

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 147
5422746

BETWEEN	PLASTECH INDUSTRIES LIMITED Applicant
A N D	GRAEME RICKARD First Respondent
A N D	ACTION PLASTICS LIMITED Second Respondent

Member of Authority: M B Loftus

Representatives: Rachel Brazil, Counsel for Applicant
Robert Thompson, Advocate for Respondents

Investigation meeting: 12 July 2013 at Christchurch

Submissions Received: At the investigation meeting

Date of Determination: 17 July 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application for an interim restraint preventing the first respondent ... *continuing to breach his duty of fidelity with the Applicant and restraining him from using confidential information owned by the Applicant.*

[2] The applicant also asks that a penalty be ordered against the second respondent for aiding and abetting the first respondent's purported breaches.

[3] Both respondents deny the claims have any merit.

Background

[4] Plastech Industries Limited (Plastech) is a Christchurch based manufacturing company. Mr Rickard was employed in February 2008 as a business development manager. Soon thereafter he was appointed general manager and he remained in that position till recently.

[5] Mr Rickard claims his terms and conditions of employment were agreed orally and the arrangement confirmed by a handshake. Plastech disagrees and says there was a signed employment agreement which can no longer be found.

[6] Aside from a disagreement over one of the terms involving Mr Rickard's purchase of a partial interest in Plastech, the relationship appears to have progressed without issue or difficulty. During the earlier part of 2013 Mr Rickard and Mr Dwayne Vaughan, the sole director of Plastech, had discussions about the possibility of Mr Rickard purchasing the business. There was no sale but this gave Mr Rickard cause to question his future.

[7] Mr Rickard subsequently tendered his resignation having sourced alternative employment with a competitor, the second respondent Action Plastics Limited. There is some dispute about exactly what was said when he advised Mr Vaughan of his decision but suffice to say Mr Rickard claims a discussion over notice led to advice his employment was to terminate forthwith.

[8] Mr Vaughan says Mr Rickard gave four weeks' notice and later that day he (Vaughan) advised the notice need not be worked but payment, and therefore the employment, would continue until the notice's expiry in early July 2013. This occurred as Mr Vaughan discovered Mr Rickard had sent an email to each and every client of Plastech along with at least six suppliers and all addressees were openly identified to each other. The email read:

Hello Folks

It is with regret that I inform you that I am leaving Plastech to become a shareholder in another plastics injection moulding company in Christchurch, due to this I am leaving the employ of Plastech today, should you wish to contact me I will still have the same cell phone number and my home number and email are ...

I would like to thank you all for your support during my time at Plastech which I have enjoyed immensely, please feel to contact me should you have any concerns, your immediate contact at Plastech

will be Adam Gage, and I am sure Dwayne will be in touch to advise you of the future contact people at Plastech.

Regards ...

[9] Subsequently two of the recipients advised they were cancelling their business with Plastech and following Mr Rickard to Action Plastics. One added advice of a prior discussion with Mr Rickard about their decision.

[10] Finally I note Mr Rickard accepts he has been in possession of confidential information belonging to Plastech, though largely as a result of using personal IT equipment for work purposes due to Christchurch's earthquakes. He states he has now deleted all such information.

Determination

[11] As already said, Plastech seeks an interim order that Mr Rickard act in accordance with his duty of fidelity and protect confidential information relating to Plastech's business.

[12] As both parties said, the law is well settled in respect of applications such as this. The Authority is required to determine:

- (a) Is there an arguable case?
- (b) Does the balance of convenience favour the granting of the orders sought?
- (c) Whether there are other adequate remedies; and
- (d) What does the overall justice require?

[13] There are two elements to the claim. The first is Mr Rickard is in breach of a confidential information clause contained in his employment agreement. The second is he is in breach of the duty of fidelity he owes Plastech.

[14] Dealing with the employment agreement. To enforce a provision thereof Plastech must establish the agreements existence. Mr Rickard denies it will be able to as he never signed one and he is supported by the affidavit of one of Plastech's previous office administrators. Plastech is unable to refute this claim. As it admits, it is unable to source an agreement signed by Mr Rickard and the one it has proffered as

a representative example cannot be the version applicable at the time Mr Rickard was engaged. If nothing else it contains a clause referencing a statutory provision which did not exist at the time of Mr Rickard's engagement.

[15] In the circumstances and given the evidence presently available, I must conclude there is not even an arguable case for interim enforcement of this provision (or any other in the agreement).

[16] The claim regarding fidelity does not face the above impediment. As the parties agree, the duty is an implied condition of employment. Plastech's claim is future focussed and they seek to prevent the purported breach *continuing*. The fear is Mr Rickard retains confidential information despite his claim he has deleted it and the concern is compounded by a claim he brought similar information from a previous employer when he came to Plastech. Unfortunately Plastech can produce no evidence to either support its claim or rebut Mr Rickard's assertions. The evidence may exist but it is not before me so I must again conclude Plastech has failed to establish an arguable case in this respect.

[17] There is, however, the e-mail and the fact it did prompt some clients to move their business. It was sent while Mr Rickard was still employed. It is therefore quite conceivable it may provide the foundation for some form of arguable case against Mr Rickard. The event is, however, in the past. An interim restraint will not undo it and any consequences can, indeed must, now be addressed through a damages claim. In other words there is an alternate remedy.

[18] When I consider the paucity of evidence supporting the application along with the fact the only available evidence of possible wrongdoing relates to a past event to which an alternate remedy must be applied, I have to conclude the balance of convenience and overall justice preclude a granting of the application against Mr Rickard.

[19] Turning to the case against the second respondent. It is alleged Action Plastics has aided and abetted Mr Rickard's purported breaches and a penalty is sought. Action Plastics denies the claim. It states Mr Rickard approached it, advised his circumstances had changed and he could commence earlier than originally planned. The parties agreed a new commencement date and there is documentary evidence supporting that assertion. In the interim and prior to Mr Rickard's

commencement Action Plastics received a letter from Plastech's solicitors. As a result the issue of Mr Rickard's commencement was again visited and a decision made to await this determination.

[20] Mr Rickard's evidence supports Actions Plastics claims and Plastech can offer no contradictory evidence. Penalties are not addressed on an interim basis and there is presently no evidence before me that could justify any form of interim order against Action Plastics.

[21] For the above reason I decline to grant the interim relief sought by Plastech against either respondent.

[22] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority