

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 241/09
5158060**

BETWEEN EQUICO EQUIPMENT FINANCE
 LIMITED
 Applicant

AND JAYE ENRIGHT
 Respondent

Member of Authority: Leon Robinson

Representatives: Andrew Steele, Counsel for Applicant
 Michael O'Brien, Counsel for Respondent

Investigation Meeting: 30 June 2009

Further Submissions: 16 & 17 July 2009

Determination: 17 July 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Equico Equipment Finance Limited ("Equico") and its former employee the respondent Ms Jaye Enright ("Ms Enright") entered into a record of settlement dated 23 February 2009 ("the record of settlement"). Equico claims penalties against Ms Enright for breaching it. Ms Enright seeks a compliance order against Equico.

[2] The parties were unable to resolve the problem between them by mediation.

[3] The Authority has heard evidence from Ms Enright and Equico's General Manager Mr Ross Alan Fodie ("Mr Fodie").

The facts

[4] Equico trades as a technology specialist finance company. It provides leasing on information communications technology and related assets to Government, education and corporate and commercial clients. The education sector is a principal area of business for Equico and includes most state schools throughout New Zealand.

[5] Ms Enright was employed by Equico from May 2002 to February 2009. From April 2005 until February 2009 Ms Enright was employed as *Account Manager - Education*. I find that upon her request and with Equico's agreement, her title was subsequently changed to *National Education Manager* about the beginning of 2007.

[6] Ms Enright was involved with Auckland Primary Principals' Association ("the Association") as Equico's representative of its sponsorship of that Association.

[7] It was a key part of Ms Enright's employment to liaise with the Association and, in particular, to promote Equico's products and services to the Association, its member schools and other sponsors of the Association.

[8] In January 2009, Ms Enright raised a personal grievance and the parties attended mediation to address the problem. As a result of those discussions, the parties agreed to end the relationship between them, amongst other things, and entered into the record of settlement, which was signed by a mediator employed by the Chief Executive of the Department of Labour and thereby having the statutory effect stipulated at section 149 of the *Employment Relations Act 2000*.

[9] Ms Enright commenced employment with Rentplus Limited ("Rentplus") in or about mid March 2009. Rentplus is a direct competitor of Equico and offers leasing on technology assets to education, business and government. Ms Enright is employed as Rentplus' *Strategic Initiatives Manager*.

The merits

[10] There are two principal disputes here. The first is that Equico claims Ms Enright has acted in breach of the record of settlement because she canvassed or solicited its vendors or customers contrary to clause 4 of the record of settlement and it claims penalties against her. The second is a claim by Ms Enright that Equico fails to perform certain terms of the settlement agreement in respect of which she seeks formal orders of compliance from the Authority. I examine each dispute in turn and it is convenient that I first deal with Ms Enright's application for compliance.

Application for Compliance

[11] The record of settlement has this term:-

1. The Employer agrees to pay to the Employee:

(a) \$XXX pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 within 10 working days after the date all parties and the mediator signs this settlement agreement.

(b) All commissions earned and due to the Employee up to 19 February 2009, such payment to be made on the usual date for such payments. For the avoidance of doubt the commission referred to herein for February 2009 shall be calculated on the sales figures contained in that attached schedule A to this settlement. For completeness, this includes commissions any vendors that the Employer purported to assign to other staff subject to the Employee having signed those sales.

[12] Ms Enright says that Equico has not paid to her commission owed on the total brokerage sum of \$94,649.64. Equico has paid commission to her on a total brokerage sum of \$72,790.41. Ms Enright says \$94,649.64 is the correct figure being the sum referred to under the clause and as specifically marked by handwritten notation. She now asks the Authority to order compliance directing Equico to pay her commission on the sum of \$92,649.64.

[13] Equico had couriered to Ms Enright a statement detailing its calculation of commission owing to Ms Enright on the total brokerage sum of \$72,790.41. It has paid commissions to Ms Enright based on that figure.

[14] I accept that Ms Enright is entitled to commissions "due and owing" to her up to 19 February 2009. I accept that attachment "A" to the record of settlement includes sales that were not settled by 19 February 2009 and therefore it includes commissions not due and owing to Ms Enright by 19 February 2009. The details of schedule "A" are only the basis upon which the calculation is to be made and not the actual calculation itself. **Accordingly, this being my view of the agreed term, I decline to make a compliance order as sought by Ms Enright.**

[15] Ms Enright's other claims in relation to a reference have been resolved between the parties.

