**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2011] NZERA Auckland 393
5308030

| | | |
|---|---|---|
| | BETWEEN | CONTINENTAL CAR SERVICES LIMITED (Applicant) |
| | AND | JASON JOYCE (First Respondent) |
| | | RICHARD GORDON (Second Respondent) |
| Member of Authority: | Yvonne Oldfield | |
| Representatives: | R. Towner and N. Van Der Sluis for applicant<br>C. Blake and S. Van der Waal for respondents | |
| Investigation meetings | 29 October 2010, 8 and 9 December 2010 | |
| Further information provided | 14, 20, 21, 22 December 2010 | |
| Submissions: | 11 February 2011, 4 March 2011 for Applicant,<br>25 February 2011 for Respondents | |
| Determination: | 12 September 2011 | |

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] The applicant (Continental Cars) occupies a prominent place in the motor vehicle industry. Its operations include workshops providing specialised after sales servicing and repairs to European vehicles, the owners of which derive a significant resale advantage from a service history with Continental Cars.

[2] The applicant's Volkswagen workshop is split into two departments: passenger and commercial. Up until early 2010 the first respondent, Mr Joyce, managed the commercial department and the second respondent, Mr Gordon, the

passenger department. Mr Joyce and Mr Gordon were party to written employment agreements which contained identical provisions regarding obligations of fidelity and confidentiality (the latter being expressed to survive after employment ended.) In addition Mr Joyce's agreement also contained a restraint of trade provision. The relevant clauses are set out in Appendix A to this determination.

[3] In February and March of 2010 the respondents resigned in turn and went to work for a new Auckland business which Continental Cars says is a direct competitor: Car n Camper Service Centre Limited (Car n Camper.) After they had gone the level of work through the Volkswagen workshops dropped off. In particular there was less work than expected from a key client in the campervan market ("THL.")

[4] Continental Cars understands that Car n Camper has picked up work from THL and attributes this to the actions of the respondents. It says Mr Joyce and Mr Gordon began organising and planning to help set up Car n Camper even before they left Continental Cars. It says that they failed to disclose that Car n Camper was targeting Continental customers and even solicited customers themselves, with the result that the applicant's customers and suppliers became aware of the existence of the new business before the applicant.

[5] As a result of all this Continental Cars claims the two men breached their duties of fidelity and confidentiality whilst employed. It also says they breached on-going obligations of confidentiality after their employment ended. Continental Cars claims that Mr Joyce has also breached his restraint of trade and finally, it claims that after he left it came to light that he had misappropriated several items of company property. In respect of these alleged breaches Continental Cars seeks orders for compliance, damages, interest and penalties against the respondents.

[6] Mr Joyce and Mr Gordon assert that Continental Cars has overstated both their level of access to confidential information and the strategic significance of their roles as Service Managers. They deny breaching their obligations of fidelity and loyalty and their obligation to act in good faith whilst employed by the applicant. They also reject the suggestion that they have disclosed confidential information belonging to Continental Cars to any third party or used any such information for their own benefit or the benefit of a third party.

[7] As for the alleged breach of restraint of trade, Mr Joyce denies any causative link between any actions he has taken and any loss Continental Cars may have suffered. In submissions on Mr Joyce's behalf it is also argued that the restraint to which he was subject was "*not applicable and unenforceable*." Mr Joyce also denies that he misappropriated company property.

*Requests for non-publication orders*

[8] During the course of the Authority's investigation orders were put in place to protect confidential information disclosed by Car n Camper. It has not been necessary to refer to this information in this determination. No orders for non-publication are therefore needed in respect of the determination itself. However the parties are reminded that the non-publication orders imposed during the investigation remain in place.

**Issues**

[9] The issues for determination are:

i. Whether the applicant has a genuine proprietary interest in information or relationships to which the two service managers became party whilst employed;

ii. Whether Car n Camper was a competitor of the applicant;

iii. Whether Mr Joyce and/or Mr Gordon breached their obligations of fidelity during their employment with Continental Cars;

iv. Whether, before or after their employment ended, Mr Joyce and/or Mr Gordon breached the confidentiality provisions of their respective employment agreements;

v. Whether there was adequate consideration for the restraint provision in Mr Joyce's agreement, whether it was reasonable and if not, whether and how it should be modified;

vi. Whether Mr Joyce was in breach of the restraint of trade, and

vii. Whether Mr Joyce misappropriated resources belonging to Continental Cars.

[10] If it is established that any one or more of the alleged breaches has been made out questions will also arise as to the extent of any loss attributable to the breach and what remedies are in order.

(i) **The proprietary interests**

[11] Mr Joyce and Mr Gordon are mechanics by trade. In the role of Service Manager each of them ran a workshop and supervised a team of mechanics. They were responsible for dealing with key customers, handling complaints and overall, maintaining the highest standards of customer service. There appears to be no dispute that they are highly skilled and experienced in their field and held their positions by virtue of this level of expertise.

[12] It was also agreed that the two Service Managers had access to information about the size and composition of client fleets, names of fleet managers or lease company representatives, pricing information and profit and loss data (including, in some cases, data showing the impact of seasonal variations on workflows.)

[13] Continental Cars says that in Mr Joyce's case this included information regarding a 2009 proposal to restructure the way Continental Cars provided services to THL. Continental Cars and THL had considered alternative ways of doing business before and in 2009 the proposal was for Continental Cars to run a workshop at THL's Auckland Airport location. Applicant witnesses told the Authority that Mr Joyce assisted in the development of the proposal and participated in pricing discussions.

[14] In the end, nothing came of the negotiations and arrangements between the two companies continued unchanged. Division Manager Tony Elsmore maintained that it was no coincidence that later, when Mr Joyce left, it was to work at a new workshop at the airport. He concluded that this was something the two men must have been planning for some time.

[15] Mr Joyce has downplayed his part in the 2009 proposal. He denied being one of the key players in the pursuit of the plan or knowing all its detail. This is accepted, but it was also the case that he visited THL's site and was included in discussions about pricing. He knew that a substantial part of the THL fleet (originally purchased from Continental Cars) was due to come out of warranty from 2008 onwards and knew that this presented a significant business opportunity for the applicant or for its competitors.

[16] The respondents also maintain that Mr Elsmore has overstated the significance of their relationships with clients. In submissions on their behalf it was argued that customer relationships with Continental are primarily founded and dependant upon its prestige status in the marketplace, as opposed to the person occupying the position of Service Manager.

[17] That submission is accepted as far as it goes. The Service Managers' roles were not primarily focussed on sales or marketing. There is no dispute, however, that the Service Manager roles brought Mr Joyce and Mr Gordon into contact with clients, and it is clear that they played an important role in helping to preserve the applicant's prestige status in the marketplace. Service Managers helped retain customers (after sales) by maintaining the high standards and reliability expected of the brand and by building client confidence and trust.

[18] To summarise, the evidence established that:

i. as set out above, in the normal course of their duties, both Service Managers were privy to confidential business information which was of potential value to a competitor;

ii. Mr Joyce was sufficiently involved in the THL proposal to gain an understanding of what the client needed and how Continental Cars proposed to provide it. The THL information Mr Joyce had, whilst not fully comprehensive, was nonetheless valuable information;

iii. It was part of the Service Manager's job to develop good relationships with clients, for the benefit of the applicant's business.

[19] Continental Cars has therefore established that it had a proprietary interest in information to which the two respondents had become privy and in the relationships they had developed with clients.

**(ii) Whether Car n Camper was a competitor**

[20] Car n Camper is a new business located near the airport. It was incorporated on 26 February 2010. Director Dean King told me that there was at that time only one garage in the vicinity of the airport and he planned to offer automotive repairs to the general public as well as businesses in the area. He had his first customer in April 2010 and his first work from THL in May 2010.

[21] To say that Car n Camper is a more modest operator than the applicant would, I accept, be a serious understatement. Nonetheless there is no dispute that Car n Camper has picked up some of the same type of work as Continental Cars in that it has had some work from THL. Notwithstanding the differences between the two companies, I accept that there is a degree of overlap in the markets they are targeting. They are, therefore, direct competitors for certain work.

**(iii) Alleged breaches of duties of fidelity**

[22] On 22 February 2010 Mr Joyce told Mr Elsmore that he was leaving and planned to move to Australia. His final day of work was to be 31 March. At first, this news did not arouse any concern on Mr Elsmore's part. Then on 16 March an anonymous email was received through the Continental Cars website to the effect that

Mr Joyce was setting up a competing business. Two days later a similar message was taken from a woman caller who also named Mr Gordon as Mr Joyce's associate.

[23] Neither source was identified but Mr Elsmore and Human Resources Manager Nicola Winnard were concerned enough for Ms Winnard to put the information to Mr Gordon. He acknowledged that he and Mr Joyce had plans to go and work for Car and Camper. Although Mr Gordon had not intended to leave until the new business was properly up and running, he felt these events forced his hand. He telephoned Mr King on the evening of 18 March to confirm that there was a job for him and after learning that there was, resigned on 19 March.

[24] Mr Gordon then agreed to take garden leave, as did Mr Joyce when confronted with the allegation about his involvement. Mr Joyce's garden leave (and hence his employment) ended on 31 March and Mr Gordon's on 16 April. Until those dates they remained subject to duties of fidelity.

[25] Mr Gordon has subsequently told the Authority that Dean King was a very old friend of his. (In addition, as the owner of a high value European car, he was and remains a customer of Continental Cars himself.) Mr Gordon told the Authority that it was he who introduced Mr Joyce and Mr King. He, Mr King and Mr Joyce all say this occurred on February 28 when Mr King was invited to join Mr Gordon and Mr Joyce on a fishing trip in Mr Joyce's boat.

[26] The evidence was not clear as to when Mr Gordon first knew of Mr King's plans about the new business but I consider it more likely than not that it was prior to the fishing trip. All three men were however firm in their evidence that it was on this trip that Mr King disclosed his plans to Mr Joyce and then suggested to both men that they might consider coming to work for him. All three are also adamant that there was no suggestion (and never has been) that Mr Joyce or Mr Gordon would be partners in the business. Having heard no evidence to the contrary, I accept that Car n Camper is Mr King's company and that the other two have no proprietary interest in it.

[27] In addition to the anonymous messages described above, Continental Cars says customers had reported being approached by Mr Joyce about doing business with the new operation. Mr Flude (Mr Joyce's replacement as Service Manager) told the

Authority he had heard this from the THL Service Manager and Mr Bradley Carrick, (the applicant's Commercial Vehicle Sales Manager) stated that he heard it from a customer with a courier business. Both witnesses said they received these reports in May. There was no evidence from the individuals who were said to have made these reports

*Determination*

[28] There has been very little direct evidence to establish any breach of duty during the employment. Although applicant witnesses spoke of hearing that Mr Joyce had approached customers there was no first hand evidence of this and nothing to establish that it happened during the employment.

[29] Nor has there been very much evidence about what the respondents knew about the proposed business at the stage in question. All I can safely conclude is that by 28 February Mr Joyce and Mr Gordon knew that Mr King was setting up a new business which would be competing with the applicant in respect of the Volkswagen and campervan market. Some time thereafter they agreed to go and work for him, and until 18 March they had taken no steps to disclose any of this.

