

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 388
3118618

	BETWEEN	NZ TECHNOLOGY GROUP HAWKES BAY LIMITED Applicant
	AND	HAIG DAVID CHARLES FLASHOFF First Respondent
	AND	DONALD PETER PRICE Second Respondent
	AND	RAYMOND REGINALD TAYLOR Third Respondent
	AND	SEAN GLASSPOOL Fourth Respondent
	AND	ENGAGE TECHNOLOGY LIMITED Fifth Respondent
Member of Authority:		Geoff O’Sullivan
Representatives:		Karina McLuskie and Mark Hammond, counsel for the Applicant Justin Cameron, counsel for the Respondents
Investigation Meeting:		23 September 2020 by telephone and on the papers
Submissions [and further Information] Received:		23-24 September 2020 from the Applicant 23 September 2020 from the Respondent
Date of Determination:		29 September 2020

DETERMINATION OF THE AUTHORITY

The Authority's investigation

[1] On 10 September 2020 the applicant, NZ Technology Group Hawkes Bay Limited (NZTG), filed a Statement of Problem together with an application for an interim injunction without notice against the first four respondents, namely Haig David Charles Flashoff, Donald Peter Price, Raymond Reginald Taylor and Sean Glasspool (collectively referred to as the four respondents). Although the Authority can exercise its powers under s 160 of the Employment Relations Act 2000 in the absence of one or more of the parties, in this case the respondents were put on notice of the application and copies forwarded to them. This resulted in them instructing counsel.

[2] Following a case management conference the matter proceeded to the hearing of submissions in respect of the application for interim injunction, on 23 September 2020. Counsel for the respondents also filed fulsome written submissions.

Employment relationship problem

[3] NZTG provides ICT services to small and medium sized businesses in the Hawke's Bay. Over a number of years in separate transactions, NZTG entered into agreements to purchase the following companies, namely: Mint Technologies Limited; Wasp New Zealand Limited; Taylor Communications Limited; Need a Nerd Limited; and Need a Nerd Franchising NZ Limited (the companies). Employees and directors of the companies then became employees of NZTG.

[4] There is a dispute between the parties as to the completion or otherwise of those agreements, with the respondents telling me that there have been continuing negotiations and that finally as a result of the applicant failing to pay the purchase price and/or performance obligations under those agreements, the respondents have moved to rescind the sale and purchase agreements. This is however not an area the Authority can investigate.

The purported facts

[5] On 7 September 2020 each of the four respondents wrote to NZTG resigning effective immediately and in each case stating, "*I opt to not work out my termination period with NZ Technology Group Hawkes Bay Limited*". By termination period the four respondents meant notice period. The employment agreements required notice and did not allow employees to opt out of providing it. NZTG also received a letter dated 7 September 2020 headed "Cancellation

of contracts” sent on behalf of Mr Flashoff, Mr Price, Mr Taylor and a Peter Dunkerley who is not part of these proceedings. The cancellation letter advised amongst other things

- (a) They had nominated a new entity to transfer the businesses to;
- (b) They were taking customers that the companies had brought into NZTG as well as non-wholesale internet companies who had bought services associated with the companies’ brands because NZTG was unable to provide those services to those customers;
- (c) They would take the assets that the companies had brought into NZTG but they also wished to take three vehicles and hardware such as laptops and phones for staff on the basis that NZTG would not need those assets;
- (d) All employees of NZTG had resigned with immediate effect and would be moving to the fifth respondent.

[6] I am told that the four respondents then cleared out NZTG’s premises, taking its assets, including cars, laptops, phones, confidential information, passwords, security data and other equipment. The premises was left vacant with no employees, no assets and no ability for NZTG to continue performing its services to its customers.

[7] The four respondents each had individual employment agreements with the applicant. By acting as they have, the applicant states that the four respondents have breached various provisions of their employment agreements including confidentiality, non-solicitation, and in most cases restraints of trade. For the sake of completeness I set out below the relevant terms in each case.

Mr Flashoff

[8] Mr Flashoff signed an employment agreement on 21 August 2019. Amongst other things the agreement provided as follows:

15. Confidentiality

15.1 The employee shall during the continuance of the employment and after its termination however occasioned:

- (i) Use the employee’s best endeavours to prevent the disclosure of any confidential information;
- (ii) Other than in the course of the employee’s duties, not disclose any confidential information to any person other than a director

or another employee of the company authorised to use it;

- (iii) Not to use any confidential information to the employee's own benefit, as distinct from the benefit of the employer;
- (iv) Not use or attempt to use any confidential information in any manner which may damage or cause loss whether directly or indirectly to the employer;
- (v) Not turn or attempt to turn the employee's personal knowledge of any suppliers or clients of the employer to his/her personal or third party benefit as distinct from the benefit of the employer;
- (vi) Immediately notify the employer of any suspected or actual unauthorised disclosure of confidential information.

- 15.2 In this clause "confidential or commercially sensitive information" means any information relating to the business or financial affairs of the employer or other companies including customers associated with the employer which has come to the employee's knowledge, or which has been disclosed, or might reasonably be understood to have been disclosed to in confidence (sic) other than information which is already public knowledge or which is obvious or trivial.
- 15.3 Without limiting the generality of the foregoing, "confidential information" shall also include details of accounts, financial records, client and/or supplier records, matters of internal policy, computer programs, software, forms and documents, training manuals and techniques, products, services, the identities and details of current, past and prospective customers, pricing arrangements and margins on products and services, marketing and sales plans, financial information which may be of commercial value to a competitor and any other information and intellectual property or other matters relating to the business or affairs of the company.
- 15.4 Upon termination of employment for any reason the employee agrees to return to the employer any confidential or commercially sensitive information (in any form) held by the employee and to not retain copies or retain the means for reproducing such information.
- 15.5 Likewise, the employee agrees not to copy or transmit any commercially sensitive information and/or designs which will potentially harm the business. The employer expects the employee to be scrupulously honest in all its business dealings.

[9] Mr Flashoff's employment agreement also provided for a restraint under clause 17.4, namely:

- 17.4 To protect the employer's business, the employee agrees that during employment and for a period of 12 months following the termination of employment (for whatever reason), the employee shall not, either personally, or as an employee, consultant or agent for any other entity or employer;
- (i) Attempt to engage or employ any contractor to or, employee of the employer or;
 - (ii) Encourage or persuade any employee, contractor or consultant of the employer to terminate their agreement or contract with the company; or
 - (iii) Carry out any work of the same nature for any client or customer of the employer with which the employee had any contact or dealings whilst employed by the company; or
 - (iv) Encourage or persuade any client, known prospective client or supplier to terminate their relationship with the employer.

[10] The employment agreement also provided under clause 28.2:

- 28.2 Digital files are considered to be employer property. The employee must ensure that company digital files are secure, are not disclosed or distributed to unauthorised parties, and are not damaged or destroyed. Damage, destruction or unauthorised disclosure or distribution of the employer's digital files, inadvertent or otherwise, must be immediately notified to the manager.

And further, under clause 28.3:

- 28.3 Upon termination and prior to departure and final pay the employee must return to the employer any vehicles assigned, mobile phones, computers, access cards, employer records, files (including digital files), data or other documents, assets or such like in any form whatsoever belonging to the employer (including any copies of such records or other documents) in the employee's position.

Schedule A of the agreement provides for a restraint as follows:

The employee agrees that during employment and for a period of six months following the termination of employment for whatever reason, the employee shall not establish, operate in (i.e. manage or operate a branch or be an employee) or be a shareholder or director in any enterprise that directly competes with this employer's business operations. This restraint of trade is limited to a 50 kilometre radius of the employee's office specified above.

Mr Price

[11] Mr Price signed an employment agreement with NZTG on 5 September 2016. Amongst other things his agreement provided as follows:

13. Confidentiality

13.1 The employee shall during the continuance of the employment and after its termination, howsoever occasioned:

- (i) Use the employee's best endeavours to prevent the disclosure of any confidential information;
- (ii) Other than in the course of the employee's duties not disclose any confidential information to any person other than a director or another employee of the company authorised to use it;
- (iii) Not use any confidential information to the employee's own benefit, as distinct from the benefit of the employer;
- (iv) Not use or attempt to use any confidential information in any manner which may damage or cause loss, whether directly or indirectly to the employer;
- (v) Not turn or attempt to turn the employee's personal knowledge of any suppliers or clients of the employer to his/her personal or third-party benefit as distinct from the benefit of the employer; and
- (vi) Immediately notify the employer of any suspected or actual unauthorised disclosure of confidential information.