The restraint

[16] The record of settlement has this term:-

4. The Employee agrees that she shall not for 3 months from 23 February 2009 directly or indirectly canvass, solicit or attempt to solicit the business of any vendor or customer of the Employer with whom the Employee has had any contact during the course of her duties for the Employer over the last 12 months. For completeness, social contact with representatives of such vendors or customers is not prohibited.

("the restraint").

[17] Equico says Ms Enright has acted in breach of that term in three ways. Firstly, her continued involvement with the Association. Next, that she has had contact with former clients and finally, that she has participated or acquiesced in the placement of an advertisement by Rentplus.

[18] This restraint is known as a restrictive covenant. I regard the law in relation to such covenants as summarised succinctly by Lord Wilberforce in *Stenhouse Australia Ltd v Phillips* [1974] AC 391, 400:-

The accepted proposition that an employer is not entitled to protection from mere competition by a former employee means that the employee is entitled to use to the full any personal skill or experience even if this has been acquired in the service of his employer: it is this freedom to use to the full a man's improving ability and talents which lies at the root of the policy of the law regarding this

type of restraint. Leaving aside the case of misuse of trade secrets or confidential information (which is separately dealt with by clause 3 of the agreement and which does not arise here), the employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation. For while it may be true that an employee is entitled — and is to be encouraged — to build up his own qualities of skill and experience, it is equally his duty to develop and improve his employer's business for the benefit of his employer. These two obligations interlock during his employment: after its termination they diverge and mark the boundary between what the employee may take with him and what he may legitimately be asked to leave behind to his employers.

[19] That statement of the principle was adopted by the New Zealand Court of Appeal in *Welsh v Cooney*¹, a case concerning solicitation of clients by a lawyer in a South Island town. The mere existence of a restrictive covenant is not of itself enough and the courts will enquire whether there is an interest which can and should appropriately be protected.

[20] In this present case I am satisfied that there is an interest which can and should be protected. I accept Mr Fodie's evidence that Ms Enright became well known as "the face of Equico" in the greater education environment. I am satisfied that her seniority and position made her intimately aware of Equico's intellectual property. Ms Enright does not challenge the reasonableness or enforceability of the clause. Having regard to those points, I therefore accept the restraint in question is reasonable and enforceable.

[21] Firstly Equico criticises Ms Enright for her continued involvement with the Association once her employment with Equico had ended. I accept that Ms Enright remained involved with the Association from Tuesday 24 February 2009 until she terminated her involvement with it on 24 March 2009. It is true that when her employment with Equico ended, Ms Enright could have no connection with the Association via Equico as sponsor. Ms Enright says she remained involved but in an entirely voluntary capacity on the sub-committee of the Association and was particularly invited to remain so by its chair because it was only a few weeks before an annual conference of Principals in April.

¹ CA 359/92, 23 April 1993, per Cooke P

[22] Equico says Ms Enright's involvement with the Association after termination was contrary to the restraint. It says that its own involvement with the Association is essentially networking and is a marketing initiative designed for one purpose - to solicit and canvass schools and other product providers to schools to secure or maintain business. It says that Ms Enright derived the same purpose through her own involvement subsequent to the termination of her employment, but more than that, for Rentplus' advantage.

[23] By email dated 23 March 2009 Ms Enright sent an email to the Association's stallholders at its upcoming conference. She wrote:-

Hi All,

Now that all the stands have been allocated we need to know who is coming along to represent your company... if you could fill in the attached form and fax it back to 09 379 8678 as soon as possible so we can get all the name tags printed up that would be great. We look forward to catching up with you and your teams.

On behalf of the APPA Committee

[24] That email was sent from Rentplus' email system and had Rentplus' details in the electronic signature. It had Ms Enright's name as "Stratigic(sic) Initiatives Manager" and showed Rentplus' full contact details including its website address. Ms Enright says she despatched this advice on the Association's behalf as expressly stated, and nothing is to be taken from the inclusion of Rentplus' details. She says it is purely coincidental that she sent the email on Rentplus' system.

[25] Equico's counsel submits that Ms Enright's use of Rentplus email to contact stall holders at the Association's conference is an example of her promoting Rentplus at Equico's cost. It is further submitted that by remaining involved with the Association after the termination of her employment with Equico, Ms Enright sought to directly or indirectly solicit or attempt to solicit principals of schools and vendors of Equico.

[26] Ms Enright's counsel refers the Authority to Black's Law Dictionary definition of a non-solicitation agreement as this:-

A promise, usu, in a contract for the sale of a business, a partnership agreement, or an employment contract, to refrain, for a specified time, from either (1) enticing employees to leave the company or (2) trying to lure customers away.