[30] While there may be circumstances in which a failure to disclose information about a competitor might amount to a breach of duty, it is not a breach of the duty of fidelity to discuss a possible change of employment with a potential employer whilst still in other employment. As Judge Travis noted in *Rooney Earthmoving Limited v McTague [2009] ERNZ 240*:

> *"[142] …I am not persuaded that the law has reached a point that the duty includes disclosing either one's own or one's fellow employee's intention to simply leave and compete. To so hold would be to undermine the freedom of movement of employees and be contrary to the authorities which 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…."*

[31] Even by March 18 Car n Camper was still in an early stage of development. There is insufficient basis to say that it posed a threat to the applicant at that point. It follows that the situation was not one where the failure to disclose amounted to a breach of duty.

[32] There was a separate submission from the applicant to the effect that the two respondents were acting in concert and thereby attempting to solicit the other in what amounted to a further breach of duty. Given the finding that neither has breached the duty of fidelity (acting alone) this submission also fails.

### (iv) **Alleged breaches of confidentiality**

[33] I have already recorded that the two respondents had access to certain confidential information belonging to the applicant. The question is now whether any of that confidential information has been misused.

[34] On 29 March the applicant's solicitors, Bell Gully, wrote to each of the respondents setting out clause 7 of their employment agreements and reminding them that their obligations of confidentiality continued after their employment ended. The letters concluded:

> *"Our instructions are that whilst employed by Continental Car Services Limited, you received confidential information about our client's important commercial customers….Any knowledge which you may have about our client's commercial customers (or for that matter any customers) is "confidential information" and covered by clause 7 of your employment agreement (including telephone numbers, contact persons, and service requirements.) You are prohibited by your employment agreement with our client from using any knowledge about any of these customers (or any other customers) which you acquired during the course of your employment with our client."*

[35] The letter set out a list of customers amongst which was "Tourism Holdings." There is no dispute that this was a reference to the customer identified here as "THL."

[36] Continental Cars now alleges the following breaches of confidentiality:

i. that Mr Gordon used a USB device to download information from the file "*vwcom"* on the workshop computer;

ii. that Mr Joyce and Mr Gordon misused the applicant's confidential information in relation to THL including contact details, relevant employee to deal with, service history, fleet size, warranty information (including when cars were coming

out of warranty) and requirements of THL (including pricing information) and

iii. that Mr Joyce misused the applicant's confidential information in relation to the courier driver client, including contact details, service history and pricing requirements.

*USB device*

[37] The allegation in relation to the USB device is the only specific allegation about information being physically taken from the workplace. The evidence to support the allegation was as follows. Mr Gordon, like other staff in his workshop, had been given a USB device to use in transferring information between different (non-networked) computers within the business. After he left, the USB he had used could not be located within his office and it was assumed he must have taken it home. A subsequent forensic search revealed that at 7.25 pm on 11 February 2010, when Mr Gordon was logged on, a USB drive had been connected to the workshop computer. A folder marked "vwcom" was accessed at 7.35 pm the same evening.

[38] Mr Gordon said he cannot remember this incident and had no way of knowing whether it involved him as his logon could be used by other workshop staff (although he conceded that the staff had usually gone home by that time of night.) As for the folder marked "vwcom" he said that he thought that was either where he stored a collection of jokes that he, Mr Joyce and other staff had exchanged, or a folder for general VW communications. This could not be verified as no residue of that folder was located in the forensic search. Mr Gordon denied taking any USB device from the applicant's premises, having a USB device at his home at all, or indeed ever having used such devices outside the workshop.

[39] Mr Elsmore feels certain that Mr Gordon (or even perhaps Mr Joyce) must have used a USB device to download confidential information and take it away. However I do not consider it open to me, on the limited evidence available, to come to such a conclusion. The allegation regarding misuse of the USB device has not been established on the balance of probabilities. I also confirm that no orders are or can be

made for the return of the USB device (as sought by the applicant) in the absence of evidence that Mr Gordon has it in his possession.

*THL information*

[40] Apart from the evidence relating to the USB, the Authority heard nothing to establish how or when Mr Joyce or Mr Gordon might actually have taken confidential information relating to THL or any other client, although the applicant asserts that Mr Joyce, in any event, would be in a position to recall some information such as the hourly rate for work on THL vehicles. The applicant also appears to rely on an inference that some of Mr King's business decisions must have been made on the basis of confidential information obtained from the respondents.

[41] As already set out, the evidence has established that Mr Joyce knew something of the THL business including THL's wish to have access to a workshop near the airport. He also knew the rate Continental Cars had proposed to charge THL. There is also no dispute that Car n Camper has set up business near the airport, or that Mr Joyce has performed work there on THL vehicles. It has also emerged that Car n Camper is charging THL $10.00 per hour less than the figure Continental Cars had proposed. Continental Cars say that taken together this establishes that the respondents, but principally Mr Joyce, have misused confidential information.

[42] That assertion has been countered by evidence from Mr Dean King. He acknowledges that one reason for positioning his operation close to the airport was the potential to attract business from operators with rental fleets (especially emergency business.) He does not however accept that he got this idea from the respondents. He explained to the Authority that he had a longstanding business connection with THL himself, having worked for the associated "Maui" campervan brand in the past. In this way, quite independently of Mr Joyce and Mr Gordon, he had his own contacts and was familiar with their business and requirements. This evidence was accepted.

[43] It is not an original proposition to locate an automotive workshop close to an airport and hence to the operators of large rental fleets. Indeed, as noted already, there was one existing competitor in the area when Mr King started Car n Camper. I cannot accept that this idea can be said to be the property of Continental Cars.

[44] Similarly I do not find it noteworthy that Car n Camper prices itself lower than Continental Cars. Although individual companies will not want to broadcast their hourly rates, the range of rates charged in an industry like this will be a matter of general knowledge. It is to be expected that a business like Car n Camper would pitch its rates at a lower point on that range than a top end operation like Continental Cars.

