

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 201/08
5086273

BETWEEN BURNARD
 INTERNATIONAL LIMITED
 Applicant

AND RAHUL VARMA and
 SARAYA POVEY
 Respondents

Member of Authority: R A Monaghan

Representatives: Owen Paulsen and Gareth Abdinor, Counsel for
 Applicant
 Ken Morrison, Advocate for Respondents

Investigation Meeting: 18 and 19 February 2008

Submissions received: 29 February and 7 March 2008 from Applicant
 3 March 2008 from Respondent

Determination: 6 June 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Burnard International Limited (“BIL”) is in the business of providing customs brokerage and international freight forwarding services. It is also a warehousing and distribution agent. It says that while in its employ two now former employees, Rahul Varma and Saraya Povey, breached duties including their implied duties of fidelity and good faith.

[2] The statement of problem also included allegations that Mr Varma and Ms Povey breached certain express provisions in their individual employment agreements. BIL is not pursuing these allegations.

[3] More specifically, the alleged breaches of the duty of fidelity and good faith concerned Mr Varma's and Ms Povey's:

- (a) having discussions with a client, Muhammed Waseem, with a view to going into business with him and in competition with BIL;
- (b) undertaking all arrangements necessary to commence trading the new business immediately on termination of their employment with BIL;
- (c) incorporating a company named Freight Direct (NZ) Limited ("FDNZ") for that purpose;
- (d) diverting the customs and freight brokerage business of Mr Waseem and associated companies to FDNZ;
- (e) emailing client contact details and other information to a personal email address; and
- (f) failing to refer all business opportunities to BIL.

[4] Mr Varma and Ms Povey accept that during their employment: they entered into discussions with Mr Waseem with a view to going into business with him and in competition with BIL; they have gone into business with Mr Waseem; they undertook certain administrative arrangements necessary to commence trading the new business immediately on termination of their employment; and FDNZ was incorporated to conduct the new business.

[5] They say further that although Mr Waseem subsequently diverted certain business to FDNZ, this was because of his dissatisfaction with actions of BIL's rather than as part of a planned diversion. They deny that any of the preparations in respect of FDNZ and its business, and any of their discussions with Mr Waseem, occurred in breach of their duties of fidelity and good faith or of any other obligation. Finally, they variously deny the substance of the remaining allegations, or that the actions complained of amounted to breaches of their employment agreements.

[6] BIL also seeks damages and penalties. By agreement this determination addresses liability only. Matters concerning the quantification of any loss remain to be investigated and determined.

Discussions with Mr Waseem and the establishment of FDNZ

[7] Ms Povey commenced her employment with BIL in March 1999, and at relevant times held the position of sales account executive. Mr Varma commenced his employment in 2004, was promoted to a sales position in 2005 and at relevant times held the position of sales executive.

[8] In the course of his sales duties at BIL Mr Varma conducted business with the following companies:

- (a) Gas Man Industries Limited (“Gas Man”). Shahida Sharwar is registered as the director and shareholder of that company. Mr Waseem is Dr Sharwar’s nephew, and has an involvement at a managerial level in Gas Man.
- (b) Mian Trading Limited (“Mian Trading”). Mr Waseem and another person are the directors and shareholders in Mian Trading.
- (c) Wholesale Autos Limited (“Wholesale Autos”). Wholesale Autos is a wholesaler and retailer of Japanese cars. Although the connection between that company and Mr Waseem or Mr Sharwar was not clear, Mr Waseem believed his uncle had an association with the company.
- (d) Super Furniture Limited (“Super Furniture”). The connection between that company and Mr Waseem was not clear either, although Mr Waseem described himself as a partner in the company.

[9] BIL says it has lost the business of all four companies.

[10] Mr Waseem and Mr Varma shared a language and cultural background, and became friendly.

[11] In or about June 2006 Mr Waseem and Hamish Milne, a director of BIL, met to discuss Mr Waseem’s suggestion that BIL take an interest in a business he wished to establish. Mr Waseem was considering the purchase of a container truck to start a trucking business, and offered BIL an interest in that business in return for its work.

Mr Varma was present. Mr Milne did not believe there would be any benefit for BIL in such a business and did not pursue the matter.