[27] It is also submitted that if solicit means to entice, then appropriate synonymous for entice include "tempt", "lure", "persuade", and "inveigle"². I accept that solicit should be interpreted similarly.

[28] In *Sweeney v Astle*³, Stout J noted that 'solicit' was a common English word, and in its simplified form meant 'to ask' and that its other meanings included 'to call for', 'to make request', 'to petition', 'to entreat', 'to persuade'.

[29] The Employment Court in *Deloitte & Touche Group-ICS Ltd v Halsall*⁴ referred to *Sweeney* and also the Shorter Oxford Dictionary definition "to seek assiduously to obtain", "to ask earnestly or persistently for" and 'request' or 'invite'. More recently, the High Court in *TAP (New Zealand) Pty Ltd v Origin Energy Resources NZ Ltd*⁵ considered that solicit in its ordinary use "has connotations of impropriety or persistence" and then cited the definition from the Shorter Oxford Dictionary that had also been referred to in *Deloitte*.

[31] It matters not who initiates the contact. The question of whether solicitation occurs depends upon the substance of what passes between parties once they are in contact with each other. There is solicitation of a client by a former employee if the former employee in substance conveys the message that the former employee is willing to deal with the client and, by whatever means, encourages the client to do so.

[32] In my view, "canvass" is synonymous with soliciting. Both words involve an approach to customers with a view to appropriating the customer's business or

² Cited to the Authority in this connection are *Austin Knight (UK) Ltd v Hinds* [1994] FSR 58-59 and *Hydra PLC v Anastasi & Ors* [2005] EWHC 1559 (QB) 44-45.

³ [1923] NZLR 1198.

⁴ unreported, EC Auckland, AEC74/97, 24 July 1997, Colgan J. The Court referred to decisions of its own which were said, while not to be determinative, "allow[ed] for a broader meaning of "solicit"" including *Dee Jay Distributors Ltd & Ors v Spring & Anor* unreported, Goddard CJ, 12 April 1995, WEC24/95, and *Circle Pacific Asparagus Ltd v Pryce & Anor*, unreported, Goddard CJ, 30 June 1995, WEC42/95.

⁵ unreported, HC Wellington, CIV 2005-485-1500, 14 February 2006, Miller J.

custom. I consider a degree of "influence" is required. There must be an active component and a positive intention.

The involvement with the Auckland Primary Principals Association (APPA)

[33] I do not consider that Ms Enright's involvement for about one month with the Association, as a matter of fact, can be described as either directly or indirectly canvassing or soliciting. I find accordingly. Then there is the email she sent with Rentplus' details on 23 March 2009. Whether or not that email is a promotion of Rentplus is a different matter from whether there is a canvassing or solicitation. I do not consider the communication, in fact, constitutes a canvassing or solicitation whether direct or indirect. There is nothing in either situation which seeks to assert any influence, there is no enticement, no assiduous seeking to obtain, any earnest or persistent asking nor any request or invitation. I find accordingly.

Interactions with clients

[34] The restraint follows a typical form. What is not typical however, is the final phrase. This unorthodox licence is appended:-

For completeness, social contact with representatives of such vendors or customers is not prohibited.

[35] That provision indicates to me the parties had in mind and contemplated at the time of entering into the restraint, social contact by Ms Enright with particular persons. Equico says that Ms Enright has cynically exploited the qualification to contact Equico's customers. It says that the qualification was allowed so that Ms Enright would not have to sever genuine friendships. It further says it was intended as a goodwill concession and it was expected that Ms Enright would exercise good faith not to exploit it. Equico alleges Ms Enright has used the qualification to network, that is, to keep her presence before its customers, instead of how it was supposed to have been used, to maintain possible friendships.

[36] Equico refers to four identified individuals that Ms Enright had contact with subsequent to her termination. The parties know who these individuals are and I see no need to identify them in this public determination beyond their initials. These are

Ms JR, Mr DR, Ms ME and Ms NV. There is no dispute that Ms Enright had contact with these people and further that they are representatives of Equico's customers. Nor is it disputed that Ms Enright had friendships with them.

[37] Ms Enright says that in the contact she had with each person, she made it immediately clear that her contact was not business related. She said that when she was asked where she was employed she disclosed that she was employed by Rentplus. She gives evidence on oath she did not in any way solicit or canvass business in her contact with any of the four identified individuals.

[38] While it is clear Ms Enright had contact, there is no evidence that she proceeded beyond mere contact to solicit or canvass business. Mere contact is not enough. Ms Enright was not prohibited from having contact, on the contrary, she was permitted to continue social contact. In having that social contact, there is no evidence that she sought to assert any influence, enticed or assiduously sought to obtain, or made any request or invitation. I find there was no solicitation or canvassing by Ms Enright.

