

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:

WA 55/08

File Number 5099623

BETWEEN

Aaron Loder
Applicant

AND

Terson Industries Limited t/a
Doortech
Respondent

Member of Authority: Denis Asher

Representatives: Jills Angus Burney for Mr Loder
Don Frampton for the Company

Investigation Meeting Wellington, 17 April 2008

Submissions Received 29 April 2008

Determination: 2 May 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] In his statement of problem filed with the Authority on 12 September 2007 Mr Loder sought to recover payment of a non-competition premium and costs.
- [2] In its statement in reply received on 26 September the Company disputed Mr Loder's claim.

- [3] In a counter-claim filed on 15 February 2008 (file number 5115819) the Company sought \$2,500 damages against Mr Loder based on a claim he had failed his fiduciary duties as an employee.
- [4] In his statement in reply filed on 7 March Mr Loder rejected his former employer's allegation.
- [5] These employment relationship problems were not resolved at mediation during October 2007.
- [6] Difficulties were subsequently encountered by the Authority in arranging a mutually convenient time for the parties for a telephone conference. A conference was set down for 10 December 2007; however Mr Frampton was not available at the agreed time. Notwithstanding his absence I was satisfied it was appropriate to proceed to set the matter down for investigation. Difficulties then arose with the investigation date and by agreement it was set down for Thursday 17 April 2008.

Investigation Development: Notice of Withdrawal

- [7] During the investigation on 17 April the Company's representative, Mr Don Frampton, advised the Company was withdrawing its claim against Mr Loder of breach of fiduciary obligations.

Background

- [8] I am satisfied that the following is an accurate summary of relevant facts and events.
- [9] Mr Loder was employed by the Company as a sales consultant from 13 March 2003 to 18 August 2007.
- [10] His terms and conditions of employment were set out in individual employment agreements, the last dated 4 May 2005 (exhibits 1 & 2 to the statement of problem). They purported to be two year fixed term individual employment agreements.
- [11] Mr Frampton is the Company's sole director and the signatory to Mr Loder's employment agreements.

- [12] The first agreement (exhibit 2) was seemingly signed off on 13 March 2003 with the given, but non-existent, expiry date of 31 February 2005 (clause G, schedule 1, exhibit 2).
- [13] The second agreement (exhibit 1) was signed off on 4 May 2005, and purported to be for a term from 1 March 2005 to 28 February 2007.
- [14] The parties agree that during the near 10-week 'gap', from (in reality) 28 February until 4 May 2005 Mr Loder was paid under his first employment agreement, including a "Vehicle/Term Loyalty/ No Competition ("Vehicle") Allowance" (sic) set out at M (b.) on page 5 of schedule 1 (exhibit 2). Amongst other things it provided payment to the applicant of \$10,000 gross p.a., at a monthly gross rate of \$833.33, contingent on Mr Loder working "the full term of employment up to 28 February 2005 etc" (above).
- [15] Mr Loder's 2005 employment agreement provided for monthly payments of a "No Competition Premium", totalling \$10,000 p.a. (annexure 1, bonuses, page 10 of schedule 1, exhibit 1).
- [16] Payment of the no competition premium was on the following (verbatim) grounds:

*TIL shall pay the employee a premium sum of \$10,000 gross per annum separate and additional to all other remuneration up to and including, but not beyond, 28th February 2007. **Such payment shall be made in consideration that the employee will both; a): not breach TIL's no competition and confidentiality requirements as set out in this agreement, and; b): provide a special extended resignation notice period of 4 months plus any period equivalent to any non-worked part of December or January where such notice period encompasses such non-worked period. In the event TIL finds the employee has breached requirements a) or b) above: such NCP entitlement shall immediately cease and the employee shall immediately repay TIL any NCP monies received – less any sum that TIL has at the time reclaimed in accordance with procedure set out in Schedule 1. M (c).***

(emphasis added)

Explanation: *TIL wishes to assist the employee reach his full potential through divulging TIL business methodologies and aim for a stable branch environment. A breach of a) or b) above could allow the employee to fairly or unfairly compete with TIL or destabilise the branch to the detriment of TIL and TIL's loyal employees. Accordingly, TIL requires all NCP amounts paid to the employee be repaid to TIL in circumstances where the employee is in breach of his contingent obligations set out in a) and b) above.*

[17] At the conclusion of Mr Loder's 2005 agreement, on 28 February 2007, the parties were unable to reach fresh agreement on the terms and conditions of a new employment agreement. Mr Loder subsequently resigned his employment on 18 April 2007, initially giving 3-months notice.

[18] In response to the applicant's notice Mr Frampton said amongst other things:

... The notice you have given is three months and your employment agreement stipulates four months. Your agreement also says the bonus we have paid you is refundable to us if you compete or do not honour such extended notice period. We would be very disappointed if you were to pursue your approach so vigorously in the face of all the good spirit that has existed between us to the point we felt obligated or pressured to maximise our legal options in the way you are attempting to maximise yours.

(email of 10 May 2007; exhibit 5, statement of problem)

[19] In response Mr Loder worked out 4-months' notice. He says he is therefore entitled to payment of the no competition premium after 28 February as he fulfilled the terms of his employment agreement up until the end of his employment in August 2007.

[20] The Company says it is not obliged to pay the no competition premium beyond 28 February 2007 consistent with the terms of parties' employment agreement, because payment of the same is stated as ending on that date.

Discussion and Findings

[21] I say that the employment agreements 'purport' to be for fixed term as the reason given for the second was that, "*... the account manager role may need to change and the company wishes to be able to negotiate its requirements from scratch (including the make up of remuneration, nature of role and human resource requirements)*" (clause G, page 4, schedule 1, exhibit 1).

[22] On their face I find these reasons do not meet the requirements of s. 66 of the Employment Relations Act, particularly *that the employer must have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end* in the way set out in the agreement (ss 66 (2) (a)). What the Company was attempting to provide for was nothing other than typical operational and business contingencies.

- [23] I also note that the Company, in breach of ss 66 (2) (b) of the Act, did not advise Mr Loder of when or how his employment would end and the reasons for its termination.
- [24] In any event, it is unnecessary to pursue further my finding that these agreements did not amount to genuine fixed term employment agreements. That is because the parties agree Mr Loder's employment extended past 28 February 2007 and that his terms and conditions were rolled over, i.e. they were based on his last employment agreement (exhibit 1).
- [25] What is at stake is whether or not the no competition premium was payable after 28 February 2007.
- [26] Did that roll-over qualify Mr Loder for payment of the non-competition bonus as the applicant claims, despite the conclusion date of 28 February 2007 as relied on by the respondent? I believe it does, for the following reasons.
- [27] There was a previous history of existing terms and conditions being continued between the 'expiry' of the first fixed term employment agreement and the 'commencement' of the second; for 10 weeks in 2005 Mr Loder was paid the equivalent bonus, at the same rate as he now claims for the period March to August 2007.
- [28] The Company enjoyed the benefit of the applicant working out 4-months' notice, an uncommonly lengthy notice period particularly as the parties' employment agreement otherwise refers to 4-weeks' notice (clause 20.1), exhibit 1).
- [29] I do not accept Mr Frampton's claim that the parties intended the no competition premium provision to have a prospective effect and/or that the contract provided for the same, i.e. that, should Mr Loder work beyond 28 February 2007, he would not receive payment of the bonus despite continuing to be bound to give 4-months' notice, and that if he did not or breached the Company's no competition or confidentiality requirements (contingencies 'a' & 'b' of that provision), he could face a recovery claim from the Company for all of the bonus money paid him.
- [30] There are no express provisions in the agreement (exhibit 2) to that effect and of course the parties did not reach agreement on fresh or different terms and conditions of employment to apply to the applicant after 28 February 2007.
- [31] Despite payment of the bonus purporting to cease on 28 February 2007, Mr Frampton – on the Company's behalf – saw fit to require the applicant to work out 4-months' notice, or face

the clearly stated threat of legal recovery action (exhibit 5). In setting out the Company's requirement, Mr Frampton clearly relied on the provisions of the no-competition bonus.

[32] Finally, I do not accept it is fair and reasonable for the Company to exercise part of the no competition premium (by requiring the applicant to work out 4-months' notice) while not remunerating Mr Loder via payment of the bonus for the same: it would be inequitable and not in good conscience to permit that outcome. That is because payment of the bonus is specifically stipulated as being "*in consideration*" of Mr Loder meeting the requirements of provisos a) and b). (emphasis added; refer annexure 1, exhibit 1).

[33] Putting it colloquially, Mr Frampton can't have his cake and eat it too: it is unreasonable for the Company to require 4-months notice of termination but not pay the allowance during the duration of that term.

Costs

[34] The parties asked that costs be reserved. Costs submissions are required from the parties no later than Thursday 8 May 2008. I can indicate now that, unless good reason is advanced to the contrary and subject to costs actually incurred, Mr Loder having succeeded, and costs typically following the event, the applicant is entitled to expect a contribution to his union's fair and reasonable costs of representing him, of up to \$3,000 plus the filing fee of \$70, as well as a further \$1,500 for the cost of having to defend an application that was withdrawn by the Company on the day of the investigation.

Determination

[35] The Company is to comply with the provisions of the parties' employment agreement and pay Mr Loder the sum of \$5,000.00 gross being the rounded up amount of six monthly payments of \$833.33 gross. Failure to pay by 28 days from the date of this determination may lead to an order adding interest to the outstanding amount.

Denis Asher

Member of the Employment Relations Authority