13.2 In this clause "confidential information" means any information relating to the business or financial affairs of the employer and/or its clients which has come to the knowledge of the employee or which has been disclosed or might reasonably be understood to have been disclosed to the employee in confidence, other than information which is already public knowledge (except where such has occurred through the actions of the employee) or which is obvious or trivial. Without limiting the generality of the foregoing, "confidential information" shall also include:

- (i) Any trade secrets, specialised know how or practices in any industry and which the employer may from time to time engage in business, client lists, client requirements, marketing material, contracts, forms, systems or procedures, performance reports or profitability figures or reports;
- (ii) Profitability of contracts, margins on products and any other financial information in relation to the business or in relation to any client which are or may be of commercial value to a competitor;

- (iii) Information pertaining to any other employee of the employer which is protected from disclosure under the Privacy Act 1993; and
 - (iv) Information disclosed in confidence by clients of the employer.
- 13.3 Upon termination of this agreement for whatever reason, the employee shall immediately deliver up all property belonging to the employer which may be in the possession or control of the employee, including but without limitation, the confidential information.
- 15.4 The employee agrees that for a period of twelve (12) months following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, seek to solicit or carry out any work of the same nature for any client or customer of the employer with which the employee had any contact or dealings whilst employed by the employer.
- 15.5 The employee agrees that for a period of twelve (12) months following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, solicit or engage or employ any employee of the employer with whom the employee had any dealings whilst employed with the employer.

[12] Clause 26.1 of the agreement provided that Mr Price was required to return all materials and documents following the termination of employment:

- 26.1 All materials and documents (whether relating to the business of the employer or its clients) supplied to the employee or otherwise acquired by the employee in the course of his/her employment with the employer are the property of the employer and must be returned upon termination of employment or at request of the employer.

Mr Taylor

[13] Mr Taylor signed an employment agreement with NZTG on 30 September 2017. Amongst other things, his employment agreement provided as follows:

15. Confidentiality
- 15.1 The employee shall, during the continuance of the employment and after its termination, howsoever occasioned:
- (i) Use the employee's best endeavours to prevent the disclosure of any confidential information;
 - (ii) Other than in the course of the employee's duties, not disclose any confidential information to any person

other than a director or another employee of the company authorised to use it;

- (iii) Not use any confidential information to the employee's own benefit, as distinct from the benefit of the employer;
 - (iv) Not use or attempt to use any confidential information in any manner which may damage or cause loss, whether directly or indirectly to the employer;
 - (v) Not turn or attempt to turn the employee's personal knowledge of any suppliers or clients of the employer to his forward/personal or third-party benefit as distinct from the benefit of the employer;
 - (vi) Immediately notify the employer of any suspected or actual unauthorised disclosure of confidential information;
- 15.2 In this clause "confidential or commercially sensitive information" means any information relating to the business or financial affairs of the employer or other companies including customers associated with the employer which has come to the employee's knowledge, or which has been disclosed, or might reasonably be understood to have been disclosed to [the employee] in confidence, other than information which is already public knowledge or which is obvious or trivial.
- 15.3 Without limiting the generality of the foregoing, 'confidential information' shall also include details of accounts, financial records, client and/or supplier records, matters of internal policy, computer programmes, software, forms and documents, training manuals and techniques, products, services, the identities and details of current, past and respective customers, pricing arrangements and margins on products and services, marketing and sales plans, financial information which may be of commercial value to a competitor and any other information in intellectual property, or other matters relating to the business or affairs of the company.
- 15.4 Upon termination of employment for any reason the employee agrees to return to the employer any confidential or commercially sensitive information (in any form) held by the employee and to not retain copies or retain the means of reproducing such information.
- 15.5 Likewise, the employee agrees not to copy or transmit any commercially sensitive information and/or designs which will potentially harm the business. The employer expects the employee to be scrupulously honest in all business dealings.
- 17.5 To protect the employer's business, the employee agrees that during employment and for a period of twelve months following the termination of employment (for whatever reason), the employee shall not, either personally, or as an employee, consultant or agent for any other entity or employer;
- (i) Attempt to engage or employ any contractor to or, employee of the employer or;