[12] Also, from about mid-2006, both Mr Varma and Ms Povey were becoming increasingly dissatisfied in their employment. Their dissatisfaction centred on their respective relationships with the company's general manager, Chris Paulsen. They were strongly critical of Ms Paulsen, as well as of the way in which BIL was run.

[13] Mr Varma expressed his dissatisfaction to Mr Waseem. In his statement of evidence Mr Waseem said:

“6. When I would meet with Rahul he was obviously not happy with the way he was being treated at Burnard. As well as the many mistakes being made he was not happy with his Manager, Chris Paulsen. I said to him many times he should leave Burnard and we could go into business together.”

[14] Although, when giving oral evidence on the point, both Mr Varma and Mr Waseem sought to minimise the nature and extent of Mr Varma's expressions of dissatisfaction, the way Mr Varma expressed his criticisms in his evidence in general leads me to consider it likely he expressed himself to Mr Waseem in a similar vein. The criticisms were very emotive. They involved assertions of incompetence and mismanagement, assertions of a lack of respect for Ms Paulsen, and frequent instances of uncalled-for sarcasm. This matter involves a question of loyalty, and in that respect both Mr Varma and Ms Povey put their credibility at risk by the extent and tone of their criticisms.

[15] Mr Waseem went on to say in evidence that, in November 2006, Mr Varma confided that he and Ms Povey were thinking about setting up a business in competition with Burnard as they were so frustrated. Mr Waseem indicated he would be interested in becoming involved as an investor. BIL believes planning for a competing business involving Mr Waseem began earlier than that, but I accept the earlier discussions between Mr Waseem and Mr Varma concerned a trucking business which would not be a competitor. Further, the discussions did not involve Ms Povey.

[16] However by late 2006 Mr Varma and Ms Povey had indeed begun planning a competing freight forwarding business. In or about November 2006 they met with each other and Ms Povey's partner, Ken Morrison, to discuss the necessary practical steps, as well as financial matters. Regarding Mr Waseem's involvement, Mr Varma said the offer of financial assistance was appreciated as he was struggling to find start-up capital. His evidence was there was no suggestion of Mr Waseem transferring his business from BIL to the new enterprise, because the new enterprise would not be able to match the terms of credit BIL offered until it had sufficient working capital.

[17] At the same time Mr Varma acknowledged that he was hoping to obtain Mr Waseem's motor vehicle business. Neither Mr Waseem, his interests or associates had business of that kind with BIL, as they were using another freight forwarding company. Mr Waseem's business with BIL was the export of used machinery. BIL has not asserted any interest in obtaining the motor vehicle business, and for present purposes I assume that its business with Wholesale Autos concerned something else.

[18] In early December 2006 Mr Waseem attended a meeting with Mr Varma, Ms Povey and Mr Morrison. The setting up of FDNZ was discussed, including in particular the shareholdings. Mr Waseem further agreed to provide additional funds by way of an interest free loan. The loan funds were deposited into FDNZ's bank account on 19 February 2007.

[19] During November and December 2006, and in the course of their meetings, Mr Varma and Ms Povey were also working with Mr Morrison on projected revenue statements and cash flow forecasts. Mr Morrison prepared projected revenue and cash flow spreadsheets on 20 and 21 November, and updated them on 7 December.

[20] BIL says these must have been prepared with the benefit of information about its clients. In support of its view it invoked the following email message from Mr Varma to Mr Morrison, dated 22 November 2006, which comments on the early spreadsheets as follows:

“Very realistic, sales of approx 4 million is certainly achievable in GST for the year.
[comments on gross margin and capital contribution]

Hope to have the sales revenues and gross margins from our Financial Controller by the end of this week which will provide a much clearer picture for the start up.”

[21] BIL says the last sentence refers to information to be obtained from it.

[22] Indeed a few days later Mr Varma approached the company’s accountant seeking his sales figures. He asserted that he did so because he sought the figures to calculate commission payments owed to him, had been waiting for them for some time, and did not believe Ms Paulsen had sought them although he had expected she would. I accept Mr Varma sought the figures in part to support a claim he was making for payments of commission.¹ However it is impossible to divorce his action in seeking the figures from the sentiment expressed in his 22 November email. He intended to, and did, use the figures for FDNZ’s purposes.