[45] It follows that it has not been established, on balance, that Mr King relied on information from the two respondents in setting his prices or in deciding to set up in business where he did. Having arrived at that point, and in the absence of direct evidence to show otherwise, I am unable to say that it has been made out that Mr Joyce and Mr Gordon have breached clause 7 of their respective employment agreements.

*Courier Driver Client*

[46] This claim is based on the same evidence referenced in relation to the alleged breach of fidelity. Mr Joyce admitted telling this customer of his availability to do some work for him but said it was a very brief conversation during a chance meeting and no specifics were discussed. There was no other first hand evidence of the conversation or of when it took place. On this basis the applicant argues that Mr Joyce misused the applicant's confidential information in relation to this client including contact details, service details and pricing requirements.

[47] Once again, I am unable to conclude that the evidence is sufficient to support the proposition advanced by the applicant. No breach of confidentiality has been made out in respect of the information relating to the courier driver.

### (v) The Restraint of Trade: consideration, reasonableness, and the question of modification

[48] All parties have acknowledged that in the event the Authority found that there was a proprietary interest to protect, it would be appropriate to consider whether there restraint provisions were unreasonable, and if they were, to consider whether those provisions should be modified pursuant to s. 8 (1) of the Illegal Contracts Act 1970 and s. 162 of the Employment Relations Act 2000.

[49] I have already set out conclusions that Continental Cars had a proprietary interest in respect of client relationships and confidential information to which Mr Joyce had become party. It now falls to be determined whether the restraint of trade provision in his agreement was necessary to protect these interests.

[50] Mr Joyce began his employment with the applicant, in 2004, as a Service Advisor and was promoted to Service Manager two years later. He was covered by a restraint provision in the Service Advisor role and thereafter. Mr Joyce told the Authority that he did not know anything about the provision until about a week after he first started work, when he was presented with a draft agreement by the human resources manager of the time. He said that in these circumstances he felt he had no choice but to sign the agreement. However the applicant's records indicated that he was provided with a proposed written agreement on 18 March 2004, signed it on 2 April 2004, and started work on 13 April 2004. Mr Joyce's base salary was $58,324.64 with bonuses of $13,400.00 and personal use of a motor vehicle.

[51] The restraint provision is contained in clause 8 of the employment agreement (and set out in Appendix A to this determination.) The operative parts, for the purposes of this case, are clauses 8.2 and 8.3. Clause 8.2 prohibits Mr Joyce from soliciting associates or business from the applicant within the greater Auckland area while Clause 8.3 prohibits him from competing with the applicant at any location within New Zealand. Both are expressed to run for six months after the employment ends.

[52] Continental Cars maintains that these restraints are reasonable in terms of both duration and coverage. It seeks to justify a six month restraint on the basis of the time required to find and train a replacement for what it says is a specialised role and on the basis of the need to allow time for his replacement to build and consolidate relationships with the customer base. It also notes that the average car is only serviced every six to 12 months and argues that a six month restraint was necessary to allow his replacement to form a relationship with regular clients "*before Mr Joyce could compete with them.*"

[53] As to the geographic scope of the restraints, it was argued in submissions for the applicant that:

> *"45. A non-compete restraint that covered New Zealand was reasonable because the applicant services Volkswagen vehicles New Zealand wide, not just in Newmarket or in Auckland. For many of the applicant's big clients (such as Coca-Cola and THL) the Volkswagen Commercial workshop facilitates servicing for the Volkswagen vehicles nationwide.*
>
> *46. A non-solicitation restraint that covered the Greater Auckland area was reasonable because the applicant services Volkswagen customers in the greater Auckland area, not just in Newmarket."*

[54] In submissions for Mr Joyce it was argued that there was an inequality of bargaining power and insufficient consideration for the restraint. As noted already, Mr Joyce considers the strategic significance of the Service Manager role has been overstated. He questions the need for a six month restraint or indeed, any restraint at all. It is Mr Joyce's position that a Service Manager can be recruited without difficulty and replaced with minimal disruption. Just like him, his successor moved into the Service Manager role from within existing staff and (as that individual conceded) was already very familiar with customers and other relevant information.

[55] Applicant witnesses acknowledged at the investigation meeting that it was in the interval between Mr Gordon's (earlier) employment and the time Mr Joyce entered into his agreement that a decision was made to introduce restraint of trade provisions across the board. Thereafter a standard clause was used in its employment agreements. It was submitted for Mr Joyce that these facts preclude Continental from arguing that his restraint was genuinely tailored to the need to protect the applicant's proprietary interests. It is argued that six month's protection was excessive and unreasonable, being an "*arbitrary restriction that was applied, without discretion, over the whole business*" and was unrelated to Mr Joyce's particular role in the business.

[56] It is also argued for Mr Joyce that by preventing him from working anywhere in NZ, in his only area of expertise, the non-competition aspect of the restraint goes much further than needed. As for the non-solicitation aspects of the restraint it is argued that they are unreasonable in that they purport to apply to any of the applicant's customers, whether or not Mr Joyce had dealt with them, and fail to identify just who those customers were.

*Determination*

[57] Where a restraint exists in a contract from the outset, consideration for the restraint will be found in the mutual exchange of promises between the parties. No extra consideration or "premium" is required.[1] Although Mr Joyce says that the applicant did not present his draft agreement to him until a few days after the commencement of his employment, I find the applicant's records to be the more reliable evidence of the sequence of events. The human resources manager at the time also told the Authority that Mr Joyce signed the document without any indication that he objected to it. Since that time the contract has been varied by agreement (to reflect Mr Joyce's promotion and increased remuneration) without any further discussion of the restraint.

[58] In these circumstances I accept that the restraint was in place from the outset of the employment with the agreed remuneration providing consideration for the restraint along with the other terms of employment.