The Interface advertisement

[39] Interface is a magazine published monthly and sent to all schools in New Zealand. In the May 2009 edition published 27 April 2009, there appeared a half page advertisement declaring Ms Enright's engagement with Rentplus. The advertisement stated:-

Exciting Additions to the Rentplus Education Team

Jaye Enright

Strategic Initiatives Manager, National

We are very excited to have Jaye join our team at Rentplus. Jaye brings in-depth knowledge, with hands on experience of schools ICT requirements and the challenges they face day to day. Jayes' last 7 years have been dedicated solely to the education environment as Jaye is incredibly passionate about helping schools to find the solution that suits them. Jayes' experience of working alongside many education resellers and the Ministry of Education ICT unit truly equips Jaye to deliver the right solutions to you and your school. Feel free to call Jaye for a chat on her mobile 021 XXX.

[40] I find that on 24 March 2009 Ms Enright telephoned the sales manager of Interface magazine. Ms Enright asked for the ratecard for advertising in Interface, as Rentplus were looking to place an advertisement. The sales manager agreed to email

the rates to Ms Enright and would meet with her on 1 April 2009. On that day Ms Enright was not available and so the sales manager met with Rentplus' sales manager instead.

[41] Ms Enright says she did not place the advertisement and it was a third party Rentplus that ultimately did. That is correct. But Equico says that even though Rentplus placed the advertisement, it was Ms Enright who initiated it and that she supplied the personal material for the content of the advertisement.

[42] I accept that Ms Enright was complicit in the placement of the advertisement by Rentplus in that she initiated the advertisement, made arrangements to meet with the sales manager in relation to it and supplied Rentplus with her personal details to form the content of the advertisement. I do not accept that Ms Enright was a disinterested observer who took no part in the placement of the advertisement. While not direct, her involvement is correctly described as indirect. The real question however, is whether the advertisement constitutes a canvassing or solicitation.

[43] I first note that this advertisement announced Ms Enright's engagement at Rentplus.

[44] It is submitted for Ms Enright that a solicitation must be made to a particular individual and an advertisement is made to all the world and cannot be a solicitation. Equico concedes that an advertisement placed, in say, the New Zealand Herald with its broad and untargeted readership, would not generally amount to solicitation. But it says that it is equally obvious that a targeted advertisement sent direct to known customers of an employer, as Interface is, would generally constitute a solicitation. It says that where a targeted advertisement reaches every customer of the employer a solicitation "seems an unavoidable inference".

[45] I agree that this Interface advertisement was placed directly in front of Equico's "education space" clients and vendors. But I find that a neutral factor because Rentplus is a direct competitor of Equico's competing in the same market.

[46] I have concluded that the Interface advertisement does not constitute a solicitation or canvassing. I regard the advertisement as constituting an invitation to treat. That is not the same as a solicitation which I find is an offer made inviting a client or vendor to business. The advertisement itself is not an invitation to convert business but there is an invitation to readers of it to "chat" with Ms Enright. Inviting persons to chat is not soliciting or canvassing in itself. But were Ms Enright to have "chatted" to Equico's clients or vendors, she was prohibited from inviting them to convert business.

[47] I agree that Equico did not restrain Ms Enright from competing with it. In that regard she was free to communicate with the market. But Equico did pay her valuable consideration not to go to its customers and vendors and invite them to convert their business from Equico. I have concluded that the Interface advertisement did not go that far.

[48] For these reasons, although I agree Ms Enright was complicit in the placement of the Interface advertisement, I conclude that her actions in doing so did not amount to soliciting or canvassing either directly or indirectly.

The determination

[49] I can understand that Equico was not pleased when, having paid Ms Enright good money for her promise not to interfere with its customers and vendors, she continued to maintain a presence before them. But her presence did not extend to any overt conversion of those customers and vendors and so Ms Enright did not act contrary to what she had agreed to do. Equico did not negotiate protection from mere competition or mere contact by Ms Enright. That being my assessment of the situation, **I decline to exercise my discretion to order penalties against Ms Enright and there will be no formal orders in this investigation. I also decline to exercise my discretion to order compliance against Equico Equipment Finance Limited.**

The costs

[50] My preliminary view at this stage is that as neither party has obtained the orders sought, costs might best be left to lie where they fall. If either party seeks to persuade me otherwise, they may make application for the exercise of the discretion in their favour by memorandum lodged within 21 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority