IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 186

5530744

	BETWEEN	CAFFE COFFEE (NZ) LIMITED Applicant
	A N D	SUNE FARRIMOND Respondent
Member of Authority:	T G Tetitaha	
Representatives:	D J Clark, Counsel for the Applicant C T Patterson, Counsel for the Respondent	
Investigation Meeting:	31 March 2015 at Auckland	
Submissions Received:	31 March 2015 from the Applicant 31 March 2015 from the Respondent	
Date of Determination:	24 June 2015	

DETERMINATION OF THE AUTHORITY

A. The application for permanent injunctive relief and penalties is dismissed.

B. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

Employment relationship problem

[1] Caffe Coffee (NZ) Limited alleges Sune Farrimond breached terms of his employment agreement by setting up a competing coffee roasting business, removing then misusing its confidential information and intellectual property and excessive

spending upon entertainment expenses. It seeks injunctions restraining him from further breaches, penalties and damages.

Facts leading to dispute

[2] The applicant, Caffe Coffee (NZ) Limited, roasts its own brands and blends of coffee (as well as chocolate powders) for sale in New Zealand. The applicant's parent company, Retail Food Group Limited (RFG) is a publicly listed company on the Australian Stock Exchange and owns and manages a number of franchise systems internationally.

[3] In 2011, RFG, through its associated entities, purchased Evolution Roasters Limited of which the respondent was a minor shareholder in the chocolate manufacturing side of the business known as *"Evil Child"*. As part of the purchase RFG purchased the respondent's shareholding. The majority of the purchase price was paid for the coffee manufacturing side of the business owned by Andrew Brodie. Mr Brodie was employed as the applicant's General Manager until December 2012.

[4] On 8 August 2011 the respondent, Sune Farrimond, was employed as the applicant's Commercial Manager then General Manager until June 2014. He was paid a salary of $102,500 plus 2% superannuation per annum and provided with a mobile phone and laptop.

[5] The individual employment agreement contained the following clauses:

> ***Duties of employee***
> *3.1 Duties*
> *...*
> *(c) In the performance of the duties the Employee must:*
> *...*
> *(ii) observe a duty of fidelity and utmost good faith to the Employer;*
> *(iii) comply with all policies and procedures (including any Codes of Conduct) implemented by the Employer, or the Ultimate Holding Company, from time to time;*
> *...*
>
> *4.1* ***Promotion of Employer's interests***
> *The Employee must use the Employee's best endeavours to promote the financial position, profits, prospects, welfare and reputation of the Employer and related corporations and not intentionally do anything which is, or may be, harmful to those interests.*

4.2 ***Other business, occupation or directorships***

During the term of this Agreement, the Employee must not carry on nor be concerned in a business or occupation nor hold a directorship of another corporation (with the exception of those entities named in the SPA or which the Employee is a director) other than that associated with the business of the Employer without the prior written consent of the COO.

4.4 ***Conflicts of interest***

(a) *The Employee will at all times endeavour to avoid situations where a conflict of interest may arise between the performance of the Employee's Duties and responsibilities of employment and the Employee's other interests.*

(b) *If the Employee becomes aware of any potential, likely or actual conflict of interest arising in the course of this employment with the Employer, the Employee will:*

(i) performance of the Employee's Duties and responsibilities of employment and the Employee's other interests.

(b) *If the Employee becomes aware of any potential, likely or actual conflict of interest arising in the course of this employment with the Employer, the Employee will:*

(i) *Act promptly to identify any conflict or potential conflict of interest;*

(ii) *Immediately advise the Employer in writing of the existing, nature and extent of any conflict of interest or any fact or circumstance likely to result in a conflict of interest immediately upon identifying any conflict or potential conflict of interest; and,*

(iii) *Act in accordance with the Employer's Instructions to address any conflict or potential conflict of interest.*

(c) *The Employee acknowledges the provisions of the Corporate Governance Charter relating to transactions and securities and conflict of interest, and agrees that those provisions are binding on the Employee as if the provisions were set out in full in this Agreement.*

8. ***OUT OF POCKET EXPENSES***

8.1 ***Reimbursement***

The Employer will reimburse the Employee for all reasonable expenses properly incurred by the Employee in the performance of the Employee's Duties provided they have been approved by the Employer before being incurred.

8.2 ***Substantiation***

The Employee will provide receipts or other evidence of payment and the purpose of each expense in a form reasonably required by the Employer to support each claim for reimbursement and keep those records

of expenses reasonably acquired by the Employer to meet income tax, fringe benefits tax, GST and other statutory requirements.

8.3 ***Credit facilities***

(a) *The Employer may provide or make available to the Employee credit charge card or trade account facilities for the purposes of the Employee incurring legitimate business expenses for and on behalf of the Employer.*

(b) *With respect to the business expenditures incurred on the credit or charge card facilities, the Employer will indemnify and hold indemnified the Employee for any and all moneys outstanding in respect of such facilities.*

9. CONFIDENTIAL INFORMATION

9.1 ***Maintenance of confidentiality***

(a) *The Employee will, both during the Employee's employment and after termination of the Employee's employment:*

(i) *Keep confidential all confidential information and use the Employee's best endeavours to prevent the disclosure of confidential information to any person except:*

- *as required by law;*
- *with the prior written consent of the CEO; or*
- *in the proper performance of the Employee's duties;*

(ii) *Not use confidential information for a purpose other than for the benefit of the Employer or a Related Corporation; and*

(iii) *Not make a copy or other record of confidential information except in the proper performance of the Employee's Duties;*

(b) *The Employee will return to the Employer all confidential information and all records containing any confidential information including copies of any documents in existence immediately upon the earlier of:*

(i) *Demand by the Employer; and*

(ii) *The termination of the Employee's employment.*

9.2 ***Confidential information***

'Confidential information' means for the purpose of this Agreement all information belonging to the Employer or a Related Corporation, and includes information which:

(a) *The Employer indicates is confidential;*

(b) *By its very nature, might reasonably be understood to be confidential or to have been disclosed in confidence;*

(c) Would be of commercial value to a competitor of the Employer;

(d) Relates to the Employer's financial or business affairs (including financial information, accounts work, financing information, management reports and performance or profitability reports and margins);

(e) Relates to any arrangements or transactions between the Employer and a third party (including details of the arrangements or transactions between the Employer and those third parties) and without limitation includes arrangements or transactions with customers, suppliers and financial institutions and/or credit providers;

(f) Relates to or is contained in any of the Employer's computer databases or software;

(g) Relates to the marketing and selling techniques used by the Employer (including marketing plans, sales plans, research and data surveys);

(h) Relates to trade secrets, technical specifications, know-how, plans, design concepts, ideas, design specifications, manufacturing or development processes, research, formulae, processes, applications, unique features or techniques in respect of any of the Employer's products or services, whether existing or in development.

10. INTELLECTUAL PROPERTY RIGHTS

10.1 Ownership

During the term of employment the Employee acknowledges and agrees that all existing and future Intellectual Property rights:

(a) In any confidential information;

(b) In respect of any intellectual property developed, in development, created or conceived wholly or partly by the Employee during employment alone or together with any other person or body, whether during or outside working hours;

(c) In respect of or associated with any of the Employer's products or services, and any alterations or additions or methods of making, using, marketing, selling or providing those products or services,

vest in and belong to the Employer, and to the extent that they may for any reason vest in the Employee are assigned by the Employee to vest in the Employer or its nominee.

…

10.6 Continuing obligations

The obligations of the Employee relating to Intellectual Property Rights continue after the

termination of this Agreement so far as it relates to intellectual property rights of a type or kind referenced in clause 10.1 hereof and not otherwise in respect to intellectual property rights developed by the Employee after the termination of this Agreement.

12. ***PROTECTION OF GOODWILL***

12.1 ***Restraint***

(a) *Subject to clause 12.3 in consideration of the Employee's employment and to protect the Employer's goodwill the Employee agrees the Employee will not in any capacity, directly or indirectly do any of the following:*

(i) *Induce other employees to resign;*

(ii) *Be associated with or engaged or interested in any business within New Zealand which is engaged in drinking chocolate powder manufacturing and/or the retail, wholesale or commercial distribution of drinking chocolate powder, whether on their own account or as a consultant to or a partner, agent, employee, shareholder, member or director of any other person, or in any other way whatsoever;*

(b) *For the term of this Agreement and for a three (3) year period after termination of this agreement.*

(c) *Nothing in this section limits the obligations owed to the Employer by the Employee under s.23 of the SPA.*

[6] It is common ground there was no restraint of trade in respect of coffee between the parties. The parties also entered into a confidentiality deed on 15 August 2011 which contained the following relevant clauses:

3. ***AGREEMENTS BY THE EMPLOYEE***

…

3.3 *The Employee agrees with the company that it shall not disclose, divulge, reveal or expose any Confidential Information or suffer or permit it to be disclosed, divulged, revealed or exposed to any person, business, partnership, joint venture, company, related corporation or any other entity without the express written authority of the Company* ***PROVIDED THAT*** *the Employee further agrees that such express written authority by the Company shall only be given on the basis that:*

(a) *The party or parties to whom the Confidential Information is disclosed shall be*

bound by the obligations of confidence imposed by this Agreement and at law;

(b) Otherwise permitted by law.

3.4 Without limiting the generality of the obligation of confidence imposed on the Employee contained in clause 3.3 hereof, the Employee shall not:

(a) Manufacture any product or use any processes, methods or procedures of operation contained in any Confidential Information whether for testing or otherwise without the consent in writing of the Company;
(b) Use or disclose to a third party any aspect of any Confidential Information received except as provided in clause 3.3;
(c) By using or by having knowledge of any Confidential Information contact, discuss with, correspond with or contract or agree with any employee, client, supplier, consultant or contractor of the Company;
(d) Photocopy any or all of the Confidential Information.

...

7. INTELLECTUAL PROPERTY

7.1 The Employee recognises that Confidential Information is a fundamental cornerstone of the Company's Business and the Employee agrees not to in any way infringe the rights of the Company or Related Companies.

7.2 If as part of the Employee's employment the Employee is to create any confidential information then pursuant to the Copyright Act 1968 the Employee hereby assigns all future copyright in the confidential information to the company.

[7] During his employment, the respondent was also given use of a corporate credit card.

[8] On 10 March 2014, the respondent tendered his resignation by email. He advised *"I intend on staying in the same industry, but return to a smaller boutique style of coffee roasting business."*

[9] Following his resignation he spent $3,611.15 upon entertainment expenses for clients and staff between 18 March and 6 June 2014.[1]

[10] On 19 March 2014 the respondent incorporated a company, The Village Roaster Limited. He is listed as one of its directors.

[11] On 20 March 2014 the respondent purchased a Chinook 25kg Air Flow coffee roaster. The coffee roaster was not delivered until September 2014.

[12] The respondent's last day of work was 10 June 2014. He returned his mobile phone and laptop. Files on the laptop had been deleted.

[13] On 18 June 2014 the respondent leased premises for his coffee roasting business.

[14] On 22 October 2014 the applicant raised with the respondent breaches of his employment agreement. It sought within seven days confirmation the respondent *"will immediately cease and desist"* contacting the applicant's customers or suppliers, comply with his confidentiality obligations and return its records obtained during the course of his employment including customer and supply lists, recipes, technical specifications, plans, designs, know-how, research, formulae, processes or applications and techniques. It asked for the respondent to execute a statutory declaration to the above effect.

[15] On 24 October 2014, the respondent's solicitor replied in full to the allegations including attaching a statutory declaration.

[16] On 30 October 2014, the applicant's solicitor raised allegations that the respondent had represented he wished to *"purchase a café with a small boutique coffee roasting business attached"*. It alleged the respondent had set up in direct competition to the applicant and was approaching major clients to offer pricing at significant discounts to the applicants. It also alleged he was manufacturing and producing the same coffee, and retained possession of client details, pricing structures, roasting recipes and distribution processes, time of supply and quantities required by customers.

[17] The parties were unable to resolve matters between themselves.

[18] A Statement of Problem was filed on or about 21 November 2014.

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[1] Bundle of Documents Tab 12-13 and Affidavit G Alford sworn 19 December 2014 Annexures G and H

[19] Issues have now been raised about the entertainment expenses of $3,611.15 following resignation and $2,036.40 incurred prior to resignation.[2]

[20] The matter is now before me for determination.

Issues

[21] At a teleconference held on 12 December 2014, the parties agreed the following issues by consent:

(a) Has the respondent acted unlawfully and breached his obligations under his employment agreement?

(b) If he has, what penalties, compensation and other relief such as further restraints to deal with further customers of the applicant should be ordered against the respondent?

Has the respondent acted unlawfully and breached his obligations under his employment agreement?

[22] The applicant alleges the respondent breached its contractual and statutory duties in various ways namely:

a) Misleading statements during resignation about setting up a café with a self-roasting business;

b) Taking preparatory steps during his employment in the form of legal advice about setting up a competing business, incorporating a company, purchase of a coffee bean air roaster and negotiations to enter into a lease for premises to run the competing business;

c) Misusing the respondent's entertainment expense account and diverting business; and

d) Taking confidential information in the form of client contacts, coffee bean roasting recipes and other unspecified information he may have held on a laptop.

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2 See above n1

[23] It is common ground there is no restraint of trade in the respondent's employment agreement preventing him from setting up a coffee manufacturing business. In absence the applicant relies upon an implied duty of fidelity and to act in good faith.

Law

[24] Any conduct by an employee which is likely to damage the employer's business or to undermine significantly the trust which the employer is entitled to place in the employee, could constitute a breach of duty. The duty of fidelity and good faith carries with it a duty not to undermine the relationship of trust and confidence[3]. Whether the conduct is sufficiently serious to warrant action is a matter of fact and degree which must be judged against the circumstances of the individual case[4].

[25] While an employee remains in the employment of the employer, the implied obligations impose a duty of good faith or fidelity on an employee. The extent of the duty of good faith will vary according to the nature of the contract. The duty of good faith will be broken if the employee makes or copies a list of the customers of the employer for use after his employment ends or deliberately memorises such a list, even though (except in special circumstances) there is no general restriction on an ex-employee canvassing or doing business with customers of his former employer.[5]

[26] If a manager or senior employee observes actions that are harmful to the employer it is no great extension of the duty of fidelity or trust and confidence to require that employee to report that conduct to the employer. That must be equally so when the conduct in question is being performed either by the employee or at that employee's instigation or where he or she is complicit in that conduct.[6]

[27] There is no obligation for an employee to disclose it wished to leave and compete under the duty of fidelity. The law has not reached a point that the duty of fidelity includes disclosing either one's own or one's fellow employee's intention to simply leave and compete.[7]

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3 *Tisco Ltd v Communication and Energy Workers' Union* [1993] 2 ERNZ 779, 782
4 *Big Save Furniture Ltd v Bridge* [1994] 2 ERNZ 507, 517
5 *Facccenda Chicken Ltd v Fowler* [1986] 1 All ER 617 (CA)
6 *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 at [141] and [142].
7 *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 at [141] and [142].

[28] Confidential information about an employer's business acquired by an employee in the course of employment could be used by the employee after the employment had ceased unless the information could be classed as a trade secret or was so confidential that it required the same protection as a trade secret, and that the use of less confidential information could not be restricted by a covenant in restraint of trade.[8]

Credibility

[29] There is a substantial conflict of evidence between the parties. This requires express findings of credibility[9] upon evidence given by affidavit, brief and orally at hearing.

[30] Credibility can be assessed on two bases – the witness personally[10] and the story the witness tells. Some factors relevant to personal credibility are:

(a) Demeanour[11];

(b) Inconsistencies and contradictions of all kinds[12];

(c) Prevarication[13];

(d) Reasons to lie[14]

(e) Concessions made where due, despite any perception by the witness of a risk to credibility in giving that evidence[15].

[31] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?[16]

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8 *Eftpos NZ Ltd v Walker* [1998] 3 ERNZ 304, 312 citing with approval above n3.

9 *RNZAF Museum Trust Board v Hunter* Employment Court Wellington WC11/00, 1 March 2000 at p6.

10 *Kelly v Accident Rehabilitation & Compensation Insurance Corporation* EMC Wellington WC 13/99, 24 March 1999 at p69.

11 *Hakaraia v Foodstuffs (Wellington) Co-operative Society Ltd* Employment Court, Wellington WC6/01, 22 February 2001 at [14]; *T v SAR Ltd* ERA Christchurch CA126/05, 23 September 2005; *Young v Venables t/a Mt Eden Bakery & Delicatessen* Employment Court Auckland AC88/00, 7 November 2000 at p 6.

12 *Taiapa v Te Runanga O Turanganui A Kiwa t/a Turanga Ararau Private Training Establishment* [2012] NZERA Auckland 252.

13 *Griffith v Sunbeam Corporation Ltd* EMC Wellington WC13/06, 28 July 2006 at [108].

14 See above at [109].

15 See above at [110]

16 See above at [111]; *Corbett* v *National Mutual Finance Ltd* (CA 172/91, 10 February 1992, p10

[32] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation.[17]

[33] The burden of establishing each of the disputed factual elements lies with the applicant and the standard is the balance of probabilities.[18]

Alleged Conduct

Resignation

[34] There is a dispute regarding what the respondent told Garry Alford, director of the respondent's parent company RFG, about his business. Mr Alford alleges he was told the respondent's desire was to establish a café that self-roasted.[19] The respondent denied any discussions about restrictions upon him setting up a coffee roasting business post termination.

[35] On its face the resignation email plainly states the respondent intended staying in the same industry operating a "*smaller boutique style of coffee roasting business".* It does not refer to setting up a café that self-roasted. The email should have given the applicant sufficient warning the respondent may be leaving to compete with it.

[36] I am not sure the respondent subsequently told Mr Alford or anyone else he intended to set up a café that self-roasted. Mr Alford's letter dated 22 October 2014 does not refer to Mr Farrimond telling him he was setting up a café that self-roasted. This was raised for the first time in the applicant's lawyer's letter dated 30 October 2014. This letter also alleged the respondent discussed a café with a small boutique roasting business with Mr Johnstone. Matthew Johnstone did not confirm in his evidence that this conversation occurred at all.

[37] I am surprised no risk assessment was undertaken about the respondent's departure given the email and the imminent departure of a senior employee. There appeared to be little in the way of any formal handover between the applicant and respondent inferring there was little or no objection to the proposed competition. It

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17 *New Zealand Merchant Service Guild IUOW Inc v New Zealand Rail Ltd* [1991] 2 ERNZ 587 (LC), at 603

18 *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 at [33]

19 Affidavit G Alford sworn 17 November 2014 at para 15.

may be Mr Alford mistook what the respondent had told him regarding the nature and scale of the business he intended to undertake given no contemporaneous note was produced of this alleged conversation.

[38] It also appears illogical for the respondent to set up a café that self-roasted. There was evidence about the high costs of purchasing a coffee roaster and green beans. From the evidence before me it did not appear economically viable to do so.

[39] The evidence does not support a finding on the balance of probabilities that the respondent made the alleged statement he was setting up a café that self-roasted.

Preparatory Steps

[40] It is accepted during his employment the respondent incorporated a company and was named as its director without written consent in breach of clause 4.2 of his employment agreement. I deal with this further below in remedies. It is also accepted during his employment that the respondent obtained legal advice about his post termination business, purchased a Chinook coffee bean air roaster and was negotiating to secure leased premises.

[41] The applicant accepts the steps taken by the respondent up to the purchase of the roaster were preparatory competitive steps. Once he had purchased the roaster it was submitted he was in competition with the applicant and therefore breached his duty of fidelity.

[42] The freedom of movement of employees and the authorities allow preparatory competitive steps to be taken, provided these are not in breach of the obligation not to compete or to damage the employer, whilst the employee is still under the duty of fidelity, trust and confidence. [20]

[43] The purchase of the coffee roaster could not have enabled him to immediately compete with the respondent or cause damage. The coffee roaster did not arrive in New Zealand until September 2014. From the evidence given by the respondent, the coffee roaster needed to be built from scratch, there was no guarantee when this would be completed and when it could be freighted from Australia to New Zealand. The purchase of the coffee roaster could not have triggered any competition or damage to the respondent's business because he would not have been able to compete

[20] *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 at [141] and [142].

with the applicant until it arrived in New Zealand. All of these actions were preparatory competitive steps only. They did not breach any duty.

Diversion of clients

[44] The applicant alleges Mr Farrimond wined and dined respondent clients on his company credit card with the intention to divert them to his business. It is also alleged he approached clients during his employment about supplying replications of the applicant coffee blends.

[45] The applicant produced copies of receipts from Mr Farrimond's expenses account and a copy of a policy for RFG Corporate. Gary Alford referred to the RFG travel policy setting a limit of $60 per day and his own expectation of 2 alcoholic drinks per person. The receipts produced were more than the daily amount and included large amounts of alcohol. There were unsigned policies pertaining to entertainment expenses contained a requirement the expenses were approved in advance.[21] Andrew Brodie, former General Manager, gave evidence that the respondent was made very aware what the protocols were for claiming expenses in relation to entertaining customers, his own overspending on entertainment expenses and being told by Mr Alford the applicant would not reimburse the expense.[22]

[46] Clause 8 of the employment agreement set out the terms of use of the credit card facility. The credit charge card facilities were to be used *"for the purposes of the Employee incurring legitimate business expenses for and on behalf of the Employer."*

[47] It is common ground these credit card receipts document expenses incurred with clients or for staff. Prima facie these all appear to be legitimate business expenses. I cannot see anything in the receipts themselves which supports the applicant's assertion the respondent was diverting business. There may be concerns about the amounts spent on alcohol but it is speculative to assert this is evidence he was using the credit card to divert business.

[48] Under examination Mr Alford conceded some of the receipts were legitimate expenses. He also conceded some would have fallen within his two drink rule. His primary objection was the amount of alcohol charged.

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21 Bundle of Documents Tab 11 p82.

22 Affidavit A Brodie sworn 19 December 2014 at para 3.

[49] The respondent denied knowing about the two drink rule or using his entertainment expense account to divert clients to his new business. He states he was unaware of the RFG travel and entertainment expenses policies because he had not signed them. He accepted they were probably available somewhere in the company.

[50] The respondent also denied knowing about Mr Brodie's problems with entertainment expenses. Mr Brodie's evidence does not confirm what the entertainment expenses protocols he and the respondent were made aware of when they became applicant employees. Rather he gives an example where Mr Alford refused to later reimburse him for a $1,000 lunch. It is from then on he is conscious of getting any entertainment approved or within protocols whatever that may mean. This infers Mr Brodie may not have known about any pre-approval of entertainment expenses when he first became an employee.

[51] I am concerned that the respondent is being treated differently from Mr Brodie. He did not know about these disputed expenses until they were included in Mr Alford's affidavit filed on 19 December 2014. He was not given any opportunity to explain the circumstances in which they were incurred until hearing. Some, if not all of these appear to be legitimate business expenses.

[52] Matthew Johnstone was present during the majority of the alleged overspending on client entertainment. He did not complain at the time about any excessive spending or breach of RFG policies. This was because he was unaware of any policies or protocols around drinking. His evidence made no reference to suspicious conduct by the respondent at these client meetings. He took no notes and had little recollection about the discussions.

[53] I also note the applicant accepted these receipts for reimbursement at the time. It is only some months later during litigation that they are produced for the purposes of seeking a penalty. Even if I was to find there had been a breach of the agreement through the excessive charging of alcohol, I would not be minded to impose any penalty in these circumstances.