[59] There has been no dispute that much of the work coming through the applicant's Volkswagen workshops involved large national fleets of passenger and commercial vehicles for major clients such as Coca Cola and THL. Such fleets move around the whole country. In this way, servicing work may be undertaken at a variety of locations. After Sales Manager Duane Jarrett and Service Manager Brendan Flude both conceded however that servicing is not a fully national business for the applicant. For completeness (since it does not affect the outcome of this case) I conclude that the scope of both parts of the restraint should be limited to the wider Auckland region.

[60] I do not find the applicant's arguments in respect of the six month duration to be persuasive either. I prefer the submissions made for Mr Joyce which was that the restraint appears to have been imposed without consideration of the specific issues relating to his position. I cannot accept that a Service Manager needs to be covered by a restraint of similar duration to that applied to senior employees or sales staff whose departure might pose a much more significant risk of lost business.

---

[1] *Fuel Espresso Ltd v Hsieh [2007] ERNZ 60 para [18].*

[61] Nor do I accept that it was likely to take six months to recruit and induct a replacement or for that replacement to build and consolidate customer relationships. Mr Flude replaced Mr Joyce in May 2010 after two years as Service Advisor (reporting to Mr Joyce) and five with the applicant in total. His promotion was consistent with the applicant's previous practice of appointing Service Managers from within the ranks. This practice is unsurprising given the nature of the workshop operation which provides for career progression with four levels of workshop staff (Technician, Foreman, Service Advisor and Service Manager.)

[62] Many of the leading cases which have addressed the question of the reasonableness of restraint provisions have involved employees of the senior or sales types mentioned above. Even in those cases, the pattern which emerges (consistent with the principle that such covenants are prima facie unlawful) is for the period of the restraint to be kept to the minimum necessary. Thus a sales representative in the print broking business[2] was held to a restraint of two months from the end of the notice period, and a business vendor turned employee was restrained from competing for only four months after his employment ended.[3]

[63] Taking into consideration the nature of Mr Joyce's role, the time needed to replace him, and the approach taken in previously decided cases I have concluded that a reasonable duration for a restraint of trade in this case is three months. I therefore order that clauses 8.2 and 8.3 of Mr Joyce's employment agreement are modified accordingly.

**(vi) Breaches of restraint of trade provisions**

[64] It has already been recorded that the applicant's solicitors wrote to both respondents on 29 March reminding them of their obligations pursuant to clause 7 of his employment agreement. In Mr Joyce's case the same letter also set out Clause 8 of the agreement. The applicant's important commercial customers (including THL) having been identified, the letter advised:

> *"Your continued contractual obligations to Continental Car Services Limited preclude you from having any dealings with any of these customers in the next six*

[2] *BFS Marketing Ltd v Field [1992] 2 ERNZ 1105*
[3] *Manchester Property Care Ltd v O'Connor (No2) [1998] 2 ERNZ 305.*

*months….our client expects you to honour your legal obligations to it and will monitor compliance."*

[65] There is no dispute that Mr Joyce worked as a contractor to Car n Camper in the three months after his employment ended (April, May and June 2010.) Although his invoices indicate he was working less than full time during that period, he worked on THL vehicles and held himself out as service manager for Car n Camper. As already recorded Car n Camper is a competitor of the applicant at least insofar that it has sought and obtained work from THL, and clause 8.3 prohibits competition in the capacity of contractor as well as employee. It follows that Mr Joyce has breached clause 8.3 of his employment agreement.

[66] Evidence that he had breached the non-solicitation component was not strong however. It consisted of the previously mentioned reports by applicant witnesses of conversations with customers (the service manager at THL and the courier driver client) who talked of attempts by Mr Joyce to solicit their business.

[67] As already recorded, Mr Joyce has admitted to speaking to the courier driver client about servicing his van. He said the conversation occurred out of a chance meeting and he was not sure when that was. He also noted that the courier driver was not named in the letter he received from the applicant's solicitor and he did not realise he was precluded from seeking his business. I accept this argument.

[68] As for THL, both Mr Joyce and Mr King were firm that it was Mr King who made the approaches to that client. I accept this evidence also. I am satisfied that Mr Joyce's value to Car n Camper was principally in Mr King being able to tell clients that he had someone of Mr Joyce's expertise working on vehicles. Sales work and client contact remained the province of Mr King himself.

[69] There was no other first-hand evidence to back up the applicant's assertions about solicitation. I do not consider it open to me, on such limited evidence, to find that Mr Joyce breached clause 8.2 of his agreement.

### (vii) Misappropriation

[70] There are four separate parts to the allegations that Mr Joyce misappropriated company resources.

*Brake pressure bleeder*

[71] The applicant's claim on this issue was triggered after Mr Joyce visited the Onehunga branch of BNT New Zealand Limited (BNT.) BNT is a supplier of automotive parts, accessories and engineering supplies to trade customers. Mr Joyce went in and asked the sales person whether they could supply a missing gauge for a Wolfhead pressure bleeder which was still under warranty (the implication being that it had been sold with the part missing.) He gave the part number and explained that he had bought it from the Newmarket store whilst an employee of Continental Cars. He was told that the Onehunga branch would pass the matter to the Newmarket store to follow up.

[72] Both the Onehunga sales person and the Newmarket branch manager gave evidence to the Authority. The branch manager told me that when she reprinted the relevant invoice she found the item had been purchased not by Mr Joyce personally but by Continental Cars itself. She told the Authority:

> *"I was aware that sometimes companies allow their staff to use the company account for personal purchases but I also knew that there has been a lot of fraud within the car part industry recently….*
>
> *I therefore phoned up the After Sales Manager at Continental Cars, Duane Jarrett to see what the story was with this part… Duane phoned back the next day and said that the brake pressure bleeder had not been purchased for an employee …personally but for one of its workshops…"*

[73] Mr Jarrett's evidence was consistent with this account. Both witnesses were able to be certain about this particular purchase because they are not a commonly bought item. The BNT branch manager told me that her company had sold only two in the whole of Auckland in an 18 month period.

[74] Mr Joyce never went back in to see BNT. His response to the evidence of the witness from the Onehunga store was simply to deny having told him that he thought

he was missing a gauge for a brake pressure bleeder that he had bought from the BNT Newmarket branch while an employee of Continental. As for the bleeder that had been purchased, he claimed that it was for Continental and was "irrelevant." He said it should be "*sitting at Continental (either in storage or out the back.)*"

[75] The two witnesses from BNT were entirely credible. Mr Joyce's response was not. I accept that he did misappropriate the item concerned and record that his overall credibility with the Authority was seriously undermined as a result of the evidence on this point.

*Work on LSD unit*

[76] The evidence here was that Mr Joyce directed a junior member of staff to remove his vehicle's LSD unit, take it to be modified offsite at Differential and Automatic Transmission Specialists Ltd, and then re-install it. The evidence is that Mr Joyce did not pay for this work to be done or obtain authorisation for this work to be done at the company's expense.

[77] Mr Joyce's response to this evidence was to deny that he had ever asked a staff member to install a modified LSD unit into his car. As for the unit itself, he did not deny that it had been obtained from Differential and Automatic Transmission Specialists Limited and said that through an error it had not been properly allocated to the relevant customer.

[78] As before, this evidence was not credible, unlike that of the young worker who recalled working on the vehicle. I am satisfied that Mr Joyce did arrange for the unit to be installed in his vehicle at the Company's expense and without authorisation.

*Abuse of supplier reward schemes*

[79] It was explained to me that many of the applicant's suppliers run reward schemes in which vouchers are provided in respect of purchases made. Schemes ran in the Volkswagen commercial workshop for "Bilstein" engine flushes (for the use of a flush machine) and "Clean Burn" product. Mr Joyce appears to have kept almost all the reward vouchers for his own use. There was no evidence of a formal written

policy about allocation of vouchers but I was told that Service Managers were expected to share these perks with their staff. I was also told that (unlike Mr Joyce) the others did.

[80] The claims in respect of the misappropriation of vouchers are not based solely on the fact that Mr Joyce kept them for himself. Rather they arise because it was said to have been discovered, after Mr Joyce left, that he inflated purchases in order to get more vouchers.

[81] Applicant witnesses told the Authority that after Mr Joyce left it was observed that that the level of engine flushes recorded during his time was much higher than afterwards. Investigation then revealed that, during Mr Joyce's time 171 'extra' flushes were recorded for which the Bilstein operator had been paid, but which had not been charged to clients. When questioned junior staff reported having seen Mr Joyce hook up the machine in such a way that it recorded a flush when none had been performed. I was also told that the number of Bilstein flushes was further over reported (that is, even beyond what was recorded on the machine) in email correspondence from Mr Joyce to the owner of the machine.

[82] When all this came to light the Bilstein representative agreed to reverse the charges to Continental Cars. The applicant did not, therefore, sustain a loss in respect of the flushes. Nor did it sustain a loss in respect of the vouchers as Bilstein did not seek their return.

[83] Continental Cars does not, therefore, claim damages in respect of payments or vouchers. It does claim general damages for what it says was the harm done to its relationship with the Bilstein representative but I note that there was no evidence from that party about this.

[84] Mr Joyce denied any personal misuse of the Bilstein flush machine saying that the alleged inflation of its use appeared to go back over a couple of years. He argued that the machine was sometimes lent to other departments which might account for the discrepancies, noting:

> *"Perhaps I should have kept better records of the flushes made when our machine was in another Department (so as to avoid any errors) but whatever I entered into our system was done openly and honestly".*

[85] The evidence from another workshop supervisor was that it was very rare for these machines to be moved from one workshop to another as each had its own.

[86] In respect of Clean Burn I was told that after Mr Joyce left it transpired that much lower volumes of Clean Burn were being purchased than before. It was discovered that there was a very large and unnecessary stockpile of this product, leading to the inference that Mr Joyce had over-ordered solely in order to obtain more vouchers for his personal use.

[87] In response to this evidence Mr Joyce argued that his purchases of Clean Burn were reasonable.

[88] I did not find Mr Joyce's evidence convincing and preferred the evidence of applicant witnesses on these matters. I am satisfied that he did inflate sales of both products and retained the resulting vouchers for his personal use.

*Tools*

[89] The evidence was that there had at one stage been a mutual toolbox in the Volkswagen commercial workshop which had been kept stocked with tools including flexible head ratchet, spanner set, socket set, ratchet, hand riveter and wheel speed sensor. I was told that neither the box nor the tools are there now. Continental Cars asserted that Mr Joyce misappropriated all of these items.

[90] Several witness confirmed that there had been such a tool box and such a collection of tools. Several also confirmed that no one knew where these items were now. However no one had actually seen Mr Joyce removing any of them from the premises and all agreed that a number of different people had access to these items, which were not kept secure in any way.

[91] On this limited evidence I am not able to conclude that Mr Joyce misappropriated the tool box or its contents.

**(viii) Remedies**

[92] The following breaches have been established:

i. Mr Joyce breached clause 8.3 of his employment agreement by working as a contractor to Car n Camper within the three month period of his restraint of trade provision;

ii. Mr Joyce misappropriated a brake pressure bleeder, failed to pay for modification and installation of an LSD unit in his vehicle and abused supplier reward systems.

*Damages for breach of restraint of trade*

[93] The applicant claims damages amounting to the gross profit lost when work from THL dropped off from April 2010 onwards. Although applicant witnesses acknowledged that the winter months can be a quiet time for rental vehicle repairs, they provided figures which showed that the previous winter was relatively busy. It was therefore contended that Mr Joyce's breach was the cause of the drop off in 2010.