[23] The figures were provided in association with discussions between Mr Varma, Ms Povey and Ms Paulsen, following a regular sales meeting on 1 December 2006. At the time Ms Paulsen was unwilling to provide Mr Varma with full details of his sales figures, but on 4 December she sent him a list of clients giving ‘indicative positioning’ from the client generating the most revenue in 2006, to the client generating the least. There was also an indication of the clients who generated \$20,000 and above, \$10,000 and above, and \$100 - \$10,000. Gas Man was at the top of the list. Also in the \$20,000 and above group were Super Furniture Limited and Mian Trading Limited.

[24] Similarly, Ms Povey sought details of her clients from Ms Paulsen. Again, she was not given full details of her sales figures but rather a list of the same kind as the one given to Mr Varma. The list was one of the documents she emailed to her home – an action said to be contrary to her duty of fidelity.

[25] Ms Povey asserted that she sought these details in order to prepare a list of the clients she would visit and provide with a Christmas gift. While this may have been part of her motivation, I cannot accept that is the end of the matter. In the

¹ The Authority heard and determined the claim in **Varma v Burnard International Limited** 17 March 2008, AA 98/08

circumstances I consider it more likely than not that the information was also taken into account when the revenue and cash flow forecasts for FDNZ were being prepared.

[26] FDNZ was registered on 21 December 2006, with Ms Povey, Mr Varma and Mr Waseem as the directors and equal shareholders.

[27] Mr Varma and Ms Povey offered their written letters of resignation on 22 December 2006. The letters gave one month's notice of their intention to leave, with the last day of work to be 19 January 2007. The letters also advised of the intention to establish a freight forwarding business in competition with BIL. BIL was already aware of FDNZ's incorporation because uneasiness about Ms Povey's and Mr Varma's behaviour had led Mr Milne to conduct a search of the companies office register on 21 December.

[28] Mr Varma and Ms Povey raised personal grievances in association with the termination of their employment. These were resolved in January 2007 in settlements which included provision for Mr Varma and Ms Povey to remain on garden leave until the expiry of their notice periods.

[29] Finally, the lease for the premises to be used by FDNZ was signed on 19 January 2007, to commence on 22 January 2007. Mobile telephone accounts for Ms Povey and Mr Varma, both in the name of FDNZ, were opened on or about 10 January 2007. Landline accounts were opened later in January. A business bank account was opened on or about 16 January 2007.

Diversion of business

1. Mr Waseem's business

[30] According to Ms Paulsen, Mr Varma made sales to Gas Man in every month from July 2005 to December 2006. She said there was no new business from Mr Waseem from November 2006, and any continued business contact concerned only

existing business. Ms Paulsen concluded that a decision to divert Mr Waseem's work to FDNZ was made in or about November 2006.

[31] Detailed information produced in support of this conclusion related only to Gas Man. BIL's records showed 10 Gas Man jobs were entered into its computer in late November and December, with the last 5 being entered on 18 December. These were the final jobs entered.

[32] Mr Waseem travelled out of New Zealand at the end of the year, returning in March 2007. He said his passport showed his date of departure as 23 November 2006, which called into question other areas of the evidence in which he and others said he was present at meetings in New Zealand in December. It appears, however, that the meetings occurred when they were said to have occurred. Mr Waseem was unable to explain the discrepancy.

[33] It was at least accepted that Mr Waseem had departed by late December 2006, and that no new Gas Man business was arranged with BIL after the date of the last entries in BIL's records, namely 18 December 2006. BIL says Mr Waseem could have initiated new business even if he was out of the country, but he did not do so. However with an exception to which I will turn shortly, there was no evidence available to me that any new business had become available in late December 2006 or January 2007 and hence nothing to support a finding that new business was diverted or withheld from BIL from about December 2006.

[34] Nevertheless BIL no longer has the business of Gas Man, Mian Trading, and Super Furniture. Mr Waseem, Mr Varma and Ms Povey denied this was part of any plan of theirs.

[35] I have no material information from any party regarding the business between Mian Trading and BIL and FDNZ respectively, and more particularly whether, how and when the Mian Trading business was transferred from BIL to FDNZ. There is no basis for a finding that the business of Mian Trading was diverted to FDNZ in breach of the duty of good faith and fidelity.

[36] I have almost no information regarding the business between Super Furniture and BIL and FDNZ respectively, and none regarding what role (if any) Mr Waseem had in these arrangements. The little information available includes a series of emailed messages between Mr Varma and a person at Super Furniture, commencing on 31 January 2007. The first of them opens: 'As discussed, details of the new company are attached.' The message also asks for details of Super Furniture's suppliers 'as we do not have any of the old data with us in the new company.' The information falls far short of being evidence that the business of Super Furniture was diverted to FDNZ in breach of the duty of fidelity and good faith.

[37] As for Gas Man, Mr Waseem said the transfer of that business occurred in February 2007 following a change in BIL's terms of trade to require cash on delivery, as well as what Mr Waseem believed to be an associated hold-up in the completion of a particular delivery.

[38] Under an arrangement reached in July 2005 BIL had made a credit facility available to Gas Man. In a message dated 28 December 2006 another BIL director, Gregory Hoffman, advised of the cancellation of that facility because of Mr Waseem's involvement in FDNZ. Because Mr Waseem was out of New Zealand by then, he did not immediately become aware of the change. It is not clear exactly when and how he found out about it.

[39] In or about February 2007, Mr Waseem became aware that BIL was holding a shipment of chains which he had been expecting. According to BIL the shipment arrived in mid-January but the goods could not be released because of incomplete documentation. It said it held the goods without clearance so that no storage charges would be incurred while the matter was addressed. Ms Paulsen also said a payment of GST was necessary. If that was true the position was not made clear to Mr Waseem. Gas Man received an invoice dated 7 February 2007 in respect of the goods, with the handwritten notation 'HOLD – payment required prior to delivery'.

[40] In the absence of any explanation, Mr Waseem was entitled to conclude from the notation that his goods were being held until he had met the new COD terms in full. In turn he emphasised that the decision to transfer the Gas Man business was

based both on the change in terms of trade and the hold-up in completion of the delivery.

[41] That explanation means Mr Waseem must have made the decision to move the Gas Man business after 7 February. He said he told Mr Varma about his concerns, and the oral evidence was that in response Mr Varma was able to offer credit terms. In his written statement Mr Waseem had said Mr Varma quoted a better price than BIL, and that he and Mr Varma 'agreed a way that Freight Direct could handle my business without too many cashflow problems.'

[42] However FDNZ issued what it said was its first invoice to Mr Waseem on 14 February 2007. The invoice related to a shipment of machinery from Nelson to the United Arab Emirates, with a departure date of 3 February 2007. The terms were COD. Mr Varma said he received the work either in late January or very early February 2007. Indeed on 31 January 2007 he sought a quote for a shipment of machinery for Gas Man. There was no explanation of why BIL did not obtain that work, or of why it was apparently obtained before Mr Waseem had made the decision to move the Gas Man business to FDNZ.

[43] Further, I did not find persuasive the explanation that, on or shortly after 7 February, FDNZ was able to offer terms it had not been able to offer before. There was nothing new about Mr Varma's general plan to offer better prices than BIL, and FDNZ had not expected to be in a position to offer credit terms at least in the short term. There has not been a satisfactory explanation of why it indicated it could do so some two weeks after it had commenced business.

[44] I do not believe Mr Waseem and Mr Varma have been frank about why Mr Waseem moved the Gas Man business to FDNZ when he did. Further, it is inherently unlikely that FDNZ would have commenced business with Mr Waseem as a shareholder but without any expectation that FDNZ would obtain business including Mr Waseem's business with BIL.

2. Other business

A. McKay Shipping Limited

[45] McKay Shipping Limited is the agent for Pacific International Lines (Pte) Limited and is a supplier to BIL. It is referred to as "PIL". Mr Varma conducted business through PIL while at BIL, and BIL believes he began to make arrangements with it for FDNZ's purposes while still in BIL's employ. BIL alleged, too, that FDNZ was able to negotiate favourable arrangements with PIL on the promise of further work from Mr Waseem's companies.

[46] BIL pointed in particular to a meeting on 5 or 6 December 2006 between Mr Varma, Mr Waseem and Andrew Twentyman, a sales representative employed by PIL. Mr Varma said the parties met to inspect a container that was out of gauge, then had coffee. He denied there was any discussion about FDNZ. I have no reason to disbelieve him.

[47] Ms Paulsen asserted further that, while Mr Varma and Ms Povey were on garden leave, she had a conversation with Mr Twentyman during which she asked if PIL would be offering FDNZ the same rates as it offered BIL. She said his response was that it would. She believed an understanding between PIL and FDNZ had already been reached.

[48] No-one from PIL gave evidence, and Ms Paulsen's account did not amount to evidence that any arrangement was made with PIL in breach of the duty of fidelity. I am not persuaded there was such an arrangement.

B. Maruha (NZ) Corporation Limited

[49] Maruha (NZ) Corporation Limited ("Maruha") was in the \$20,000 and above group of Mr Varma's clients at BIL. There was no suggestion it had any link with Mr Waseem.

[50] Late in 2006 Maruha had freight for shipping to Hakata, Japan. It approached Mr Varma about rates for that destination in October and again in November 2006.

By email message dated 29 November 2006 it said: "... next discharge of our vessel would be 21/22 December. Can you advise your best rate to Hakata, Japan. Approx 2 containers per month."

[51] No record of any response was produced, but Mr Varma asserted BIL did not get that business because its rate was too high. BIL says it did not handle the business because PIL did not offer a direct service to Hakata. From that it appears at least that the approach from Maruha was addressed and there was a genuine reason why BIL did not handle the Hakata shipment.

[52] A series of emailed exchanges showed that at 9.58 am on 22 January 2007 (the first day of trading for FDNZ) Mr Varma approached Maruha seeking an opportunity for FDNZ to quote for its business. The affirmative response from Maruha came in a message timed at 12.22 pm, requesting information in respect of a number of destinations not including Hakata. Mr Varma immediately sought a quote from PIL, and received rates in respect of some of the destinations some 20 minutes later. Subsequently Mr Varma contacted Maruha in respect of those destinations.

[53] The first references to a confirmed booking were dated 1 February 2007. There was also emailed material, dated from 13 February, which referred to shipments destined for Hachinohe, Japan. There was no direct service to Hachinohe so the freight was transhipped at Busan, Korea. As a result of that, BIL asserted Mr Varma could have taken the opportunity to use a transhipping service while at BIL.

[54] Neither that assertion, nor anything else in the material relating to Maruha, warrant a finding that Mr Varma was in breach of any duty to BIL in respect of Maruha.

C. Profile Plastics Limited

[55] Ms Paulsen asserted that, on 15 January 2007, a director of Profile Plastics told her he was aware Ms Povey had left BIL, and that Ms Povey had told him she was going to be 'doing something in the new year'. That information is hearsay and the person concerned did not give evidence. Further, even if the comments were made, it is doubtful whether they evidence a breach of the duty of fidelity.

[56] In any event Ms Paulsen also said she was told Profile Plastics had followed Ms Povey before and would follow her again. Indeed Ms Povey once had a close personal relationship with the person concerned. In principle Ms Povey was entitled to obtain business from someone whose connection with her was personal and unrelated to her employment with BIL.

Emailing client details

[57] Ms Povey accepted that she emailed client information to her home, but denied she did so in breach of the duty of fidelity. It was common ground that she did not work in the office full time, and supplemented her office hours by working from home. To that end she was able to access her BIL email and attachments remotely, although the system was slow. Ms Povey said it was more convenient to email information to her home email address when she needed material for her work at home. She acted accordingly.

[58] BIL was concerned about particular examples of emailed information which it identified, and which were discussed during the investigation. For the most part I found the examples to be consistent with Ms Povey's carrying out her duties while at home, and nothing more. The content may have been commercially sensitive at the time Ms Povey sent it to herself, but there was nothing to suggest it was obtained in breach of any duty and no evidence that it was misused.

[59] A concern of a different kind arises out of Ms Povey's forwarding to her home email address a copy of her list of clients. I have addressed that matter elsewhere in this determination.

Failing to refer all business opportunities

1. Maruha

[60] For reasons indicated by the earlier discussion of material relating to Mr Varma's dealings with Maruha, I find there was no evidence of a failure to refer business opportunities in respect of Maruha and no evidence of any breach of duty.

2. Tasman Insulation

[61] While still an employee of BIL Mr Varma had negotiated with PIL freight rates for BIL's client Tasman Insulation. The rates were to remain open until 31 March 2007.

[62] Ms Paulsen said that in February 2007 a BIL employee was told the rates were no longer available. Again that information is hearsay, and it is difficult to see what it would prove even if it was a correct statement of fact. In any event Mr Varma said the rates were no longer available because Tasman Insulation dealt directly with PIL. There was no opportunity for FDNZ either.

[63] There was no evidence of any breach of duty in respect of Tasman Insulation.

3. Chevpac

[64] By email message dated 22 November 2006 Ms Povey asked Mr Varma to assist with a quote for shipping rates for a client, Chevpac. By return message dated 7 December Mr Varma replied 'have held it back till next year if ok'. Ms Povey replied 'good plan'. Ms Paulsen said this matter should have been followed up.

[65] The alleged lack of follow up was explained in that certain rates were to be changed on 1 January 2007. There was no point in quoting before then. I have no reason to disbelieve that explanation. Further, the matter was noted in BIL documents and the status of the Chevpac quote was mentioned in at least one sales meeting. I do not accept there was any failure to refer a business opportunity and note that Mr Varma and Ms Povey say they did not approach the company on behalf of FDNZ.

[66] There was no evidence of any breach of duty in respect of Chevpac.

Determination

1. Discussions with Mr Waseem and establishment of FDNZ

[67] The following extracts from the decision of the Employment Court in **Walden v Barrance**² set out aspects of the duty of fidelity and good faith which are relevant to the present facts:

“... the respondent’s employment contract was subject to an implied term that he was under a duty of fidelity to his employer to abstain from conduct likely to do damage to the employer’s business or having the potential to undermine the relationship of trust and confidence. Obviously an employee who has given notice must be entitled to make preparations for departure and for his or her future working life. There is nothing wrong with any of that. For example, the respondent was perfectly at liberty in his spare time to look for premises and order stationery ... However conduct will be of a different colour if the preparations are at the expense of injury to the goodwill of the employer’s business or involve some serious dereliction of the continuing duty of trust and confidence.

The precise content of the duty of fidelity may vary from case to case³

[68] Thus the mere seeking of premises for FDNZ, the opening of a bank account and other administrative preparations were not on their face conducted in breach of Mr Varma’s and Ms Povey’s duty of fidelity. However in effect BIL’s submission is that their conduct was ‘of a different colour’.

[69] The strongest of the submissions in support concerned the association with Mr Waseem. Further to that, the Employment Court in **Walden v Barrance** went on to set out a series of rules relevant to the duty of fidelity, addressing first the prohibition on deliberate actions likely to injure the employer’s business. The prohibition included a prohibition on competing with the employer. The court said:

“Competing for this purpose can in turn include hostile acts during the employment in preparation for competing after it has ended. Common examples are removing, copying, memorising or compiling for the employee’s as opposed to the employer’s purposes a list of customers or any other information, soliciting clients prior to departure, and any other acts by the employee that involve an actual incompatibility in important respects with the employment relationship or a conflict with the interests of the employer, to serve which it remains the employee’s duty so long as the employment subsists.”⁴

² [1996] 2 ERNZ 598

³ at p 616 ll 14 – 25.

⁴ P 616 at ll 34 – 44.

[70] When a client and an employee discuss the possibility of entry into a competing business arrangement between them, regardless of who made the first approach:

“The duty of an employee in such circumstances is to reject categorically any such approach, to report it to his or her employer along with any criticisms made of the employer and to work with the employer to rectify any shortcomings.”⁵

[71] Further to the scope of the prohibition on ‘soliciting clients prior to departure’, the facts in **Sanders v Parry**⁶ are illustrative. A solicitor established a new practice in competition with his former employer. The former employer alleged that, while still in its employ, the solicitor arranged with a client to set up in practice on his own, and to carry out that client’s work in premises leased from the client. The court was unable to conclude that the arrangement was initiated by the solicitor, but still found against the solicitor. It said:

“In my view there was a duty at all times during the subsistence of [the employment relationship] on the defendant to protect his master’s interests, ... [Parry] was knowingly, deliberately and secretly acting, setting out to do something which would inevitably inflict great harm on his principal.”⁷

[72] The essential failure on Mr Parry’s part was the failure to act to retain the client’s services for his employer, and instead to act in his own interests.

[73] Here, while the detail is different I find the character of the conduct is the same. In his dealings with Mr Waseem, Mr Varma was acting in his own interests and not those of BIL. His conduct both in criticising his employer to a client as he did, and discussing and pursuing the possibility of entry with the client into a competing business, was disloyal. Both Mr Varma and Ms Povey then knowingly, deliberately and secretly set out to do something which would inevitably inflict great harm on BIL.

⁵ **Morris v Interchem Agencies Limited** (CA 185/02, 3 July 2003) at [38]

⁶ [1967] 2 All ER 803.

⁷ P 807 – 808.

[74] I do not accept that the discussions with Mr Waseem can be taken out of the employment arena and the associated obligations, and characterised as discussions between friends. The friendly relationship between Mr Varma and Mr Waseem arose out of Mr Waseem's status as a client of BIL's dealing with Mr Varma as an employee of BIL's. Nor do I accept that any alleged plan for Mr Waseem to remain a passive investor rather than active participant in FDNZ's business makes a difference to whether there was a breach of duty by Mr Varma and Ms Povey.

[75] Accordingly I find Mr Varma and Ms Povey were in breach of their duty of fidelity by planning with Mr Waseem to establish a business to compete with BIL while they were still in BIL's employ, and putting the plan into effect.

[76] A second line of argument was based on a development of the general obligation to protect the employer's interests and advise the employer of matters adverse to those interests. The submission was that Mr Varma and Ms Povey had a duty to advise BIL of their plans to establish a competing business, which they breached. The submission did not address when the duty crystallised although I infer from subsequent submissions that it was in early December 2006, at or about the time arrangements to go into business with Mr Waseem were confirmed and the decisions to resign were made.

[77] No authority directly on point was cited. I do not accept that a determination of the Authority in **NZ Grazing Co Ltd v Fraser-Jones**⁸ is on point, primarily because the Authority was addressing the effect of a contractual provision expressly requiring the employer's prior consent to the employee's entry into other employment or a competing business. No such provision was in issue here.

[78] The matter was touched on by Justice Tipping in **Big Save Furniture Limited v Bridge**⁹. Mr Bridge was canvassing his employer's suppliers in the course of a plan to leave his employment and set up his own business. His actions caused rumours about his employer, which had the potential to undermine its reputation and goodwill. Mr Bridge also advised other staff members of his plans. His Honour said:

⁸ 16 November 2005, V Campbell, AA 441/05

⁹ [1994] 2 ERNZ 507.

“He did all this without letting Mr McKimm know what he was doing. It is one thing to plan to leave your employer and set up a competing business if you proceed with discretion. It is quite another, in my view, to do so in such a way that your plans become widely known but without telling your employer, and in a way that is potentially damaging to your employer.”¹⁰

“I cannot accept the proposition espoused by the Chief Judge that Mr Bridge had no obligation to tell Mr McKimm of his plans unless and until asked. That might have been so if he had not informed other people including suppliers and staff.”¹¹

[79] I do not accept that there is in law a bare duty to advise an employer of plans to establish or move to a competing business. It may be that such a duty would arise on the facts of a particular case if the employee’s actions amounted to more than those permissible for the establishment of a new business and more than a mere departure to work in the business. In those circumstances the actions in question would probably amount in themselves to a breach of the duty to serve the employer with good faith and fidelity, with the failure to draw necessary matters to the employer’s attention being taken into account as part of that breach.

[80] Here, if there was a duty to advise BIL of the plan to set up a competing business, it centred on the involvement of BIL’s client Mr Waseem. I would accept that the failure to advise of the plan to set up a competing business in those circumstances amounted to a failure to advise BIL of an action that was contrary to BIL’s interests. Mr Waseem’s involvement in FDNZ created a very obvious risk to BIL. In that respect the failure to advise of the plan to set up a competing business with Mr Waseem was a breach of duty.

[81] Additional facts said to give rise to a duty to advise BIL of the plan to set up a competing business included: the nature of Mr Varma’s and Ms Povey’s positions meant they were in a special relationship with clients, with significant client contact and ability to influence clients; and the Christmas period was approaching, involving

¹⁰ P 518.

¹¹ P 519. The then Chief Judge of the Employment Court found in **Needax Systems NZ Ltd v Waterford Security Ltd** [1994] 1 ERNZ 491 that that two senior employees who were planning to depart to a competing business were not under a duty to ‘denounce’ each other to their employer.

enhanced client contact in circumstances where that contact would not have been permitted had BIL known of their intentions.

[82] Alleged plans to divert BIL's business to FDNZ were also cited, although - aside from matters involving Mr Waseem – on the evidence available to me the plan is better stated as one of targeting BIL's clients once FDNZ commenced trading.

[83] I deal with all of these matters in the next section of this determination.

2. Diversion of business

[84] A breach of the duty of fidelity in this regard arises out of any actual or attempted diversion of the employer's business carried out while the employment relationship continued. Mr Varma's announcement at the time of his resignation that he intended to target BIL's clients was not in itself evidence of a breach of the duty of fidelity, and unless Mr Varma acted on his stated intention before his employment ended he was not in breach of the duty.

[85] An employee is entitled to act as follows:

“... a servant, intending to enter into business for himself, may, during his employment, do many things by way of preparation for that event, even if he means ultimately to compete with his employer, provided he does not fraudulently undermine the latter by breaking the confidence imposed in him. In connexion with this last-mentioned proposition, the servant may, for instance, while still in his employment, be as agreeable, attentive and skilful as it is in his power to be in respect of others with the ultimate view of obtaining the benefit of the customer's friendly feelings when he calls upon them, if and when he sets up in business for himself.”¹²

[86] Aside from matters involving Mr Waseem, I have found nothing to indicate Mr Varma and Ms Povey exceeded those boundaries. As far as their contact with clients was concerned, they were doing what was required of them in order to carry out their duties. While the timing of their departures was probably inconvenient to say the least, it was no more than that.

¹² **Schilling v Kidd Garrett Ltd** at p 245 (CA).

3. Emailing client details

[87] This matter was developed in submissions as a claim that Mr Varma and Ms Povey misused confidential information, most significantly in the form of the client lists they obtained in December 2006.

[88] To the extent that both Mr Varma and Ms Povey had in their possession up-to-date lists of their respective clients together with an indication of the revenue those clients generated for BIL identifiable in bands, and I consider it likely that the information was used in the preparation of the financial forecasts for FDNZ, then I find the information was confidential and it was misused.

[89] The alleged misuse of confidential information was not developed any further and I make no further findings in that respect.

4. Failing to refer all business opportunities

[90] There was no evidence of any failure to refer to BIL business opportunities which should have been referred to it.

5. Additional breaches

[91] It was submitted in addition that Mr Varma and Ms Povey undermined BIL's business relationship with its clients. The submission was concerned primarily with matters involving Mr Waseem and it would be unrealistic to suggest that Mr Varma's expressions to him of frustration with BIL had no undermining effect. However I regard this as a factor relevant to the quality of Mr Varma's conduct overall, rather than warranting a head of claim in its own right.

[92] Finally, it was said that a relationship with a client was undermined because of an emailed message Ms Povey sent in December 2006 to the client, Glomesh NZ Limited. The message referred to invoicing errors in a tone that may not have been appropriate but that is the worst that can be said of it. There was no evidence that the

relationship with Glomesh was undermined as a result. Not only that, I was told the client's business has not been lost.

Costs

[93] Costs are reserved.

[94] Since the identification and quantification of loss have yet to be determined, unless I hear otherwise from the parties I propose to address costs in association with the determination of those matters. The Authority will contact the parties shortly to make further arrangements.

R A Monaghan

Member of the Employment Relations Authority