[54] It was agreed Mr Farrimond removed another client's coffee machine and replaced it with another. The client states it entered into discussions with Mr Farrimond about supplying his coffee in September 2014 and purchased $10,000 of

new equipment at the same time.[23] Mr Farrimond stated he sold the machine to them at cost price and made no profit. Any claim for return of the machine must lie with the client not Mr Farrimond. Given his employment had terminated at this stage, this cannot be any breach.

[55] Matthew Johnstone and Nicky Twiss gave heresay evidence a client had been told by Mr Farrimond that he would match the applicant's blend of coffee.[24] Ms Twiss also alleges she was not encouraged by Mr Farrimond to communicate with clients.[25] The client concerned denied she advised either Mr Johnstone or Ms Twiss the respondent was matching the applicants blend. The client further states Ms Twiss did come to see her but there were times the client (not the respondent) refused to meet because it was inconvenient.[26] There is an absence of any motive for the client to be untruthful. I place more weight on the client's evidence than Mr Johnstone's or Ms Twiss.

[56] The respondent denied making any statement he would try to match their blend or even trying to do so. His business plan was to roast a coffee blend to meet the client café's preferences. Matthew Johnstone gave evidence the respondent did not have the skillset to create and maintain blends including its own.[27] The respondent sought advice from John Burton Limited about roasting his own fair trade organic blend.[28] It seems unlikely in the circumstances he would or could match the applicant's blend at all. Rather he relied upon John Burton to assist in that regard. Mr Burton has not given evidence of any attempt by the respondent to replicate the applicant's blends.

[57] It seemed illogical for the respondent to reproduce the applicant's coffee blend to divert business when he lacked the resources to meet the demands of the applicant's clientele. The applicant's clients required higher volumes than the respondent appeared able to produce. The applicant was able to obtain the green beans at a discounted rate which the respondent could not.[29] I doubt the respondent

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23 Affidavit Gregory Cornes sworn28 November 2014 para 4-5.
24 Affidavit Matthew Johnstone sworn 20 November 2014 para 23(a).
25 Affidavit Nicky Twiss sworn 20 November 2014 paras. 5-6.
26 Affidavit Christine McFarlane sworn 28 November 2014 para 6.
27 Affidavit Matthew Johnstone sworn 20 November 2014 paras. 16-17.
28 Affidavit Henrik Rylev sworn 28 November 2014 para 5.
29 Affidavit John Burton sworn 20 November 2014 para 5 - 6.

could have maintained a similar supply and pricing for applicant clientele over the long term. The evidence does not support a probable inference the respondent was diverting the applicant's clientele to his business during employment including statements about matching the applicant's blend.

Confidential Information

[58] It was alleged Mr Farrimond took information in the form of coffee roasting blend recipes, pricing, laptop files and a SIM card.

[59] There is no evidence Mr Farrimond physically removed the recipes. It is inferred he copied or memorised them given his alleged statements to clients about matching blends. I have determined the statements were not made as alleged. Therefore the allegation he memorised or copied them must also fail. I see nothing in the evidence produced, including his pricing of a recipe for a client in spiral bound diaries he returned to the respondent, inferring he memorised the applicant's recipes. It is mere speculation.

[60] It is accepted Mr Farrimond knew about the applicant's pricing structure because he was responsible for setting it. Mr Farrimond gave evidence the applicants pricing could only be fixed for six months at a time due to price fluctuations in green beans. They would negotiate a set price for purchasing the green beans in six month periods. This was last set in November 2013 during his employment. Any knowledge of pricing would have been redundant at the time of his termination.

[61] There was heresay evidence a client told Mr Johnstone the respondent tried to undercut the applicant's pricing inferring he was using his knowledge of the applicant's pricing. I have no dates this conversation allegedly occurred. These approaches seem to have happened after termination when the applicant's pricing information would have been redundant. The respondent denied deliberately undercutting the applicant but accepts he gave this client 'sharp' pricing. There is no detail about the respondent product offered, the respondent's pricing offered and the applicant's pricing at the time. Any undercutting that occurred may have been luck as opposed to actual knowledge of the applicant's pricing structure at the time. Other issues such as customer preferences may override pricing in determining whether to change suppliers in any event. The applicant did not have exclusive supplier agreements with any of these clients.