[94] However, Mr Elsmore conceded that all he really knew was that the same volume of THL work was no longer coming to Continental Cars as before. He did not know where it had gone. On that basis it was argued for Mr Joyce that much of what Continental Cars put before the Authority (about the loss of business and its causes) was supposition. It was suggested that reasons for any loss might include the failure of the 2009 proposal, repeat business diminishing as vehicle warranties expired, and THL getting more work done in house or through some other provider.

[95] The Authority was provided with Car n' Campers invoices to THL from April 2010 onwards, along with the invoices for Mr Joyce's services to Car n Camper. These indicate that the level of business obtained by Car n Camper over the winter period was much less than the business Continental Cars claims to have lost. I was also told by Mr Joyce and Mr King that much of this work was 'emergency' weekend work that the applicant would have been unlikely to pick up anyway, since its workshops were not open for the whole weekend but just a short day on Saturday.

[96] I am not satisfied that Mr Joyce can be held liable for all the business Continental cars believes it has lost from THL. I am prepared to give the applicant the benefit of the doubt that the work THL picked up was business lost by the applicant. Because Mr Joyce performed this work on behalf of Car n Camper it follows that the applicant's loss resulted from Mr Joyce's breach of his restraint of trade.

[97] Damages are therefore in order in respect of the loss of the work Mr Joyce performed for Car n Camper on THL vehicles. Damages are properly assessed as the loss of expected gross profit.[4] The applicant has done its own calculations (using Car n Camper invoices) of the profit it would have derived from that work had it retained it. In order to protect Car n Camper's confidential information I do not reproduce those workings here but record that I accept them. The gross profit lost comes to $1,929.04.

[98] Mr Joyce is therefore ordered to pay damages of $1,929.04 in respect of his breach of the restraint of trade.

*Damages for misappropriation*

[99] The applicant has claimed damages of:

i. $675.00 in relation to the LSD unit;

ii. $471.66 in relation to the brake pressure bleeder, and

iii. $3,600.00 in relation to Westfield vouchers received as rewards for purchase of Clean Burn.

[100] The amounts claimed were adequately supported by evidence. I am satisfied that they are accurate and order damages accordingly.

[101] In relation to the abuse of the Bilstein flush machine the applicant claims general damages for the effects on its relationship with the Bilstein representative

[4] *Doherty Trading v Ferris [1999] 2 ERNZ 776, 784.*

however there was very little evidence to support this assertion. No order is made for general damages under this head.

*Penalties*

[102] No penalty is ordered in respect of the breach of the restraint of trade. It was in the end a minor breach and does not warrant further sanction beyond the payment of damages.

[103] Separate penalties of $5,000.00 were sought in respect of each of the four breaches relating to misappropriation including misuse of the Bilstein flush machine.

[104] I am satisfied that high levels of penalty are in order for all these breaches since they have been shown to involve deliberate dishonesty. Each amounts to serious misconduct for which there were no mitigating circumstances. A penalty of $5,000.00 is therefore ordered in respect of each of the four breaches (that is in relation to the brake pressure bleeder, LSD unit, and each of the Clean Burn and Bilstein reward schemes.)

[105] The applicant has argued that penalties should be awarded directly to the applicant however I consider the applicant to have been adequately remedied by the other awards made here. Penalties are to be paid to the Crown in the normal way.

*Special damages*

[106] The applicant also claims special damages of $488.75 being costs incurred in the preparation of the 29 March 2011 solicitor's letter to the respondents. It does so in reliance on the following comments of the Court of Appeal:[5]

> *"We offer an additional observation on this aspect of the present case. Legal expenses properly incurred in relation to issues such as wrongful suspension of employees and investigations into their conduct might well be classified as special damages rather than as party and party costs. The latter generally have as their focus the issue of proceedings, preparation for hearing and the hearing itself.*
>
> *If the proportion of Dr Binnie's total costs which might have been classified as special damages were treated as such, the amount of party and party costs would be*

[5] *Binnie v Pacific Health Limited [2002] 1 ERNZ 438, paragraphs [17] and] 18].*

*materially reduced. This would have a significant effect on the proportionality issue. In addition, of course, as special damages the costs in question would be recoverable in full as opposed to being recoverable only to the extent of a reasonable contribution. The line between special damages on this footing and party and party costs will often be blurred at the margins, but the point is valid as a general proposition. We do not wish to encourage unduly precise apportionments in this area. Use of the special damages approach should be reserved for cases in which a proper line can be drawn, albeit only in broad terms."*

[107] I am not persuaded that this case is one in which it can be said that "*a proper line can be drawn*." Special damages are declined. (I note that in the absence of any findings of breach on Mr Gordon's part, there could be no question of special damages against him anyway.)

*Compliance Orders*

[108] On the basis that clauses 2, 7 and 8 of the employment agreements had been breached, and in order to prevent future breaches, the applicant sought orders for compliance with each of these clauses.

[109] Although it has been established that Mr Joyce breached clause 8 the restraint period is now well and truly over. No order for compliance is needed.

*Interest*

[110] The recently amended Clause 11 of Schedule 2 of the Employment Relations Act 2000 provides as follows:

"***Power to award interest***

*(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgement is given, of interest at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority."*

[111] The Authority thus has a discretion to order interest on the damages recovered at the rate prescribed under section 87 (3) of the Judicature Act 1908 (8.4% per annum.)

[112] Penalties have been found justified in this case because of the element of dishonesty in Mr Joyce's conduct. For the same reason I am satisfied that this a proper case for the Authority to exercise its discretion to award interest on the damages awarded to the applicant.

[113] Mr Joyce is therefore ordered to pay 8.4% interest on the damages from the end of his employment (31 March 2010) until the date of payment.

**Summary**

[114] Mr Joyce is ordered to pay to the applicant:

i. damages of $6,675.70 in total, and

ii. interest on damages of 8.4% per annum from 31 March 2010 to the date of payment of the damages.

[115] Mr Joyce is ordered to pay penalties of $20,000.00 in total.

[116] No orders (indeed no findings of any sort) are made against Mr Gordon.

**Costs**

[117] Costs are reserved. Any application for costs should be made within 28 days of the date of this determination.

Yvonne Oldfield
Member of the Employment Relations Authority

# Appendix 1

***"2. DUTIES AND RESPONSIBILITIES OF THE EMPLOYEE***

*2.1 The Employee has been employed as a Service Advisor on the terms and conditions contained in this Agreement.*

*2.2 The Employee shall:*

*(a) Perform the duties as set out in the Job Description…*

*(b) Comply with all reasonable and lawful directions given by his/her supervisor or anyone delegated by the Employer to issue such directions and with all rules and regulations laid down by the Employer concerning its Employees.*

*(c) During normal working hours (unless prevented by ill health or accident and/or except during holidays) devote the hole of his/her time, attention and abilities to carrying out his/her duties.*

*(d) Well and faithfully service the Employer giving it the full benefit of his/her experience and knowledge to promote the interests of the Employer and its shareholders.*

*(e) He/She shall not, except with the Employer's prior written consent, during the course of his/her employment with the Employer, be directly or indirectly employed, engaged or concerned in, or assist financially, any other business which in the opinion of the Employer competes or conflicts with the business of the Employer or gives rise to a conflicts of interest involving the Employee.*

*(f) Use his/her best endeavours to promote, develop and extend the Employer's business, interests and reputation and not do anything to its detriment, or inconsistent with the Employer's objectives and policies as determined by the Employer.*

*(g) Travel to such places, in such manner and on such occasions as the Employer reasonably requires.*

*(h) Perform services for any related company of the Employer as directed by the Employer from time to time.*

*(i) Behave at all times in a manner appropriate for business purposes in the conduct of their duties and comply with the Employer's code of conduct as may be issued from time to time.*

*(j) Comply with any other duties prescribed or implied by law."*

***"7. CONFIDENTIAL INFORMATION***

*7.1 In this clause "confidential information" includes any secret process or formula, trade secret or any information which is within or may come to the Employee's knowledge during the course of employment concerning the organisation, methods, business or finances of the Employer, its customers, clients or shareholder, its administration and operation.*

*7.2 The rights and interests in the confidential information are vested in the Employer at all times and the Employee does not have, by reason of his/her employment or otherwise, any right or interest in the confidential information.*

*7.3 The Employee shall during the continuance of his/her employment and after its termination (for whatever reason):*

*(a) Not disclose any confidential information to any person other than an Employee of the Employer authorised to receive it.*

*(b) Use his/her best endeavours to prevent the disclosure or publication of any confidential information.*

*(c) Not use or allow to be used any confidential information for his/her own benefit or for the benefit of any third party.*

*(d) Not use or attempt to use any confidential information in any manner which may injure or cause loss whether directly or indirectly to the Employer.*

*(e) Not use his/her personal knowledge of or influence over any customers, clients, suppliers or contractors of the Employer to his/her own benefit or for the benefit of any third party.*

*7.4 The provisions of this clause shall survive the termination of the Agreement but shall cease to apply to information which enters the public domain other than directly or indirectly through any action of the Employee.*

***8 RESTRAINT OF TRADE***

*8.1 The Employee acknowledges that:*

*(a) during the course of the Employee's employment the Employee will obtain confidential information concerning the business, customers and finances of the Company;*

*(b) disclosure of confidential information could materially harm the Company;*

*(c) the undertakings set out in clauses 8.2 and 8.3 below are reasonable and necessary for the protection of the Company's goodwill; and*

*(d) the remedy of damages may be inadequate to protect the interest of the Company, and the Company is entitled to seek and obtain injunctive relief, or any other remedy in any court to protect its interests.*

*8.2 The Employee covenants and agrees that the Employee will not, whilst employed, and for a period of six months following the termination of the Employee's employment (for whatever reason) within the greater Auckland area, without the prior written consent of the Company, do any of the following:*

*(a) induce or attempt to induce any director, manager, contractor or employee of the Company to terminate his or her employment or*

*engagement with the Company, whether or not that person would commit a breach of that person's employment agreement; and*

*(b) approach, induce, solicit or persuade any person or entity who or which was or is a client or customer of the Company, pr any related company, within the 12 months prior to termination of this agreement, to cease doing business with the Company or to reduce the amount of business which the person or entity would normally do with the Company.*

*8.3 In addition, the Employee agrees that the Employee will not for a period of six months after termination of the Employee's employment, anywhere within New Zealand, solely or jointly with any other person, whether as a principal, agent, director, executive officer, employee, contractor, shareholder, partner, joint venturer, member, advisor, consultant or otherwise howsoever, directly or indirectly carry on or be engaged, concerned or interested in (except as the holder of not more than 5% of the issued capital of any company whose shares are listed on a recognised stock exchange) or otherwise associated with any trade or business in direct competition with any business carried on by the Company at the time of termination of this agreement.*

*8.4 The Employee and the Company consider the restraints contained in these paragraphs to be reasonable and intend them to operate to the maximum extent possible.*

*8.5 If the restraints above:*

*(a) are held to be void and unreasonable for the protection of the interests of the Company; and*

*(b) would be valid if part of the wording was deleted or the period or area or activity was reduced,*

*the restraints will apply with the modifications necessary to make them effective.*

*8.6 The restraints contained in 8.2 and 8.3 are separate, distinct and several, sot that the enforceability of any one restraint does not affect the enforceability of the other restraints.*

*8.7 The Employee acknowledges that the value of the salary and other entitlements referred to in this agreement has been assessed and it dependent upon the Employee giving the undertakings contained in this Agreement for the proper preservation of the goodwill in respect of the business and the Company."*