IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 221/09
5147719

	BETWEEN	ASAP 4 DOORS LIMITED Applicant
	AND	CRAIG YOUNG Respondent

Member of Authority:	James Crichton
Representatives:	Jeff Goldstein, Counsel for Applicant No appearance for Respondent
Investigation Meeting:	17 December 2009 at Christchurch
Determination:	21 December 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (the company), alleges that the respondent (Mr Young) has breached statutory duties of good faith, express terms of his employment agreement with the company and the implied duty of fidelity in various actions which Mr Young allegedly took both during his employment with the company and subsequently to solicit the company's clients, to denigrate the company's work and to compete with the company.

[2] Mr Young says that he was constructively dismissed by the company on 2 December 2008, that he has breached no duty owed to the company and that in any event, there are no relevant obligations in the relevant employment agreement.

[3] The parties attended a mediation on 20 January 2009 and as a consequence reached terms of settlement which appear to have dealt with the urgent and interim matters which were the subject of the original applicant to the Authority. The

substantive issues remained unresolved and that matter proceeded to the investigation meeting on 17 December 2009.

[4] Mr Young did not participate in the investigation meeting, either in person or through counsel. He had originally instructed counsel but the latter was forced to seek to withdraw on the footing that he was unable to obtain continuing instructions.

[5] I was satisfied that Mr Young had been advised of the hearing date, both by the Authority and by his former counsel, been supplied with the appropriate documentation again from both sources, and accordingly was not involved with the Authority's process by a deliberate decision rather than an omission. Accordingly, I elected to proceed to take the applicant's evidence in the matter. However, I did this on the footing that, once the applicant's evidence and any submission the applicant wished me to consider were dealt with, I would endeavour to make contact again with Mr Young and seek to have him attend at the Authority so that I could interview him in the presence of counsel for the company. These arrangements were specifically approved by the company at the commencement of the hearing.

[6] In the result, having taken the company's evidence and received its submissions on the matter, I promptly sought to contact Mr Young personally using the two phone numbers that the Authority had. Both were disconnected. That being the position, I elected to continue with this determination and issue it having advised the company through its counsel that I had been unable to contact Mr Young at all.

[7] Mr Young commenced employment with the company as a technician on 19 May 2008. The company is a small operation with four staff and a working managing director. As its name suggests, the company's principal focus is the installation and repair of doors of all shapes and sizes. The company said in its evidence (and I accept), that prior to Mr Young joining the firm as an employee, Mr Young had no contact with the business or indeed with its customers and as well had not even been in the particular trade that the company operated in.

[8] Mr Young had previously worked in aluminium joinery and had sought a position with the company prior to eventually being offered the position that he commenced on 19 May 2008. He proved to be a satisfactory worker but it seemed to the company that he had other skills which the company's principal, Mr Weir, lacked. Mr Weir had attempted to undertake selling of the company's services, but really his

background and experience was more suited to the hands on work that he was good at and he did not think that he did a good job in selling. However, he told me that Mr Young *had the gift of the gab* and a few months into the employment, Mr Weir asked Mr Young to undertake some marketing and sales work. In effect, much of this work involved attending on customers and quoting for new work. Mr Young undertook this role and became known by the title of *operations manager*. In that capacity, he did in fact attend on customers of the company, evaluate their work and prepare quotations for work to be attended to by the company. The way in which this was done was that Mr Young would visit the customer with a pre-prepared template of the issues that he needed to consider in preparing a quotation, and he completed that template in his own handwriting, did the appropriate calculation for the price and then returned the document to the company's office where a formal quotation was typed up. That formal quotation was based exclusively on the handwritten template form which Mr Young had completed. Copies of examples of these documents were provided to the Authority for perusal.

[9] The evidence from Mr Young that is available to the Authority suggests that the employment relationship, at least from his perspective, was not a happy one. He complains in an affidavit filed in respect of the original interim application (which as I noted was dealt with in the mediation), that there were a number of health and safety matters which concerned him about the business and that he had drawn these to the attention of Mr Weir but allegedly, without result. In the absence of Mr Young's presence to give his evidence in person, it is difficult to assess the importance of these complaints. For his part, Mr Weir acknowledges that some of the matters referred to by Mr Young were appropriate and genuine concerns which needed to be drawn to his attention, but his evidence was that much of Mr Young's behaviour was just *grizzling*. Mr Weir concluded that there was an element of *negativity* devolving amongst his small workforce and he blamed Mr Young for that. He told me in his evidence that the company had engaged the assistance of a business coach to help it work through the challenges of running a small business in the existing economic environment and that all of the staff had been involved with the business coach during that process. One of the things the business coach apparently taught Mr Weir and his staff involved a graphic representation of *above the line* and *below the line* actions and the consequences of those.

[10] Mr Weir decided to have a staff meeting on 2 December 2008 at which he sought to confront the negativity of the staff. It is the outcome of this meeting that Mr Young says resulted in a constructive dismissal. At the meeting, Mr Weir drew on a whiteboard a horizontal line above which he wrote *ASAP Door* and below it he wrote the words *fuck off*.

[11] Mr Weir told me that the purpose of this graphic representation was to try to encourage his staff to rid themselves of the negativity and in effect to choose whether they were committed to the firm or not. His diary note of that meeting has been provided to the Authority. As well as a copy of the graphic representation I have just referred to, Mr Weir records what he actually said and the consequences for Mr Young in terms of the latter's behaviour. Mr Weir records that he said: *Make a choice what side of the line you are on* and that in consequence of that, Mr Young left indicating *he had had enough*.

[12] There was further contact between Mr Weir and Mr Young later that day which seems to have been a bit inconclusive and there was a telephone conversation that evening initiated by Mr Weir in which Mr Weir offered Mr Young the opportunity of taking a day off on pay to think about his position. Mr Young's sworn affidavit evidence is that no such offer was made, but I prefer the evidence of Mr Weir on this point. In the result, Mr Young subsequently rang the following day to indicate he was leaving, then rang back later to say that he was *going to go into competition with the company*, and then subsequently the company began to receive reports of Mr Young approaching the company's clients and denigrating the company as well as offering to compete with the company on price.

[13] The matter then proceeded to the Authority, initially on an urgent basis to seek to protect the company from further damage by Mr Young's alleged activities and that group of issues was, as I have already mentioned, resolved in the mediation on 20 January 2009. The substantive claim remains seeking:

(a) A reimbursement of costs incurred by the company in shoring up the damage done by Mr Young; and

(b) Loss of profit from the work of a particular client (Client A) which had been taken from the company by Mr Young; and

(c) An additional lost sum of moneys incurred as a consequence of Mr Young's actions; and

(d) Costs which are sought on an indemnity basis.

Issues

[14] It would be useful if the Authority considers the following questions:

(a) Was Mr Young constructively dismissed?

(b) Did Mr Young breach any duty?

(c) Did the company sustain any loss in consequence?

Was Mr Young constructively dismissed?

[15] Mr Young's position seems to be that, as a consequence of being present at the staff meeting on 2 December 2008, he felt he had no alternative but to resign his position and set up in business on his own account.

[16] As a consequence, his allegation of constructive dismissal is a shield rather than a sword in the sense that there is no counterclaim of constructive dismissal, simply the bald allegation that because he felt he was being given no option at the 2 December 2008 meeting, he left the company and set up in competition.

[17] My considered view is that, even if it were true that Mr Young had been constructively dismissed on 2 December 2008, that would not entitle him to breach his obligations to the company, assuming that is what happened. Furthermore, I am not persuaded, on the facts before the Authority, that Mr Young was constructively dismissed. I am satisfied that the manner of the discussion at the 2 December 2008 meeting was not a textbook example of how to speak to staff, but in a robust industry dominated by small businesses, it seems unreasonable to expect a gold standard. The nature of the constructive dismissal is not pleaded, but presumably the allegation is that there was no option for Mr Young other than to resign his employment. That does not seem to be consistent with the facts.

[18] First, whatever Mr Young may have thought, this was a whole of staff meeting and although the staff was small, the comments were directed at everyone, not just Mr Young. On the evidence before the Authority, it seems that Mr Weir's intention

was simply to get staff focusing on the health of the business and he sought to do this using the same device that the business coach had used. No doubt he can be criticised for not doing the job very elegantly (an observation I have already made to him in the investigation meeting), but it is a moot point whether the nature of this discussion can constitute a constructive dismissal of one employee only when there is no evidence that that employee was being singled out for special treatment.

[19] Even if that proposition is not accepted, it is clear from the evidence that Mr Weir effectively negotiated with Mr Young to endeavour to give him a chance to consider his position and, amongst other things, I am satisfied Mr Weir gave Mr Young a day's grace to consider his position on pay.

[20] For the foregoing reasons, I am not persuaded that Mr Young was constructively dismissed from his employment, but even if I am mistaken in that conclusion, that claim is not pleaded by Mr Young in any other way than as a defence or explanation for his subsequent behaviour.

Did Mr Young breach any duty?

[21] I am very clear that Mr Young breached a number of obligations that he had as an employee, both at common law, in terms of his employment agreement and pursuant to statute. Before dealing with those issues in turn, it is appropriate that I deal with Mr Young's contention that there are no restraint of trade or non-solicitation provisions in his employment agreement and that the company is attempting to *impose* them.

[22] It is true that the employment agreement does not contain a clause headed *restraint of trade* or *non-solicitation*, but it is not true to say that those provisions are missing from the agreement. On p.2 of the agreement, under the generic heading *Work Description*, there are two relevant paragraphs which I now set out in full:

> *The employee shall have the right to engage in outside personal, financial and business transactions or other activities that do not interfere with the performance of the employee and their duties to the employer or that could act against the interests of the employer. Such activity should not involve the misuse of the employer's property, facilities, influence or other resources and should not reflect discredit on the employer. Any such activities will not encroach on either performance or hours of work required to be undertaken for the employer under and pursuant to this agreement.*

> *The employee shall not engage in any activities from which such employee stands to benefit personally from any resources of the employer. Nor shall any employee engage in any activity including acting as an employee adviser for any entity that directly or indirectly competes with the employer. All employees will promptly disclose to the employer any actual potential conflicts of interest that they have or may acquire at any time during the currency of this agreement.*

[23] I am satisfied that the extent of those two subclauses is quite sufficient to emphasise Mr Young's obligation pursuant to the agreement to refrain from competing with the company, to not use the company's resources for his own gain, to not act against the interests of the company (by, for instance, soliciting clients of the company), and to not misuse the property of the company (by, for instance, visiting clients of the company in the company's vehicle in order to denigrate the company and seek to compete against the company by soliciting the client's work).

[24] It follows that I am satisfied that Mr Young was bound by the terms of his agreement not to compete against the company, not to solicit the company's clients for his own gain and not to use the company's property for his own gain.

[25] As to the common law, it seems to me plain on the evidence that Mr Young breached his duty of fidelity to the company by determining, whilst still in the company's employment, to compete with the company by operating his own like business and by actively soliciting clients of the company during the employment to leave the company and be clients of his own. The law is clear that employees owe a duty of fidelity to their employer as, for example, the Employment Court made clear in *Rooney Earthmoving Ltd v. McTague & Ors* (CC10/09, 24 August 2009) when the Court held that employees *while in the course of their employment owe duties of fidelity, good faith and trust and confidence.*

[26] Pursuant to s.4 of the Employment Relations Act 2000, parties to an employment relationship are required to deal with each other in good faith and there is little doubt in my mind that Mr Young's behaviour toward his employer fell far short of his good faith obligations. He took no steps, in my judgement, to be *active and constructive in establishing and maintaining a productive employment relationship*, and indeed behaved in a way that was likely to *mislead or deceive* the company.

[27] As part of those breaches of law, the evidence is clear that Mr Young misused the company's property by, for instance, using the company's vehicle to visit a company client and then attempt to solicit that client to his own firm, and by using the

company's financial information in order to compete with the company. Mr Young says in his affidavit that he had no company information which he might use for that purpose. I do not accept that statement as truthful. Mr Young made quotations on behalf of the company when he was in its employment. In order to make those quotations, he, of necessity, required to have the company's financial information such as mark ups and base prices for goods being purchased for the purposes of a particular job so it seems perfectly plain that Mr Young knew everything he needed to undercut the company's pricing. The fact that Mr Young had no access to the company's computer and that the office administrator physically typed up the quotations is neither here nor there. The computer had no greater amount of information on it than Mr Young was provided with and the office administrator typed up the quotations which Mr Young had previously prepared.

Did the company sustain any loss?

[28] I accept Mr Weir's evidence on behalf of the company that losses were sustained by Mr Young's activities. First, Mr Weir identifies the sum of $1,228.50 in taking remedial action once Mr Young's default was discovered. This cost was primarily generated by Mr Weir setting aside his usual work as a tradesman for the company and visiting clients to effectively *shore up* the business.

[29] In respect of the Client A work particularly (a major client of the company), Mr Weir identified that, as a consequence of a brief period when Client A chose to deal with Mr Young in preference to the company, the company lost an estimated $6,000 in net profit. In addition, during the period that the work of Client A was taken over by Mr Young, the company sustained an actual loss of $2,445.23 plus GST over that period. This is the actual loss on that particular contract during the period of three months or thereabouts that Mr Young did the work.

[30] The company seeks reimbursement of those sums and indemnity costs.

Determination

[31] The company seeks a declaration from the Authority that Mr Young has breached his obligations to it together with remedies of damages, penalty and full indemnity costs.

[32] As the foregoing sections of this determination make clear, I am satisfied on the evidence before the Authority that Mr Young has breached his duty of fidelity, has breached his obligations pursuant to the employment agreement and has breached his obligation to act in good faith towards the company.

[33] The cases disclose that the quantification of damages in matters such as this is not straightforward and this case is no different. Mr Weir's evidence on behalf of the company is that the company sustained losses as follows:

(a) In remedying the damage done by Mr Young in the sum of $1,228.50;

(b) Lost revenue from the Client A contract in the sum of $2,445.23 plus GST;

(c) A further amount of $6,000 in lost net profit as a consequence of the loss from the same contract;

(d) Lost cashflow of around $13,500 by reason of Mr Young breaching his duty of fidelity in failing to protect the company's interests and actively encouraging Client A to pay only half of the company's then outstanding invoice of twice the amount claimed.

[34] I am satisfied on the evidence before the Authority that the claim for costs incurred by the company in remedying Mr Young's default is made out and ought to sound in damages. These costs were primarily incurred by Mr Weir taking time from productive employment in the company to visit clients and shore up the damage done by Mr Young. I think it proper that Mr Young compensate the company for this actual loss.

[35] Furthermore, there is no doubt that the company suffered actual losses as a consequence of the short term loss of the Client A contract. The facts are that from 16 December 2008 down to around 26 March 2009, the company had lost the Client A contract as a consequence of that contract being *poached* by Mr Young. During that period, the company obtained no revenue at all from Client A and that actual loss ought to be recoverable from Mr Young. I allow both the $6,000 amount claimed as a loss of net profit in respect of that particular client over that period, together with an allowance which takes account of the claimed loss of $2,445.23 in relation to the same client and the same period. The financial information before the Authority was

not sophisticated and I have been unable to satisfy myself entirely that there is not an element of double counting in the two amounts just referred to and as a consequence, I have discounted the latter appropriately.

[36] The final aspect which I desire to comment on is the contention that Mr Young is obligated to the company to a further extent of half of Client A's outstanding bill of some $27,500. This is because of the company's contention that Mr Young actively encouraged Client A not to pay the account in full and, as a matter of fact, it paid only 50% of it. As is clear from the determination as a whole, I am satisfied that Mr Young did breach his fiduciary obligations to the company but the evidence that Mr Young specifically connived at encouraging Client A to pay only 50% of this significant invoice is no more than circumstantial and I am not satisfied that this claim by the company can be taken any further.

[37] It follows from the foregoing analysis that I direct that Mr Young is to pay to the company damages in the amount of $9,228.50.

[38] I decline to order a penalty.

Costs

[39] In the particular circumstances of this case, I think it appropriate to fix costs at this point. I direct that Mr Young is to make a contribution to the company's costs in the sum of $2,750.

James Crichton
Member of the Employment Relations Authority