- (ii) Encourage or persuade any employee, contractor or consultant of the employer to terminate their agreement or contract with the company; or
 - (iii) Carry out any work of the same nature for any client or customer of the employer with which the employee had any contact or dealings whilst employed by the company; or
 - (iv) Encourage or persuade any client, known prospective client or supplier to terminate their relationship with the employer.
- 28.2 Digital files are considered to be employer property. The employee must ensure that company digital files are secure, are not disclosed or distributed to unauthorised parties, and are not damaged or destroyed. Damaged destruction or unauthorised disclosure or distribution of the employer's digital files, inadvertent or otherwise, must be immediately notified to the manager.
- 28.3 Upon termination and prior to departure and final pay the employee must return to the employer any vehicles assigned, mobile phones, computers, access cards, employer records, files (including digital files), data or other documents, assets or such like in any form whatsoever belonging to the employer (including any copies of such records or other documents) in the employee's possession.
- 28.4 The employee agrees that if such property is not returned prior to departure that the employer shall be entitled to deduct the costs associated including replacing or securing these items from the employee's final pay.

Schedule A Restraint of trade

The employee agrees that during employment and for a period of six months following the termination of employment for whatever reason, the employee shall not establish, operate in (i.e.. manage or operate a branch or be an employee) or be a shareholder or director in any enterprise that directly competes with this employer's business operations. This restraint of trade is limited to a 50 km radius of the employee's office specified above.

Mr Glasspool

[14] Mr Glasspool signed an employment agreement with NZTG on 6 September 2017. Amongst other things his employment agreement provided as follows:

15. Confidentiality
- 15.1 The employee shall during the continuance of the employment and after its termination, how soever occasioned:
- (i) Use the employee's best endeavours to prevent the disclosure of any confidential information;
 - (ii) Other than in the course of the employee's duties, not disclose any confidential information to any person

other than a director or another employee of the company authorised to use it;

- (iii) Not use any confidential information to the employee's own benefit, as distinct from the benefit of the employer;
 - (iv) Not use or attempt to use any confidential information in any manner which may damage or cause loss whether directly or indirectly to the employer;
 - (v) Not to turn or attempt to turn the employee's personal knowledge of any suppliers or clients of the employer to his/her personal or third-party benefit as distinct from the benefit of the employer;
 - (vi) Immediately notify the employer of any suspected or actual unauthorised disclosure of confidential information;
- 15.2 In this clause "confidential or commercially sensitive information" means any information relating to the business or financial affairs or the employer or other companies including customers associated with the employer which has come to the employees knowledge, or which has been disclosed, or might reasonably be understood to have been disclosed to [the employee] in confident, other than information which is already public knowledge or which is obvious or trivial.
- 15.3 Without limiting the generality of the foregoing, "confidential information" shall also include details of accounts, financial records, client and/or supplier records, matters of internal policy, computer programmes, software, forms and documents, training manuals and techniques, products, services, the identities and details of current, past and prospective customers, pricing arrangements and margins on products and services, marketing and sales plans, financial information which may be of commercial value to a competitor and any other information and intellectual property or other matters relating to the business or affairs of the company.
- 15.4 Upon termination of employment for any reason the employee agrees to return to the employer any confidential or commercially sensitive information (in any form) held by the employee and to not retain copies or attain the means for reproducing such information.
- 15.5 Likewise, the employee agrees not to copy or transmit any commercially sensitive information and/or designs which will potentially harm the business. The employer expects the employee to be scrupulously honest in all business dealings.
- 17.4 To protect the employer's business, the employee agrees that during employment and for a period of 12 months following the termination of employment (for whatever reason), the employee shall not, either personally, or as an employee, consultant or agent for any other entity or employer;
- (i) Attempt to engage or employ any contractor to or, employee of the employer or;

- (ii) Encourage or persuade any employee, contractor or consultant of the employer to terminate their agreement or contract with the company;
 - (iii) Carry out any work of the same nature for any client or customer of the employer with which the employee had any contact or dealings whilst employed by the company; or
 - (iv) Encourage or persuade any client, known prospective client or supplier to terminate their relationship with the employer.
- 28.2 Digital files are considered to be employer property. The employee must consider that company digital files are secure, are not disclosed or distributed to unauthorised parties, and are not damaged or destroyed. Damage, destruction or unauthorised disclosure or distribution of the employer's digital files, inadvertent or otherwise, must be immediately notified to the manager.
- 28.3 Upon termination and prior to departure and final pay the employee must return to the employer any vehicles assigned, mobile phones, computers, access cards, employer records, files (including digital files), data or other documents, assets or such like in any form whatsoever belonging to the employer (including any copies of such records or other documents) in the employee's possession.

Schedule A Restraint of trade

The employee agrees that during employment and for a period of six months following the termination of employment for whatever reason, the employee shall not establish, operate in (i.e.. manage or operate a branch or be an employee) or be a shareholder or director in any enterprise that directly competes with this employer's business operations. This restraint of trade is limited to a 50 km radius of the employee's office specified above.

[15] In each case the applicant is asking the Authority to issue interim orders requiring each of the four respondents to comply with those provisions of the employment agreement that survive termination.

[16] The applicant states that the resignation of all its staff without notice, including the resignations of the four respondents named, has had a devastating effect to the extent NZTG cannot carry out its function and is in dire risk of losing its entire business. It wants urgent interim orders requiring the four respondents to comply with the terms of the employment agreement.

[17] I pause at this point to reiterate the view of the respondents is that they are engaged in a commercial dispute which has been presented by the applicant as an employment dispute

when it is not. They hold the view that their employment agreements were also subject to completion of the commercial contracts between the parties and that as those contracts have now been rescinded, the basis for their employment likewise ceases.

Legal framework – interim orders

[18] The legal framework which I must follow in respect of the application for interim orders can be summarised as follows:

- (a) Step one – the applicant must establish that there is a serious question to be tried;
- (b) Step two – consideration must then be given to the balance of convenience and the impact on the parties of the granting of, or refusal to grant, the interim orders sought. The impact on any third parties will also be relevant to waiting exercise; and
- (c) Step three – the overall interests of justice are to be considered, standing back from the detail required by the earlier steps. Both parties attended the investigation meeting held by telephone conference on 23 September 2020.

A serious question to be tried

[19] The threshold for a serious question to be tried is that the claim is not frivolous or vexatious; analysing this is not an exercise of a discretion, rather it must be based on a judicial assessment of the evidence, albeit untested, and the submissions advanced.¹ The serious question to be tried covers the question of whether or not the four respondents have breached or are in danger of breaching their contractual obligations as specified in each case above.

[20] Mr Cameron had submitted quite strongly that there was no arguable case or serious question to be tried. This seemed to be on the basis (paragraph 38 of the respondents' submissions) that to establish it has an arguable case, the applicant would need to:

- (a) Provide an evidential basis for having a property interest that needed protecting;
- (b) Define what its property interest is by identifying the confidential information and equipment that it owns;
- (c) Provide an evidential basis that the respondents (as opposed to third parties who are not a party to these proceedings) are in possession of the confidential

¹ *Western Bay of Plenty District Council and NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

information and equipment at paragraph 39, “*the applicant has not established any of the above, let alone all three, and therefore has not established that there is a serious question to be tried in these proceedings.*”

[21] As I have indicated, the threshold for an arguable case is not high. I do not accept the respondents’ submissions. Not only does it seem to me there is an arguable case, there is a strongly arguable case. If the respondents’ have done what they are accused of having done, then that would seem to be a clear breach of the specific covenants contained in each of the four respondents’ employment agreements.

Balance of convenience

[22] Assessing the balance of convenience requires an imperative analysis of the impact on each party and third parties if interim orders sought are either granted or not. I must then also assess what happens if the interim position is reversed in any substantive determination. For the applicant, this means assessing the consequences of allowing the four respondents continuing as if the provisions of their employment agreements do not apply.

[23] NZTG states that the four respondents continue to breach the terms of their employment agreements even after cease and desist letters were sent to them. It says that the four respondents have taken all of the applicant’s assets including its cars, hardware, laptops, phones, confidential information, customer lists, passwords, security data and confidential information. The premises were left vacant with no employees, no assets and no ability with which to perform its service. It says the balance of convenience must favour it, because damages will not be an adequate remedy and as time passes will become increasingly difficult to calculate. It says further that in any event, its business which already risks being destroyed, would certainly be so if the interim orders sought were not granted. It also says, in essence it is simply asking the Authority to require the four respondents to comply with their employment agreements, in other words, to carry out a clear, contractual obligation.

[24] On the other hand, the respondents say the balance of convenience favours them. They reject NZTG’s submission that its business would be irreparably harmed and say damages would be an adequate remedy because all payments made by customers by direct debits etc. are recorded and could be easily quantified. They say that they provide IT services to thousands of customers and these people would be left without support. They say these customers are relying on the respondents to provide services to keep their businesses functioning.

[25] The respondents' argument cuts both ways. NZTG say it is its business and these are its customers. It says it can service these customers provided the four respondents are required to comply with their employment agreements at least in the interim.

[26] However, these customers are the customers of NZTG, or at least they were. Whilst they are clearly caught in the middle of a commercial dispute between NZTG and companies controlled by the respondents, nonetheless I am mindful that the injunction sought is to require the four respondents to comply with the express provisions of the employment agreements in the interim. Accordingly, I do not find the respondents' arguments compelling. If at a substantive hearing I was to find that for some reason none of the non-solicitation provisions and/or restraint provisions were enforceable, any loss suffered by the four respondents should be able to be easily assessed. If on the other hand I was to find at a substantive investigation meeting that the non-solicitation provisions and the restraint provisions were enforceable, it is likely NZTG's business would have been significantly damaged in the interim and may not be able to be put back into the position it was before, when it thought it had the advantage and security of clear contractual restraints on the four respondents.

[27] The merits of NZTG's case are also relevant to the balance of convenience. I would have to say that NZTG's position is strongly arguable.

Overall justice

[28] The overall justice assessment is really a check on the position which has been reached after the analysis of the serious question to be tried and the balance of convenience. As I have said, there is a serious question to be tried and the applicant's case is strongly arguable. Despite the respondents' inference that the employment agreements were some form of device, there was a well-documented employment relationship in place and employment agreements between each of the four respondents which in each case set out specific contractual provisions surviving the termination of employment. Employment relationships need to be taken seriously. The balance of convenience favours granting the interim orders sought. Standing back and looking at the matter from the overall interests of justice, clear contractual agreements also weigh in favour of granting the orders sought.

Conclusion

[29] The interim injunction is granted and shall continue in force until such time a substantive investigation meeting finally disposes of the matter. Accordingly, the following orders are made:

- (a) Haig David Charles Flashoff is ordered to comply with the following provisions of his employment agreement dated 21 August 2019, namely:
 - (i) Clause 15.1(i)-(vi) – 15.5(ii);
 - (ii) Clause 17.4(i)-(iv);
 - (iii) Clause 28.2 – 28.3; and
 - (iv) The restraint provision contained in schedule A of his employment agreement.

- (b) Donald Peter Price is ordered to comply with the following provisions of his employment agreement dated 5 September 2016, namely:
 - (i) Clause 13.1(i)-(vi) – 13.3;
 - (ii) Clause 15.4 – 15.5; and
 - (iii) Clause 26.

- (c) Raymond Reginald Taylor is ordered to comply with the following provisions of his employment agreement dated 30 September 2017, namely:
 - (i) Clause 15.1(i)-(vi) – 15.5;
 - (ii) Clause 17.4(i)-(iv);
 - (iii) Clause 28.2 – 28.4; and
 - (iv) The restraint of trade contained in schedule A of his employment agreement.

- (d) Sean Glasspool is ordered to comply with the following provisions of his employment agreement dated 6 September 2017, namely:
 - (i) Clause 15.1(i)-(vi) – 15.5;
 - (ii) Clause 17.4(i)-(iv);
 - (iii) Clause 28.2 – 28.3; and

- (iv) The restraint of trade contained in schedule A of his employment agreement.

[30] Costs are reserved.

Geoff O'Sullivan
Member of the Employment Relations Authority