[62] It is alleged by Mr Johnstone the respondent approached John Burton during his employment demanding green beans at a similar price to the applicants. This is contradicted by the evidence of Mr Burton. He says he was approached on 3 July 2014 by the respondent seeking similar pricing which was refused due to the differences in quantities. The evidence of Mr Burton inferred he set the price based upon quantities supplied.[30] The green beans were also purchased in US dollars and subject to currency fluctuations. There is no evidence the applicants pricing from John Burton was exclusive or a trade secret.

[63] It was accepted the laptop had been returned without any files and the content of the respondent's inbox had been deleted. The mobile phone was returned but there is a dispute whether this included the SIM card. The respondent says he deleted all of the content on the laptop because it was personal or sensitive. He assumed the laptop was being backed up to the server so the applicant could retrieve anything it needed. It was not. The respondent believed he had returned his SIM card. He accepted it may have had confidential information but did not believe there was any benefit for him in retaining that information. There is no evidence the lap top or phone contained coffee blend recipes or pricing information. It is common ground the coffee blend recipes were in a book located near the coffee roaster. I accept the respondent's evidence pricing was located in his diaries not his laptop or mobile. There is no evidence any information he had on the laptop or phone was not deleted.

[64] I am not convinced on the balance of probabilities the respondent uplifted or misused the applicant's confidential information as suggested.

[65] Given the above, I determine the respondent has not acted unlawfully by breaching his obligations under his employment agreement with the exception of the incorporation of the company, The Village Roaster Limited.

If he has, what penalties, compensation and other relief such as further restraints to deal with further customers of the applicant should be ordered against the respondent?

[66] As noted above, the incorporation of the Village Roaster Limited was in breach of clause 4.2 of his employment. The clause requires that he seek written consent which he did not. This is a breach of his employment agreement which may be subject to a penalty under s135 of the Act.

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30 Affidavit John Burton sworn 20 November 2014 paras 4-5.

[67] The Authority has discretion to either award a penalty claimed or dismiss the action under s 135 (4) of the Act. The Employment Court noted a non-exhaustive list of factors that may usefully be considered when considering whether it is an appropriate case to award a penalty and if so the quantum of the penalty:[31]

- The seriousness of the breach;
- Whether the breach is one-off or repeated;
- The impact, if any, on the employer/respective employees;
- The vulnerability of the employer/respective employees;
- The need for deterrence;
- Remorse shown by the party in breach; and
- The range of penalties imposed in other comparable cases.

[68] It is generally accepted that a penalty should only be imposed for the purpose of punishment and should not be used as an alternative route for increasing compensation.[32]

[69] There is no record of the respondent having previously appeared before the Authority or Court regarding breaches of his employment agreement. I accept this involved an inadvertent breach given my above findings about his resignation and the preparatory competitive steps taken by Mr Farrimond prior to termination. I must weigh this against the seriousness of a breach of an express term in the parties employment agreement.

[70] His action appears to have been a one off incident and was not repeated during his employment. The impact of the incorporation of the company upon the respondent appears negligible. There is no evidence this breach exposed any vulnerability for the employer. I accept there is a need for deterrence to prevent breaches of agreements by parties. The range of penalties imposed in the past 12 months ranges from under $2,000 to $10,000 + although these have been part of global awards for multiple breaches which is not the case here.

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31 *Tan v Yang & Zhang* [2014] NZEmpC 65 at para.[32]

32 *Xu v McIntosh* [2004] 2 ERNZ 448 (EmpC).

[71] I understand the respondent accepted the breach as early as 24 October 2014. He also signed a statutory declaration about acting in the respondent's best interests and denying he uplifted any confidential information.

[72] In my view this is a matter which does not require a penalty to mark the breach of an express term of an employment agreement. Given the breach was inadvertent, accepted at the earliest opportunity and not repeated, the publication of my determination should be sufficient penalty to mark any breach.

[73] Accordingly I decline to award a penalty in the circumstances.

[74] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority