

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 19/10
5290103

BETWEEN RON RICHDALÉ FIRE
 EQUIPMENT SERVICES
 LIMITED
 Applicant

AND JOHN SILVAN BEAUMONT
 Respondent

Member of Authority: P R Stapp

Representatives: John Unsworth and Sarah Little Counsel for Applicant
 Philip Drummond Counsel for Respondent

Investigation Meeting: 2 February 2010 at Palmerston North

Determination: 8 February 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Beaumont worked in a business called Link Services Limited trading as a fire services contractor (Link). His partner was the sole director and shareholder, although Mr Beaumont gave the impression he was the sole operator of the business. Mr Beaumont's role was to issue certificates of compliance called 12A certificates to customers to allow them to obtain building warrants of fitness under the Building Act 2004. One of Link's customers included Transfield Services Limited, which manages facilities at the NZRAF Base at Ohakea.

[2] Link was sold to Ron Richdale Fire Equipment Services Limited trading as Richdale Fire and Security (Richdale) effective from 30 June 2006 under an Agreement for Sale and Purchase dated 20 June 2006 and was signed off by the directors of both companies. The negotiations for the sale and purchase were conducted by Messrs Richdale and Beaumont. The Agreement for Sale and Purchase

included a restraint of trade clause for 2 years and within 200 kilometres of the premises that Messrs Richdale and Beaumont believed applied to Mr Beaumont.

[3] Mr Beaumont signed the Agreement for Sale and Purchase personally: “*so as to acknowledge his covenants [in] this agreement*”. The sale and purchase included the transfer of key clients, including Transfield. There was agreement that Mr Beaumont would become an employee and facilitate a transition from Link to Richdale.

[4] From June 2006 Mr Beaumont became an employee of Ron Richdale Fire Equipment Services Limited, and he remained an employee until he resigned on 1 May 2008. During his employment with Richdale Mr Beaumont was given an employment agreement that cited “*Richdale Fire and Security*” as the employer, but he did not sign it off because he considered various matters were covered enough in the Agreement for Sale and Purchase, including the restraint of trade provision.

[5] After Mr Beaumont had left Richdale, Mr Richdale discovered that Mr Beaumont had become an employee of Transfield Services Limited. Mr Richdale says he has seen three 12A certificates issued by Transfield and signed by Mr Beaumont. Mr Beaumont has not challenged that. About the time Mr Beaumont left Richdale, Transfield ended its contract with Richdale.

[6] In its SOP Richdale sought an injunction restraining Mr Beaumont from having any involvement in the business of Transfield or any other business associated with Transfield or a compliance order for Mr Beaumont to comply with his restraint of trade by ceasing any competition with Richdale. Now it wants to restrain Mr Beaumont from carrying out any fire protection work at Transfield and any other business.

[7] Mr Beaumont has opposed the claim. He has raised an issue that the Authority does not have any jurisdiction in regard to the Agreement for Sale and Purchase and the employment agreement remained unsigned and unresolved on a number of issues, which included the proposed restraint of trade.

Issues

[8] Does the Authority have jurisdiction over the Agreement for Sale and Purchase between two companies and Mr Beaumont in regard to the restraint of trade?

[9] What were the terms of Mr Beaumont's employment with Ron Richdale Fire Equipment Services Limited?

[10] Is there a restraint of trade applying to Mr Beaumont, and if so, is it enforceable as being reasonable and in the public interest?

The facts

[11] There is a restraint of trade provision in the Agreement for Sale and Purchase dated 20 June 2006 between Link Fire Services Limited and Ron Richdale Fire Equipment Services Limited. Mr Beaumont accepted the covenants in the agreement.

[12] The relevant provisions include: :

7.0 Restraint of trade

7.1 In consideration of the purchase price the vendor hereby agrees with the purchaser that the vendor will not during the vendor's restraint of trade period inserted on the front page of this agreement either directly or indirectly carry on or be interested either alone or in partnership with or as manager, agent, director, shareholder or employee of any other person in any business similar to that hereby sold within the radius from the premises stated on the front page of this agreement.

7.2 If the vendor is an incorporated company it will on or before the possession date procure its shareholders and its directors to enter into a Deed of Covenant with the purchaser binding themselves to the like effect, such Deed of Covenant to be prepared by and at the expense of the purchaser and tendered to the vendor or the vendor's solicitor for execution.

[13] The Agreement for Sale and Purchase also included the following:

18. John Beaumont will be employed by Ron Richdale Fire Equipment Services Limited for a period of two years from the date of this Agreement on such terms as may be agreed.

19. *John Beaumont will cooperate to the best of his ability in the obtaining by the Purchaser of Sprinkler Contractor Only Approval from the New Zealand Insurance Council and the parties will share equally the cost of obtaining that approval.*
21. *The date of commencement of the restraint of trade provision shall be the date on which ~~John Beaumont~~ the two year employment contract between the parties hereto expires.*
23. *John Beaumont signs this agreement personally so as to acknowledge his covenants in this agreement.*

[14] On the covering page of the Agreement for Sale and Purchase there is the following:

“Vendors restraint (clause 7.1) 2 years after the date specified herein with 200 kilometres of the Premises”

[15] The Agreement for Sale and Purchase was signed by the directors of the vendor and purchaser. Mr Richdale accepted that the Agreement for Sale and Purchase did not have a particular covenant to restrain Mr Beaumont personally, although it was his understanding that the terms did include a personal restraint. Mr Beaumont believed, until he found out that there were other defences to the claim that the restraint applied to him. He did not dispute the restraint at the time. Also, Mr Beaumont did not challenge Mr Richdale’s evidence that he (Mr Beaumont) was not in any hurry to sign off the employment agreement because he considered the terms were covered by the Agreement for Sale and Purchase.

[16] Mr Beaumont worked as a service and sales technician at Richdale. He never signed the employment agreement he was offered after he started even though it contained a proposed restraint of trade.

[17] The proposed restraint in the employment agreement was as follows:

20. Restraint of Trade

- 20.1 *The employee agrees that any time during the term of this agreement and for a period of 24 months after the termination of employment with the Employer and within a radius of 200 kms, he or she will not establish, purchase, or obtain an interest in (directly or indirectly) any business or be employed by or provide his/her services to any business which is in competition with the Employer’s business.*

- 20.2 *The Employer and Employee agree that the restrictions upon the Employee's future conduct are reasonable and necessary to protect the business of the Employer. If such period is found to be unreasonable by any Authority or Court with jurisdiction to consider such clauses, then the period of time shall be reduced or amended to eliminate such portion as is deemed unreasonable, and the clause shall apply as modified by the Authority or Court.*

[18] Mr Beaumont accepted during the Authority's investigation meeting that he understood a restraint applied to him and that it was not until Mr Drummond became his lawyer that his defence changed (27 January 2010).

[19] His changed defence was put on notice in an amended statement in reply lodged in the Authority on 29 January 2010 by Mr Drummond. He has vigorously defended the matter because of the threat to his ability to work and earn an income. Mr Beaumont accepted that he works for Transfield and has issued 12A certificates. He says that his fire protection work at Transfield involves 20% of his weekly time. His written role description does not include any specific reference to fire protection work at Transfield, but he said during the Authority's investigation meeting that he runs a diesel sprinkler system with 2 pumps and oversees the checking of hose reels and fire extinguishers once every two months where there are 4 other people who can check. He said that he is the only person who has the responsibility to sign off 12A certifications as an Independent Qualified Person (IQP). He is currently registered to carry out fire protection work and issuing 12A certificates. Otherwise his role is a general maintenance role and he pretty much does everything. He accepted that there was other work for him at Transfield if the fire protection work had to be limited for any time.

Determination

[20] The agreement reached on the Agreement for Sale and Purchase is not enforceable in the Authority. That agreement is between the vendor and the purchaser. Mr Beaumont was not an employee of Richdale at the time. However, the Authority does have jurisdiction to scrutinise what the terms and conditions of his employment were once he became an employee and it is open to give consideration to the Agreement for Sale and Purchase because it is related to the employment

relationship Mr Beaumont agreed to undertake with Richdale. This is because he signed personally to fulfil the covenants. He acted as if he operated the business and he essentially was the sole operator in Link, although he was not a director or shareholder. The Agreement for Sale and Purchase made provision for “...*such terms as may be agreed*”. It follows that the Agreement for Sale and Purchase was not an employment agreement, which had to be entered into separately, I hold. The matters arising from the Agreement for Sale and Purchase related to the employment relationship are restricted to the operation of the covenants only, and do not include the restraint of trade. These were that he would become an employee for 2 years and would facilitate the transition from Link to Richdale. Indeed the wording of the restraint applies to the *vender* and *purchaser*, not Mr Beaumont.

[21] In addition the terms of the restraints in the employment agreement and the Agreement for the Sale and Purchase are different. I conclude that while Messrs Richdale and Beaumont believed that they had some type of restraint the differences between the two documents mean that there was no agreement reached on the actual terms. Greater certainty would be required to conclude what the parties wanted, I hold.

[22] Therefore, I conclude, there is no restraint of trade applying to Mr Beaumont personally.

Orders of the Authority

[23] The claims from Ron Richdale Fire Equipment Services Limited are dismissed.

Costs

[24] Submissions were made by both parties on costs at the Authority’s investigation meeting. It was accepted that costs follow the event. Mr Beaumont has defended the claims. He is seeking an estimated \$7,000 plus GST for costs because Mr Beaumont has been put to unnecessary costs to defend the matter when the Applicant was on notice of the defence that there was no jurisdiction. Also, it is claimed that the applicant could have stopped the investigation earlier and avoided

more costs. Although I have held that the Authority has jurisdiction I have found there was no restraint that applied. In this sense both parties had a genuine matter to be heard.

[25] Mr Beaumont has cooperated to save costs by accepting that mediation should be used first. He gave undertakings that he would not be carrying out fire protection work from December 2009 until returning to work in January 2010 to avoid the costs of an interim investigation meeting.

[26] Therefore, costs in this matter will be determined by the tariff, and I have decided not to exceed the usual range.

[27] Mr Beaumont has incurred costs for Mr Drummond to reply and represent him at the investigation meeting, including the costs of preparation, and costs for his solicitor used before Mr Drummond was instructed. The previous solicitor also lodged a reply in the Authority and attended to a case management conference for the Authority's investigation meeting before instructing Mr Drummond.

[28] My assessment of a contribution of reasonable costs is \$3,000 plus GST. I order Ron Richdale Fire Equipment Services Limited to pay \$3,000 costs plus GST to Mr Beaumont for his use.

P R Stapp
Member of the Employment Relations Authority