they should be modified under s.8 of the [Illegal Contracts Act 1970](#).

[41] Covenants in restraint include all the contractual provisions under which Mr Kearins has restricted himself in his ability to work following the ending of the employment relationship. That is therefore each of the provisions in clause 12 of the agreement, although clause 12(c) was not relied on in this case.

[42] The reasonableness of restrictive covenants will usually be judged at the time of making the covenants - *Gallagher Group Ltd v. Walley* [1999] NZCA 333; [1999] 1 ERNZ 490. Things an employee has done and learned during the course of the whole of the employment though may be considered - *Broadcasting Corporation of New Zealand v. Neilson* (1988) 2 NZELB 96,040.

[43] When Mr Kearins and Design Engineering commenced their employment relationship in 2001, Mr Kearins was performing a range of tasks and not simply detailing. He was also undertaking some outdoor work and fencing work for Mr van Buuren. That changed in 2003 when Mr Kearins became solely focused on detailing. The parties did not discuss the restraint covenants at the time Mr Kearins was given the employment agreement or at the time he signed.

[44] A restrictive covenant may be reasonable if the nature of Mr Kearins' employment was such that customers would learn to rely upon the skill and judgment or deal with him to the virtual exclusion of his employer and therefore he could be said to have some influence over them. Whilst evidence about that for the first part of the employment was less than clear, towards the latter stage of his employment in 2008 and 2009 a significant part of Mr Kearins' work involved one customer, Chapman Engineering.

[45] It is clear that Mr Kearins became known to Chapman Engineering as a good detailer. His evidence was to the effect that he worked fairly autonomously from Mr van Buuren although the evidence, in my view, did not go so far as to have him deal with Chapman Engineering to the virtual exclusion of Mr van Buuren. For example, in terms of pricing, Mr Kearins' input may have been requested but the evidence was not that he was usually involved in pricing the whole of the job.

[46] I accept Ms Clifford's submission that the degree of influence that a skilled tradesperson in Mr Kearins' situation has can be seen as different from a radio personality or a salesperson. There was no evidence that it was Mr Kearins role to bring work into the company or sell his skills rather he performed the work that he was asked to. I accept Ms Clifford's submission

that a proprietary interest does not arise simply because an employee is good at their job. Nevertheless I accept that Mr Kearins had some influence over customers because he worked in a fairly autonomous way with them when he undertook their steel detailing requirements.

[47] There was no evidence that Mr Kearins received significant training from Design Engineering. Prior to using the Prosteel software which he accepted took him time to become proficient with, Mr Kearins was a skilled AutoCAD operator.

[48] I find that the only proprietary interest that Design Engineering could have protected that was not merely to prevent competition in Timaru was that of unfair competition arising from influence Mr Kearins may have over its customers. Unfair competition that is, in having an ability or a head start in establishing a future customer base by virtue of having been introduced to and performing work for customers at Design Engineering - *Air Gas Compressor Specialists v. Bryant* [1998] NZEmpC 45; [1998] 2 ERNZ 42 at 59. I shall go on shortly to consider in light of that limited propriety interest whether the restrictive covenants in 12 (a) and 12 (b) are reasonable or whether they go too far to provide adequate protection.

[49] One of the matters that can be considered in terms of reasonableness of restrictive covenants is consideration. In *Fuel Espresso Ltd v. Hsieh* [2007] NZCA 58; (2007) 4 NZELR 258, the Court of Appeal held, in circumstances where it was dealing with the initial and only agreement of the parties, the law does not inquire into the adequacy of the consideration nor require an extra premium for a restraint of trade clause.

[50] Consideration, though, is relevant where the restraint is imposed by way of a variation. Ms Clifford places reliance on the fact that there was a period of time between when Mr Kearins commenced employment on 14 May 2001 and when he signed the agreement on 31 October 2001. I have already found that Mr Kearins was handed the agreement a few days after he commenced his employment. In *Marine Helicopters v. Stevenson* [1999] 1 ERNZ 472, it was held in circumstances where the defendant's employment contract was oral, but the unsigned written agreement was retained by him, that its terms, including the restraint of trade, formed part of the oral contract. The restraint of trade covenant in that case was held to be reasonable.

[51] Applying that to this matter, I find that notwithstanding there was a delay in Mr Kearins signing the agreement, he was in possession of the unsigned written employment agreement and I am satisfied that the terms and conditions of that agreement formed part of the agreement between the parties.

[52] Mr McRae also referred in his submission to clause 4.1 of the agreement that provided, amongst other matters that the remuneration specified included the undertakings made with respect to the restraint in trade.

[53] I do not find that additional consideration is required over and above that set out in the employment agreement but I accept Ms Clifford's submission that Mr Kearins' remuneration was relatively modest in the employment agreement.

[54] I turn then to the length of the restraint for the restrictive covenants. That is expressed to be 18 months. Mr van Buuren said that it would take a considerable period, at least 12 months, to train someone new on the software. He did, however, give evidence that there were already detailers, himself included, who could have undertaken work when Mr Kearins left the firm. Although each case falls to be assessed on its own facts, Employment Court judgments describe 12 months as being at the upper end of the period likely to be held by the Court and three months as the usual period for salespersons and hairdressers. The period of 18 months is too long to be reasonable for the restrictive covenants.

[55] In assessing reasonableness particularly in terms of length of the restrictive covenants I have also had regard to the notice period within the employment agreement which is expressed to be two weeks/months. I formed a clear view from the evidence that both parties considered two weeks' notice to be reasonable. That is a matter that I shall touch on briefly in terms of the claim for breach of the duty of fidelity. A notice period gives an employer time to make sure customer relationships are maintained and secured when an employee departs. I find that, when assessed against a two week notice period, the length of the restrictive covenants is unreasonable.

[56] It seems to be accepted by both Mr Kearins and Mr van Buuren because work by a steel detailer is undertaken using computer software location is not so important.

The geographical limitation of the restrictive covenants prevents Mr Kearins from carrying on, being connected, engaged or interested, either directly or indirectly, alone or with any other person in any capacity in any business that competes or may compete with Design Engineering within a radius of 50km from the business premises of Design Engineering. The only limitation to that is that Design Engineering can provide consent, which consent will not be unreasonably withheld. I find that the geographical restriction would mean that, in order to either set up his own business or be employed, Mr Kearins would be required to shift from the Timaru area altogether if he was to carry on with the same sort of steel detailing work he had been undertaking from 2001. That is unreasonable.

[57] The restrictive covenants should also be no wider than necessary. It was clear from the evidence that the interest Design Engineering most wanted to protect was its relationship with its customers and unfair competition from Mr Kearins having influence over those customers and enticing them away. I am not satisfied that there is any other proprietary interest that is

capable of protection that is not simply to prevent competition. There is adequate protection for the proprietary interest that I have found in the non solicitation covenant in clause 12 (b). Clause 12 (a), the restraint in trade covenant is unreasonable, and unenforceable and not necessary.

[58] The scope of the non-solicitation covenant is restrictive being clients, customers or suppliers of the employer for the period of 18 months immediately preceding termination of the contract which includes Chapman Engineering. Nevertheless if the length of the non solicitation covenant is limited to not more than three months I am satisfied the scope is reasonable.

[59] I have been asked if the Authority finds that the covenants are unreasonable, to consider modification and that is a matter I shall return to later in this determination.

Confidentiality

[60] Mr McRae submits that Mr Kearins has used the respondent's confidential information about proposed tenders and their contents and confidential information about pricing.

[61] I accept Ms Clifford's submission that it is not entirely clear what is meant by Mr Kearins' alleged access and use of information concerning proposed tenders. She submits, in relation to the tendering process generally, that that information is not confidential although accepting the content of any tender put out by Design Engineering would be.

[62] I accept that there is no evidence about a breach by Mr Kearins in terms of the contents of any tender because the evidence that I heard was concentrated on the pricing. Mr van Buuren said that Mr Kearins priced the jobs for Chapman Engineering at approximately half of the tonnage rate that Design Engineering would perform the job for and doing so Chapman Engineering preferred him to undertake the detailing rather than Design Engineering. Mr van Buuren went further than that and said that in pricing as such; Mr Kearins had affected the rates for steel detailing in Timaru and indeed New Zealand. Given the limited evidence that I heard, I could not form a view on that.

[63] It did seem to me that Mr McRae's submission was probably about using knowledge about the tender Chapman Engineering had put in for the Mitre 10 work and the subsequent prospect that Design Engineering may well be contracted to perform the steel detailing part of that contract.

[64] Putting aside for the moment whether that information was confidential or not there was no evidence to satisfy me that he used that information. I accept there is difficulty in getting that sort of evidence. If there was evidence that Mr Kearins, attempted to interfere with that process whilst an employee, then that may well give rise to a breach of fidelity. That, however, is a different matter.

[65] In terms of the pricing, Mr Kearins said that he was not aware other than in a general way about the pricing details while an employee at Design Engineering and he was not interested in pricing. He explained the rationale behind the rates that he said he had undertaken the Chapman Engineering job for. It was clear that his overheads were very low compared with Design Engineering. He works out of a basement. Mr Kearins was aware of the usual price range for detailing work undertaken by Design Engineering although evidence given by the then project manager, Andrew Kitchings, was to the effect that the price range was greater than Mr Kearins had said it was in his evidence.

[66] I accept that Mr Kearins may have seen job sheets on occasions with pricing written at the top, although the evidence of Mr Kitchings was that that was not standard practice. He may well have overheard pricing discussions because the offices were in the nature of open plan offices. Mr Kearins said that in terms of any pricing discussions that he had with Chapman Engineering that they commenced in the New Year but that he said he probably started the job in the first week of January 2010 without in fact pricing it. Mr Kearins said that he prices any work on a case-by-case basis.

[67] I accept Mr McRae's submissions in terms of the law applicable to confidential information. I do not intend to set it out. I am not satisfied, however, from the evidence that Mr Kearins breached the confidentiality provision in his employment agreement in terms of tenders or pricing. There was insufficient evidence to persuade me that such a breach had occurred. If Mr Kearins had priced the job just below that of Design Engineering, then I may well have formed a different view of the evidence. It did appear, however, that halving in effect what Design Engineering would have charged seemed less likely to be on the basis of any knowledge of pricing.

[68] In conclusion, I am not satisfied that Mr Kearins breached the confidentiality provisions of his employment agreement.

Breach of the implied duty of fidelity

[69] I am not required, given my earlier findings, to go on to consider this alternative claim. I will say that had I not found that the employment agreement of 2001 applied to this employment relationship then I would have found there was an argument, given the evidence that Mr Kearins approached Chapman Engineering on 1 or 2 January 2010, that he did so within what could be considered a reasonable notice period of two weeks. I would probably have given counsel a further opportunity to provide additional submissions on this as although this was touched on the case was not really progressed on that basis.

Damages

[70] I accept that, because of the loss of the detailing work from Chapman Engineering, including the Mitre 10 job, Design Engineering suffered damage as the result of a breach of a reasonable restrictive covenant of non-solicitation, if modified as to length.

[71] The evidence I heard about damage was limited. The claim for damages will need to be revised as a result of the findings I have made in this determination. As Ms Clifford submitted, these issues are often determined on the basis of a loss of profit but in this case there would need to be reflection on the possibility that had Mr Kearins not received work from Chapman Engineering between say 23 December 2009 and 23 March 2010, it may also have not been given to Design Engineering. Those are matters for the parties to give further consideration to.

[72] Mr McRae recognises in his submissions that calculation of loss is notoriously difficult in situations. The Authority, however, cannot simply rely on speculation unless there is some basis before it for determining damages. The other difficulty in a case of this nature is that the quantum of those damages and the basis on which they are to be assessed will depend, and indeed has depended, on certain findings in respect of the restrictive covenants, any modification, and those matters could only be considered following findings about whether or not Mr Kearins had resigned. Mr McRae conservatively estimated damages in the vicinity of \$50,000.

[73] I am not in a position to form a firm view about those damages from the evidence. The parties will need to consider that matter further.

Modification

[74] I have found that Design Engineering has a protectable proprietary interest. I am not persuaded that clause 12(a) should be modified. The restraint of trade provision was not reasonable at the time that the employment agreement was entered into, particularly in light of the adequate protection afforded by clause 12(b). Clause 12(b) is for a period which is too long to be reasonable, but would have been reasonable at the time the employment agreement was entered into if varied so as to apply for no more than three months.

[75] The Authority may, under [s.162](#) of the [Employment Relations Act 2000](#), subject to [s.163](#) and [s.164](#), make any orders that the High or District Court may make under the [Illegal Contracts Act 1970](#). The Court has the power under s.8 of the [Illegal Contracts Act 1970](#) to modify a provision.

[76] Mr McRae provided careful submissions about the Authority's power to vary an employment agreement under s.8 being constrained by [s.164](#) of the [Employment Relations Act 2000](#). In his submissions, he set out the provision in [s.164](#) in full but submitted that the parties had already participated in mediation and modification of the clause was directly canvassed. Mr McRae submits that further mediation would not assist in resolving the issues that have arisen and that the Authority can be satisfied that any remedy other than modification would be inappropriate or inadequate.

[77] Recently another member of the Authority, Member Cheyne, in *Kiwi Stat Ltd v. Tania Nichols* CA138A/10 also considered the provisions of [s.164](#) in terms of modification of a restrictive covenant and concluded that, notwithstanding the parties did participate in mediation by agreement the Authority was obliged under [s.164](#) to direct mediation which he did so as a matter of urgency.

[78] The wording of [s.164](#) indeed supports such a course because it specifically refers to the Authority only having the ability to make an order if it has identified the problem in relation to the agreement. It would seem to me that the problem in relation to the employment agreement has only been identified at the point of issuing this determination.

[79] Here, I consider, as did Mr Cheyne in his determination, that I am obliged, under [s.164](#), to direct mediation before I can make any order as to modification. It would also be a good opportunity for the parties to consider the issue of damages. I would request that the parties advise the Authority by Friday, 29 October 2010 whether the problem has been resolved or not and whether further order is required from the Authority.

Costs

[80] I reserve the issue of costs until this matter has been finally determined at which point I will issue a timetable.

Helen Doyle
Member of the Employment Relations Authority