

Smiths City awarded over \$800,000 after employees found to have acted in competition while employed

The Employment Court has found two senior Smiths City employees breached their employment agreements and duties of fidelity for engaging in business activities that directly competed with Smiths City while employed.¹

Mr Claxton

Mr Claxton was employed by Smiths City as Flooring Manager. While employed, he worked as a 'consultant' for "**Can Do Flooring Ltd**", which sold and installed flooring products. He would work out costings and quotes for work, attend to measuring the jobs and arrange installation. He also assisted with invoicing and answering customer queries. This relationship began in 2011, and transactions continued until early 2019, totaling about \$397,000 plus GST.

Gradually, Mr Claxton began operating as a sole trader. He would purchase, or arrange purchases of carpet and flooring through other Smiths City customer account holders for himself. This allowed him access to credit and enabled him to circumvent Smith City's staff purchasing policy.

In 2017, Mr Claxton incorporated his own company "**Cando Creative Flooring Limited**", undertaking flooring activities in direct competition with Smiths City.

11 witnesses gave evidence to the effect that Mr Claxton interposed himself, Can Do Flooring, or Cando Creative Flooring, in transactions the customer thought were with Smiths City.

One example was a customer who would go to Smiths City on behalf of her son's business to look at samples

and get quotes. She got a quote from Smiths City in an email from Mr Claxton, signed by him as the Flooring Manager. Subsequently, she received an invoice from Cando Creative Flooring Limited. She phoned Mr Claxton and asked for an explanation and he told her the transaction was "all good" and that she was "not to worry and it was not a problem" because "Cando was another division of Smiths City".

Essentially, each customer thought they were dealing with Smiths City, but Mr Claxton was diverting the purchases away from Smiths City for his own benefit.

Employment Court

The Court was satisfied that Mr Claxton undertook business in direct competition with Smiths City from about October 2011 right up until his employment ended in 2019 by way of resignation, and he did not have permission to do this.

Mr Claxton was found to have breached multiple provisions in his employment agreement by:

- establishing and maintaining a conflict of interest for a long time and competing with Smiths City; and
- using Smiths City's property to store his carpet and show it to customers; and
- influencing potential transactions with Smiths City's customers by diverting them for personal gain; and
- incorporating Creative Flooring and acting as its director and being a director of Cando Creative Installs.

Mr Claxton was also found to have breached his duty of fidelity to Smiths City. Employees owe a duty of fidelity to their employer. The duty is broken when there is conduct that undermines the relationship of trust and confidence between employer and employee.

¹ *Smiths City (Southern) Ltd (in rec) v Claxton* [2021] NZEmpC 169.

Smiths City awarded over \$800,000 after employees found to have acted in competition while employed
(Continued)

The Court upheld the findings of Judge Travis in *Rooney Earthmoving Ltd v McTague*² which found the duty of fidelity is more extensive when applied to senior employees.

Judge Travis found that the duty prohibits competing with an employer directly, or working at the same time for a competitor. It includes precluding soliciting clients prior to departure, and any other acts that involve an actual incompatibility.

The Court in *Rooney* found that it was no great extension of the duty to require the employee to report that conduct to the employer. It stopped short of concluding that the duty required **all** employees to disclose their plans to leave to begin competing businesses.

Mr Claxton was found to have breached the duty by:

- failing to advise Smiths City before he began to compete with it that he intended to do so, and subsequently by not disclosing that he was competing with it; and
- failing to disclose Mr Milne's competing activities and plan to establish a competing business.

Immediately before his employment ended, Mr Claxton had also emailed confidential information to himself intended for the use of Cando Creative Flooring. This was also held to be a breach of the duty of fidelity.

Mr Claxton was held liable for damages totalling \$732,399.

Mr Milne

Mr Milne undertook some work for Mr Claxton as early as December 2015. Mr Milne eventually admitted he worked for himself, describing his business as "**Tip Top Flooring**" to undertake flooring installations for Mr Claxton and Cando Creative Flooring Limited.

Mr Milne had arranged for Smiths City installers to work on behalf of Can Do Flooring Ltd and Cando Creative Flooring Limited during the working day. Similarly to Mr Claxton, these were situations where the customer thought they were dealing with Smiths City.

In 2018, Mr Claxton and Mr Milne began making plans for the creation of "**Cando Creative Installs Ltd**".

Employment Court

The Court found that Mr Milne had been operating in competition with Smiths City which was in breach of his employment agreement, and the trade agreement which restricted the use of his trade skills outside working hours.

The Court concluded that Mr Milne had also breached his duty of fidelity by:

- undertaking work in competition with Smiths City; and
- approaching existing Smiths City employees inviting them to transfer to Cando Creative Installs Ltd; and
- retaining confidential information; and
- not reporting to Smiths City that Mr Claxton was operating a competing business.

The Court awarded damages against Mr Milne of \$83,568.

Key takeaway

Although both employees were plainly in breach of their employment agreements, a key takeaway is the discussion on the duty of fidelity. The duty may hold employees to account for actions wider than is specified in their employment agreement, particularly senior employees.

² [2009] ERNZ 240, [2012] ERNZ 273.

Smiths City awarded over \$800,000 after employees found to have acted in competition while employed
(Continued)

Want to know more?

If you have any questions about [insert], please contact our specialist [Employment Team](#)