IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 163
5388747

	BETWEEN	FOOD AND HEALTH STANDARDS (2006) LIMITED Applicant
	A N D	BARRY DUNSTAN Respondent

Member of Authority:	David Appleton
Representatives:	Linda Ryder, Counsel for Applicant Andrew Riches, Counsel for Respondent
Investigation meeting:	31 July 2012 at Christchurch
Submissions Received	31 July 2012 from Applicant 31 July 2012 from Respondent
Date of Determination:	3 August 2012

DETERMINATION OF THE AUTHORITY

A. Interim relief is granted in the terms set out in this determination.

B. The parties are directed to mediation on an urgent basis.

C. Costs are reserved.

Employment relationship problem

[1] The applicant company seeks an interim injunction until the matter can be finally determined enforcing restraint of trade covenants, confidentiality obligations and obligations arising out of Mr Dunstan's duty of fidelity.

[2] An undertaking has been lodged by Gail Shaw, Director of the applicant company agreeing that it will abide by any order that the Authority may make in

respect of damages that are sustained by Mr Dunstan through the granting of the interim orders sought and that the Authority decides that it ought to pay.

[3] Affidavits in support of the application were served and lodged by Ms Shaw, Mr David Shovel, Managing Director of the applicant company and Mr Kerry Faass, a former employee of the applicant company. A statement in reply and an affidavit in opposition were served and lodged by Mr Dunstan.

[4] Whilst the restraints relied upon by the applicant company use both the term *client* and *customer*, the terms are not defined and appear to be used interchangeably. Save for when I quote directly, I shall use the word *client* throughout this determination to encompass both words.

The events leading to the application for interim relief

[5] The applicant company provides a range of services, including public and environmental health, the provision of registered food safety programmes, resource management compliance and monitoring, food safety and quality systems and building management services. The applicant company was formed on 1 June 2006 and took over the business from the previous company, Food and Health Standards New Zealand Limited (FHSNZ). Mr Dunstan was initially employed by FHSNZ in February 2004 as a manager of the Building Management Services Division of that company. Mr Dunstan entered into an individual employment agreement with FHSNZ which included a conflict of interest provision, a restraint of trade provision and a confidentiality provision.

[6] Mr Dunstan holds a qualification as an Independent Qualified Person (IQP) which enables him to issue Building Warrants of Fitness and to undertake related activities. At the material time the applicant company also employed in the Building Management Services Division Ms Bichan, who is also an IQP, Mr Faass, and an administrator.

[7] When the applicant company was formed, Mr Dunstan was offered a new individual employment agreement with the applicant company containing, materially, the same terms and conditions as he had signed with FHSNZ. Mr Dunstan signed that new employment agreement on 24 January 2007 (the 2007 Agreement). The 2007 Agreement also included a conflict of interest provision, a restraint of trade provision and a confidentiality provision.

[8] Mr Dunstan deposes that when he started working for FHSNZ his role largely involved the provision of environmental health compliance services, including waste water testing, amusement device inspection, drinking water sampling, investigating noise complaints, animal control, back flow prevention on commercial water supplies and other work. Building inspection work as an IQP comprised only a small part of his work. However, from late 2009 onwards, after the business had been acquired by the applicant company and he had signed the employment agreement with the applicant company, the building inspection part of his role expanded and he began working full time on building management. This account is in contrast with the assertion of Ms Shaw in her second affidavit, which was that Mr Dunstan's core duties performed throughout his employment did not change. Obviously, affidavit evidence is untested, but on the basis of the two contrasting accounts, I prefer that of Mr Dunstan, in that his account is more detailed and he is more likely to know what duties he did.

[9] The 2007 Agreement contains, inter alia, the following clauses:

> ***THIS AGREEMENT***
>
> *2.1 The parties to the Agreement ("the Parties") agree that all previous agreements and arrangements, verbal or written, relating to conditions of employment, both express and implied, are replaced by this Agreement taking effect from the date on which the parties sign this Agreement.*
>
> ***TERMINATION***
>
> *11.1 This agreement may be terminated by either party giving four (4) weeks notice, with wages being paid only up to the date of termination. ……*
>
> ***CONFLICT OF INTEREST***
>
> *14.1 The Employee confirms that, except as expressly disclosed to the Employer and acknowledged in writing by the Employee, the Employee is not involved in a situation that might create or appear to create a conflict of interest, including by* [sic] *not limited to:*
>
> *(a) being connected either directly with any business (as owner, director, partner, licensee, consultant, shareholder or as the recipient of a salary or commission) which sells or provides services of the employer or which is in direct or indirect competition to the Employer or which is a customer of the Employer, providing that nothing herein shall*

prevent the Employee from acquiring as an investment shares in any public listed company;

(b) Acquiring directly or indirectly through ownership or consultancy, any interest in a business without the express consent of the Employer; …

14.3 The Employee further agrees not to become involved in any situation such as those referred to in paragraph .13.1 [sic] *of this clause which might create or appear to create a conflict of interest and agrees that during the employee's employment he shall immediately report any circumstances or situations arising that might involve the employee or appears to involve the employee in any conflict of interest. …*

14.4 The Employee agrees not to engage in any activity, paid or unpaid, which in the opinion of the Employer is likely to impinge on or restrict the Employee's ability to perform the Employee's duties and responsibilities under this Agreement, without the prior written consent of the Employer.

RESTRAINT OF TRADE

15.1 For a period of twelve (12) months following the termination of the employment for any reason other than redundancy, the Employee shall not (without the prior written consent of the Employer) whether on his or her own or as a consultant or contractor to or partner or agent, employee, shareholder or director of any other person, either directly or indirectly:

(i) provide services to any of the Employer's customers or competitors comparable to the types of business that at the date of termination of the Employee was within the Employer's ordinary business as health-related service providers;

(ii) employ or solicit the services or offer employment to any person who was employed by the Employer at the time of, or was employed by the Employer within the 12 months preceding, the date of termination of the Employee's employment, or endeavour to entice any of the Employer's clients away from the firm.

15.2 The consideration of this employment and the rate paid is a consideration for the Employee agreeing to this restraint.

CONFIDENTIALITY

16.1 As part of normal duties the Employee will obtain, or have access to, confidential information concerning the employer, its clients and its operating procedures. Under no circumstances is any use or disclosure to be made of this information except for purposes directly related to furthering the Employer's business objectives.

> *16.2 The Employee shall not knowingly take any action or disclosure any information to another person which could cause harm to the Employer's business.*
>
> *16.3 The restriction on confidentiality is to apply after termination of this agreement without limit in point of time, but shall cease to apply to information or knowledge that comes into the public domain through no fault of the Employee. …*
>
> ***PROPERTY OF THE EMPLOYER***
>
> *21.3 Upon the termination (for any reason) of the Employment of the Employee under this Agreement, the Employee shall deliver up to the Employer all information, equipment and materials used in the Employee's position relating to the operation of the Employer and all other property of the Employer which may be in the Employee's possession or under his/her effective control at the termination of the Contract.*

[10] In addition to his individual employment agreement, Mr Dunstan also entered into a confidentiality agreement on 17 May 2012. This agreement was entered into when Mr Dunstan was having discussions with the applicant company and its business adviser, in relation to Mr Dunstan's ongoing relationship with the applicant company. An options or discussion paper was presented to Mr Dunstan on or around 17 May 2012. The applicant company had some concerns regarding the preservation of confidential information being provided to Mr Dunstan as part of the discussions and, with a view to protecting that confidential information, the confidentiality agreement was signed by Mr Dunstan and the applicant company on 17 May.

[11] Although counsel for the applicant company stated at the investigation meeting that it was not relying on that 2012 agreement for the purposes of the interim relief sought, Mr Dunstan argues that the agreement actually sanctioned him contacting clients of the applicant company. It is therefore necessary to set out in this determination the pertinent clauses. In it, the applicant company is referred to as *the Provider* and Mr Dunstan is referred to as *the Recipient.*

> *WHEREAS*
>
> *(a) The Recipient has been or will be provided with certain information, which is the property of the Provider and which is secret and of value to the Provider.*
> *(b) It is a condition of disclosure by the Provider to the Recipient that the Recipient agrees to keep such information confidential in accordance with the terms of this Agreement.*
>
> *IT IS AGREED as follows:*

> *1. DEFINITION*
>
> *"**Confidential Information**" shall mean information, data and know-how, whether technical or not, which is disclosed to the Recipient, and which relates to the research, development or business activities of the Provider, which is either marked or stated to be confidential, or is by its nature reasonably intended to be confidential; but shall not include information, data or know-how which the Recipient* [sic] *can be established by written records to be already known to the Recipient or the public at the time of its disclosure, nor information, data or know-how which enters the public domain through no fault of the Recipient.*
>
> *:*
> *:*
> *:*
> *SCHEDULE*
>
> *CONFIDENTIAL MATERIAL*
>
> *Information and material relating to BMS (Building Management Services a division of Food Health and Standards) including customers, operations and staff, whether provided electronically, in writing or verbally.*
>
> *The purpose of providing the information is to allow the recipient to investigate the possibility of becoming an exclusive service provider to Food and Health ~~and Services~~ Standards of BMS services.*

[12] Mr Shovel deposes that Mr Dunstan was the primary contact for all the company's clients who required building management services and that he had the discretion to determine how the division was run and how he managed his own work load. He was also responsible for determining the charges which would be invoiced to clients for the services provided within the division.

[13] The current clients of the Building Management Services Division are mainly property managers or building owners who need to obtain annual Warrants of Fitness for their buildings. Ms Shaw deposes that, to obtain a building Warrant of Fitness a number of different features must be signed off and that often more than one contractor is required to inspect each feature or system in terms of the Code of Compliance requirements. It was Mr Dunstan's job to co-ordinate other contractors as needed. In addition to annual building Warrants of Fitness, Mr Dunstan would also carry out monthly building owner inspections and trial evacuations.

[14] Mr Shovel deposes that, over time, Mr Dunstan built up a close working relationship with a number of the company's clients and, in particular, Chubb, Wormald Limited, Masterguard Fire & Security Limited and Southgate Fire and Safety Limited.

[15] In or around September 2011 Mr Dunstan began to express dissatisfaction with his employment with the company. During a meeting that took place on 29 September 2011, Mr Shovel deposes, Mr Dunstan indicated that he could leave the next day and that he would be quite happy. He said that he had 76 days holiday pay owing to him, that he had grown the business at his own expense and he expressed dissatisfaction with his remuneration. He stated that the companies he dealt with wanted him to work for himself and he said that he felt that he would be better off working for himself.

[16] Mr Shovel deposes that, in May 2012, Mr Dunstan's dissatisfaction came to the surface again and that, during a conversation on 11 May 2012, he said that if he left, so would all of *his* clients. Mr Shovel deposes that a proposal document was put to Mr Dunstan in mid May 2012, suggesting a contractor relationship between the applicant company and Mr Dunstan. Mr Dunstan deposes that he took the discussion document away and began to make enquiries about it. Exhibited to Mr Dunstan's affidavit is a copy of the document annotated with his comments indicating agreement to some matters and enquiries against others.

[17] The discussion document proposed in essence that Mr Dunstan could become a contractor with his own company with the applicant company having a minority shareholding, Mr Dunstan leaving and going it alone or Mr Dunstan becoming a contractor for the applicant company, receiving a percentage of the revenue of the applicant company's building management services. This final option was explored in greater depth in the document and included proposals that Mr Dunstan employ the applicant company's staff providing building management services.

[18] It was as a result of the discussions around this document that the applicant company asked Mr Dunstan to enter into the 17 May 2012 confidentiality agreement.

[19] Mr Shovel deposes that on 30 May 2012 Mr Dunstan told him and Ms Shaw that he had decided he needed to move on. He also stated that Ms Bichan knew that he was not happy and that he was going to give six weeks' notice and then he would

be going. He stated that he would not be taking Ms Bichan with him and that he had not decided what he wanted to do. He stated that Ms Bichan was not happy and she had not been happy for a long time.

[20] Mr Dunstan deposes that he had decided to move on by 30 May because he had become frustrated by the lack of progress being made in the discussions about him becoming a contractor.

[21] Mr Dunstan resigned from his position on 5 June 2012 and stated in his letter of resignation that it would take effect from 29 June 2012 (less than the four weeks' notice he was obliged to give under his 2007 Agreement).

[22] Mr Faass, a trainee IQP deposed that, on 5 June 2012, Mr Dunstan told him that he had given in his notice of resignation and that he was going to do exactly the same job as he was currently doing but would set up his own business to do it. Mr Faass deposes that Mr Dunstan told him that the applicant company's clients, Wormald Limited, Chubb and Compass NZ Limited were *happy to go with him* and that, when Mr Faass asked him about his restraint of trade clauses, Mr Dunstan replied that there were *ways around that.*

[23] Mr Faass deposes that, on 8 June 2012, which was his last working day for the applicant company, Mr Dunstan again told him that he was going to be carrying on doing the same work but that he would then *set it up so that it appears* [Mr Dunstan was] *an employee of Compass.* Mr Dunstan then offered a full time position to Mr Faass which probably would take effect in around two months time after he had had time *to set things up.* When Mr Faass asked him about Ms Bichan, Mr Dunstan replied that *there would be plenty of work for both of* [them].

[24] Mr Faass deposes that Mr Dunstan also told Mr Faass that he was currently in discussions with another company in Auckland, which Mr Faass believed was Compass NZ Limited, in relation to a $300,000 contract inspecting schools. Mr Faass also deposed that, later that day, Mr Dunstan told him that he had just negotiated a $6,000 contract with PGG Wrightsons Limited to re-write the Compliance Schedules on all of their buildings.

[25] Mr Dunstan deposes that he did not offer Mr Faass work, but indicated that there may be an opportunity for him two months down the track. He accepts that he did tell Mr Faass that he had had discussions with Wormald Limited, Chubb and

Compass NZ Limited. Mr Dunstan's position is that these discussions had been part of the research he had been carrying out in respect of the proposal that he become an independent contractor and was anticipated by the 17 May 2012 confidentiality agreement.

[26] Mr Dunstan denies that he told Mr Faass that he had just negotiated a $6,000 contract with PGG Wrightsons Limited to re-write the Compliance Schedules on all of their buildings, but agrees that he had said that their compliance schedules needed doing. Mr Dunstan deposes that he had mentioned a $300,000 contract to Mr Faass, as he had been hoping for such a contract but this was not with Compass NZ Limited and he had not finalised or approached anyone about that.

[27] Mr Shovel deposes that on 11 June 2012 Wormald's representative emailed Mr Dunstan and advised him that it had decided to terminate the applicant company's supply of building management services effective from that date. Mr Shovel deposes that he asked Mr Dunstan why Wormald had cancelled their contract and that Mr Dunstan had replied that he did not know, could probably guess why and that *that's for me to know and for you to find out.* Mr Dunstan does not deny this in his affidavit but speculates that the reason Wormald terminated the contract with the applicant company was because Wormald did not like the person who would be taking over Mr Dunstan's work at the applicant company.

[28] By way of a letter dated 13 June 2012 the applicant company's legal advisers wrote to Mr Dunstan reminding him of his contractual obligations. Mr Shovel deposes that Mr Dunstan's reaction to this letter was angry and abusive. Mr Shovel deposes that, on the same day, Ms Bichan stated that she wanted to leave and that she did not want to be part of the business after seeing the letter that the applicant company's lawyer had written to Mr Dunstan.

[29] Mr Shovel deposes that Mr Dunstan had also told him on 13 June that he was going to see another one of the applicant company's major clients, Foodstuffs (SI) Limited, to tell them that he had resigned and that he would be forwarding letters to all of his clients regarding his resignation. Mr Shovel told him that he was not to do that. Mr Dunstan does not deny he said he would be telling Foodstuffs he had resigned, but says he did so as a matter of *good faith.* He possibly means as a matter of courtesy.

[30] Mr Shovel deposes that Mr Dunstan then stated that he would not be in the following day as he would be taking it as sick leave. Mr Shovel deposes that, despite being told to remain in the office, Mr Dunstan left saying that he was going to see his doctor. Mr Dunstan was informed by a second letter that he was to attend work on 14 and 15 June. However, Mr Dunstan informed Mr Shovel that he had a doctor's appointment the following day (14 June) at 9am even though he had already left work early that day (13 June) saying that he needed to attend at a doctor's appointment that afternoon. Mr Dunstan says that this was because he had been unable to obtain an appointment at short notice. He deposes that he was suffering considerable stress at that time.

[31] The following day, 14 June, Mr Dunstan asked for a written authority enabling him to obtain a doctor's appointment at 9am, which was given. The company subsequently found on Mr Dunstan's computer system copies of air tickets indicating travel to Auckland on that day. Mr Dunstan then provided a medical certificate dated 14 June stating that the doctor had examined him, and in his opinion, Mr Dunstan was medically unfit from 14 June and that his situation would be reviewed in four days time.

[32] On Saturday 16 June 2012 the applicant company arranged for a private investigator to be at the airport to see whether or not Mr Dunstan arrived on the flight in accordance with the air tickets that they had found on his computer. The private investigator confirmed that Mr Dunstan had been on that flight. He had been travelling alone and was met at the airport by his wife.

[33] Mr Dunstan deposes that he had pre-planned the trip to Auckland to further his investigations regarding the discussion paper and that he had applied for leave, which had been granted. He says that he decided to take the leave anyway to get away from the stress he was feeling under at that time. He says that he did not enter into any negotiations in Auckland, or deal with any work related matters, but visited friends.

[34] Mr Shovel also deposes that Mr Dunstan advised him that he was meeting with the applicant company's major client Foodstuffs (SI) Limited to talk about him providing sprinkler systems certificate to Foodstuffs himself, rather than the applicant company. Mr Dunstan was advised by Mr Shovel that he was not to meet with Foodstuffs without Mr Shovel being present.

[35] Mr Shovel also deposes that he was informed by the manager of Chubb that Mr Dunstan had approached Chubb while he was still working for the applicant company with a view to soliciting them to transfer their business to Mr Dunstan after his employment with the applicant company ceased. Chubb indicated to Mr Shovel that the company was not willing to transfer their business to Mr Dunstan despite his approaches to them. A letter from Chubb produced by Mr Shovel confirms this.

[36] On 26 June 2012 Mr Dunstan received an email from Masterguard Fire & Security Limited advising that they had decided to utilise the services of an alternative code of compliance sub-contractor and that, from 1 July 2012, they would no longer require the services of the applicant company.

[37] Mr Shovel deposes that he recently found a text on Mr Dunstan's cell phone from Ms Bichan stating *Southgate are on board*. Southgate Fire and Safety Limited is one of the applicant company's top eleven clients based on fees. During Mr Dunstan's notice, Southgate gave notice of their intention to terminate their contract with the applicant company. Mr Shovel deposes that Southgate collected their documentation on Friday 6 July 2012 and advised that they were giving it to Mr Dunstan who was going to do their work. Mr Dunstan deposes that the text was actually from him to Ms Bichan, but does not deny its content.

[38] On 6 July 2012 the applicant company received an email from CBRE Assets Limited Colliers advising that they were cancelling their services with the applicant company with immediate effect.

The injunctions sought

[39] The applicant company seeks urgent interim orders that, until further order by the Authority, the respondent does not either directly or indirectly:

a. Provide building management services to any of the applicant company's clients;

b. Endeavour to entice any of the applicant company's clients away from the applicant company;

c. Employ or solicit the services of or offer employment to any person who was employed by the applicant company in the twelve months prior to the respondent's termination;

d. Use or retain any information relating to the applicant company's business, including details relating to the applicant company's clients;

together with an order that all confidential information be immediately returned.

The issues

[40] It is settled law that there are three broad questions that need to be considered by the Authority in an application for an interim injunction:

a. Whether there is a serious issue to be tried;

b. Where the balance of convenience lies (including whether damages would be an adequate remedy); and

c. Where the overall justice of the case lies.

Is there a serious issue to be tried?

[41] In considering this question there are a number of considerations, as follows:

a. Is it arguable that the non-dealing clause contained in Mr Dunstan's 2007 employment agreement is enforceable?

b. Is it arguable that there is an enforceable clause in the 2007 employment agreement preventing Mr Dunstan from enticing away the company's clients?

c. Is it arguable that the non-solicitation of employees clause in Mr Dunstan's 2007 employment agreement is enforceable?

d. Is it arguable that the obligations of confidentiality contained in the 2007 employment agreement are enforceable?

e. For each of the four questions above that can be answered in the affirmative, is there an arguable case that Mr Dunstan has breached or is likely to breach any of the said clauses?

f. Is there an arguable case that Mr Dunstan has breached his obligations of fidelity and confidentiality at common law?

Is it arguable that the non-dealing clause is enforceable?

[42] The general principle obtaining in respect of restraint of trade or restrictive covenants that operate post termination is that they are generally void for public policy reasons unless they go no further than is reasonably necessary to protect the legitimate proprietary interests of the entity seeking to enforce them. There are a number of elements of the non-dealing clause contained in the employment agreement signed by the parties on 24 January 2007 that need to be considered to determine whether or not the clause goes further than is reasonably necessary to protect the legitimate interests of the applicant company.

The duration of the restraint

[43] Generally speaking, a period of 12 months is the maximum that is likely to be enforceable in an employment context. Naturally, each case needs to be considered on its own merits and there is no general rule of thumb that would assist.

[44] In the case of the provision of building management services, I believe that it is arguable that the business can be said to operate on an annual cycle given that a key part of Mr Dunstan's role was to provide annual building Warrants of Fitness. This is not a business like a hairdresser's, for example, where there is likely to be a reasonably fast turnover of clients. Whilst little evidence was deposed by either party in respect of the cyclical nature of the business, from the evidence (untested) that was put before me, I am satisfied that it is of an annual nature which would therefore justify a post-termination restraint period of 12 months.

The geographical scope of the restraint

[45] Despite the submissions of Mr Dunstan's counsel to the contrary, the restraint in question seeks to protect the applicant's clients, and is not a non competition clause. Therefore, the lack of any geographical limit to its operation is irrelevant to the enforceability of the clause.

The scope of the definition of "customers"

[46] The non-dealing clause does not limit in time the clients of the applicant company which are to be protected by it. Whilst the services that are prohibited by the non-dealing clause relate to the types of business that was within the applicant company's ordinary business at the date of termination, it is arguable that, as drafted, the clause relates to any clients of the applicant company, past or present. This raises an argument that the clause is unenforceable as being too wide in its ambit.

[47] Furthermore, and more seriously, the drafting of the non-dealing clause does not restrict Mr Dunstan from dealing only with those clients of the applicant company with which he had material dealings. As drafted, the non-dealing clause restricts him from providing prohibited services to any of the applicant company's clients, even if he had never dealt with them before. This is particularly pertinent with the applicant company given that it operates in a number of fields, the provision of building management services being distinct from the other fields in which it operates. Therefore, it is arguable that this clause is too wide in its ambit to be enforceable.

[48] However, s 162 of the Employment Relations Act 2000 allows the Authority, pursuant to s.8 of the Illegal Contracts Act 1970 Act, to modify a provision of any contract constituting an unreasonable restraint of trade. This power could allow defects in the drafting of the non-dealing clause to be rectified at the substantive investigation, if the Authority considered it necessary to do so. I accept the submission of the applicant company's counsel, however, that it is not appropriate for the Authority to exercise its power under s.8 of the 1970 Act at this interim stage.

Competitors

[49] A further problem that I see with the non-dealing clause is that it prohibits Mr Dunstan from providing services to any of the applicant company's *customers or competitors* [which are] *comparable to the types of business that, at the date of termination of* [Mr Dunstan's employment] *was within the* [applicant company's] *ordinary business as health related service providers*.

[50] The inclusion of the words *or competitors* arguably widens the effect of the restraint considerably so that Mr Dunstan is effectively restrained for 12 months from working for any competitor of the applicant company, at least within the scope of providing services which are comparable to the types of business that, at the date of

termination was within the applicant company's ordinary business as health related service providers. Again, however, this aspect of the clause could be modified, if necessary, at the substantive investigation meeting pursuant to s.8 of the 1970 Act. In addition, the applicant does not seek to restrain Mr Dustan from working for any of its competitors.

The scope of the prohibited services

[51] A difficulty that the applicant company faces relates to the scope of the prohibited services, and whether Mr Dunstan's activities fell within the provision of services comparable to the types of business that, at the date of termination, was within the applicant company's ordinary business as *health related service providers*.

[52] Ms Shaw's second affidavit deposed that the Building Management Services Division of the applicant company forms an ordinary and integral part of the company's business and has done so since the inception of the applicant company on 1 June 2006. She states that the Building Management Services Division was also an ordinary and integral part of the previous company of which she was the founding director. She states that the previous company had provided building management services since around 1996.

[53] The applicant company is a multifaceted company whose key divisions, apart from the Building Management Services Division, are public environmental health and registered food safety programmes. Ms Shaw deposes that the environmental health services include liquor licensing, annual registered premises inspections, noise and nuisance complaints, resource management compliance and monitoring and waste management. The food safety division developed food safety programmes for food manufacturers and food outlets and processing companies. She deposes that this is a quality assurance system and that the company provides internal auditing and training.

[54] The term *health related* cannot be ignored. It qualifies the meaning of *ordinary business*. The effect of the ordinary meaning of the term *health related* is to narrow the scope of the meaning of the words *services* and, by extension, the scope of the non-dealing restraint in its entirety. It may have been better if the term *health related service providers* had been omitted, or alternatively, for Mr Dunstan's restraint clause, substituted with the words *building management service providers.* Therefore, the scope of the prohibited services may not catch many of the services

which Mr Dunstan is currently providing through his company Building Compliance Management Ltd.

[55] This problem arises, I strongly suspect, because the company has simply replicated across its employment agreements exactly the same wording for its non-dealing restraint, regardless of which employee it was meant to bind. Restraints tailored for the specific role in question are more likely to be enforceable than blanket restraints, regardless of the type of job they apply to.

[56] Whilst s.8 of the 1970 Act allows the Authority to modify the provisions of a restraint of trade clause, it may only do so where the provision of the contract constitutes an unreasonable restraint of trade, (s.8(1)). It cannot be said that that provision, referring to the business of health related service providers, is an unreasonable provision from the point of view of Mr Dunstan (as, say the unrestricted scope of the concept *customer* could be said to be) and so I do not believe that I will have the power under s.8 of the 1970 Act to modify this clause at the substantive investigation meeting in such a way as to rectify it and make it binding upon Mr Dunstan.

[57] Although Ms Shaw deposes that all of the company's work comes under the umbrella of *regulation and quality and safety certification*, and I agree that Mr Dunstan's work could come under that umbrella term, it strikes me as somewhat strained to attempt to squeeze that wide concept into the scope of the term *health related service*. The only way that I can see to make the wording relate to Mr Dunstan's circumstances would be if one could designate *health related services* to encompass health *and safety* related services, which could in turn be stretched to include the regulation and safety certification work that Mr Dunstan carried out as an IQP.

[58] An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success. *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 863. In conclusion, it is my view that the applicant company has an arguable prospect of being able to enforce the non-dealing restraint of trade clause against Mr Dunstan, albeit a prospect which does not approach certainty by any large degree of proximity.

Is it arguable that there is an enforceable clause in the 2007 employment agreement preventing Mr Dunstan from enticing away the company's clients?

[59] Tucked away in the non-solicitation of employees clause are words which, including the preamble, read as follows:

> *For a period of twelve (12) months following the termination of the employment for any reason other than redundancy, the Employee shall not (without the prior written consent of the Employer) whether on his or her own or as a consultant or contractor to or partner or agent, employee, shareholder or director of any other person, either directly or indirectly… endeavour to entice any of the Employer's clients away from the firm.*

[60] Although the term *clients* is used instead of *customers* and the word *firm* is used instead of *employer* or *company* I am prepared to accept that the intent of this clause is to prevent the enticing away of the company's clients during a period of 12 months from the date of termination of Mr Dunstan's employment. The terms *client* and *customer* are used interchangeably I believe for the purposes of the 2007 Agreement.

[61] I believe that the period of 12 months is reasonable for the same reasons given above with respect to the non-dealing clause. Geographical scope is not relevant to a non-enticing clause. However, as with the non-dealing clause, the same problem exists with respect to the definition of *client*, which is not limited to those with which Mr Dunstan had material dealings, and is therefore arguably too wide to be enforced. This is capable of being fixed by the Authority exercising its powers under s.8 of the Illegal Contracts Act 1970 to modify the clause, however, if it decides it is necessary to do so at the substantive investigation meeting.

Is it arguable that the non-solicitation of employees clause is enforceable?

[62] The purpose of the non-solicitation of employees clause is to protect a company's human capital, bearing in mind that employers often spend a lot of time, effort and resources in training employees. It would be unjust if one of its staff could take advantage of that effort and expenditure of time and resources to entice away other valuable members of staff for his own benefit.

[63] The principle of the prima facie unenforceability of non-dealing restraints of trade applies equally to non-solicitation of employees clauses, bearing in mind, in addition, that an employee should have the freedom to work for whomever he or she

wishes. Again, therefore, the non-solicitation of employees restraint of trade clause should go no further than is reasonably necessary to protect the human capital of the company.

[64] The clause in Mr Dunstan's employment agreement does not restrict the solicitation in employment to key employees but, given the relatively small job market in New Zealand, I do not believe that this is fatal to its enforceability.

[65] This clause also does not limit the affected class of employees to ones with whom Mr Dunstan had material dealings. However, in view of the fact that the applicant company is a relatively small one, so that Mr Dunstan could in practical terms have influence over any of the staff in the company, I am satisfied that this clause is enforceable in terms of the scope of the employees covered.

[66] However, it is also necessary to consider the duration of the post-termination restraint, which is set at 12 months. In my view, this is too long, as it not only prevents Mr Dunstan from employing anyone from the applicant company for that period, but to also prevents anyone from the applicant company from working for him or his company for that period. The impact is therefore significant.

[67] Given that the notice that the employees are required to give to leave the employment of the applicant company is not likely to be in excess of four weeks (which is what Mr Dunstan is required to give), and that it is not likely to take the applicant company more than a matter of weeks to find replacement staff and to embed them with the company's clients, I believe that a more reasonable period of restraint post termination is likely to be between three and six months. This will depend upon more detailed evidence being heard at the substantive investigation. Again, this defect could be modified pursuant to s.8 of the 1970 Act.

Is it arguable that the obligations of confidentiality contained in the 2007 employment agreement are enforceable?

[68] Whilst it will sometimes be difficult to define *confidential information* it is established law that information such as client lists, pricing strategies and proposed advertising campaigns are of equal, if not greater value compared to the traditional type of trade secret such as formulae and secret processes: *Lansing Linde Ltd v Kerr* [1991] 1 WLR 251 (CA). Even where the identity of clients are public knowledge, confidentiality may attach to factors such as the fragility of a relationship between the

employer and a client: *Medic Corp Ltd v Barrett* [1993] 2 NZLR 122. I therefore accept in general terms that the applicant company would be likely to have a proprietary interest in information which it considers to be confidential.

[69] The confidentiality clause in the 2007 Agreement is expressed in fairly standard and general terms, with no definition of *confidential information*. However, it is not unreasonable in its scope and is enforceable. The issue to resolve is whether it is reasonably clear what information it is meant to protect and whether Mr Dunstan had access to it as part of his employment with the applicant company. That will be examined below.

For each of the four questions above that can be answered in the affirmative, is there an arguable case that Mr Dunstan has breached any of the said clauses?

The non-dealing clause

[70] I have found that the applicant company has an arguable, albeit not a strong, case for being able to enforce this clause. If it were enforceable, I would accept that there is a more than even chance that Mr Dunstan has breached or is likely to breach the clause. I refer, for example, to the affidavit of Mr Faass that deposes that Mr Dunstan told him that three of the applicant company's clients were happy to go with him, and that Mr Dunstan was going to carry out the same work but that he would set it up so that it appears that he was an employee of Compass NZ Limited. Whilst untested, this affidavit carries some weight of credibility because Mr Faass no longer works for the applicant company and so has no obvious axe to grind.

[71] Mr Dunstan's credibility, on the other hand, is damaged by the fact that he had clearly instructed his lawyers in or around June 2012 that he had not agreed to be bound by a restraint of trade clause with the applicant company. (I refer to a letter from Mr Dunstan's lawyers to the applicant company's lawyers dated 25 June 2012.) This had been written before the applicant company had managed to locate a copy of the employment agreement between Mr Dunstan and the applicant company which not only contains restraint of trade clauses, but which has been signed by Mr Dunstan.

[72] In addition, Mr Dunstan deposed that he had been struck off the IQP register due to the activities of the applicant company. However, an email from the secretary of the South Island IQP Register produced by counsel for the applicant company at the start of the investigation meeting showed that this was not the case.

The non-enticing away of clients clause

[73] It is not clear when Mr Dunstan is accused of having attempted to have enticed away Southgate Fire and Safety Limited, although they terminated their contract with the applicant company after Mr Dunstan's employment ended.

[74] It seems clear on the untested evidence that Chubb has been approached by Mr Dunstan shortly after the ending of his employment, and it may be inferred that he has enticed away CBRE Assets Ltd shortly after his employment ended.

[75] Mr Dunstan argues that the words in the 2012 agreement (*the purpose of providing the information is to allow the Recipient to investigate the possibility of becoming an exclusive service provider to Food and Health and Services of BMS services*) allowed him to approach clients. However, Mr Dunstan is unable to argue that he was talking to Chubb and CBRE Assets Ltd as part of the discussions with the applicant company as he appears to have been doing so after the discussions stalled and his employment ended.

[76] Mr Dunstan also states in his affidavit that he was unaware that there was a non-solicitation clause in his 2007 agreement and I am not clear whether he means by that a non-dealing clause or the non-enticing clause. In any event, he signed the agreement with the restraint clauses unamended and intact and it will be hard for him to argue that the clauses do not bind him.

[77] On a related matter, Mr Dunstan's counsel argues that there was a variation as between the first and second employment agreements for which no consideration was provided, and that a commission bonus he had enjoyed at the start of his employment under the first agreement was unilaterally removed. I do not accept that either argument invalidates the agreement to be bound by the restraints. The second employment agreement was not a variation of the first agreement as it completely superseded it, and was with a different entity. The commission bonus ceased before the end of the first agreement and, again, any rights to it would have been forfeited when Mr Dunstan signed the second agreement with a new employing entity.

[78] Counsel for Mr Dunstan also argued that Mr Dunstan did not sign the second agreement for 6 months, and may not have been given a chance to seek legal advice on it. I cannot see what difference the delay of six months makes. As far as not

having been given a chance to seek legal advice, I prefer the evidence of the applicant company.

[79] All in all, I believe that there is an arguable case that Mr Dunstan breached his non-enticing of clients clause during the 12 months immediately following the termination of his employment.

The non-solicitation of employees clause

[80] Mr Faass deposes that on 8 June 2012 Mr Dunstan offered him employment *in about two months' time* and stated that there would be plenty of work for Mr Faass and Ms Bichan. Ms Bichan resigned on 13 June 2012 after Mr Dunstan had shown her correspondence from the applicant company's lawyers seeking undertakings.

[81] Given these facts, I think that, on balance, there is an arguable case that Mr Dunstan solicited Ms Bichan whilst she was an employee.

The confidentiality clause in the 2007 employment agreement

[82] I accept that, given Mr Dunstan's position as de facto head of the Building Management Services Division of the applicant company, that there is an arguable case that he is likely to have been privy to a wide range of information about the applicant company's clients and their needs and that the applicant company has a legitimate interest in protecting it from the risk of disclosure.

[83] The affidavits lodged on behalf of the applicant company do not detail the confidential information that it seeks to protect. They only touch in superficial terms on what information Mr Dunstan had access to (by inference, the identities of the clients he dealt with, and expressly, *pricing structures* and a *knowledge and history of the work he conducted for clients*).

[84] Furthermore, when reading the affidavits of Messrs Shovel and Faass, and of Ms Shaw, there are no direct references to what confidential information they believe has been misused. There is no reference to client lists or other confidential information being copied or wrongfully retained or memorised, and although there are copious examples of possible breaches of the duty of fidelity by Mr Dunstan, none of the examples cite any confidential information that has allegedly been misused, nor is

it possible to draw any firm inferences that it has been because so little detail is given of the confidential information the applicant company relies upon.

[85] However, Counsel for the applicant company submitted that Mr Dustan contacting clients while employed was a misuse of confidential information. Mr Dunstan deposes that he only did so as part of his investigations into the proposal put to him by the applicant company. However, it is strongly arguable that Mr Dunstan should have been open with the applicant company as to the discussions he was having and the applicant company should have been given the opportunity to be present at the discussions with the clients, as they clearly retained an interest in them under the proposal that was being explored.

[86] The confidentiality clause prevents Mr Dunstan from, under any circumstances, using or disclosing confidential information except for purposes directly related to furthering the applicant company's business objectives.

[87] I believe that there is an arguable case that Mr Dunstan used the confidential information comprised in the identities of the clients in order to persuade the applicant company's clients to terminate their arrangements with the applicant and give their work to Mr Dunstan. This, on its face, would constitute a misuse of that confidential information and so would be a breach of Mr Dunstan's duties under the confidentiality provisions of the 2007 agreement.

Is there an arguable case that Mr Dunstan has breached his obligations of fidelity and confidentiality at common law?

[88] It has been confirmed by the Employment Court that it will be a breach of an employee's duty of fidelity to talk to clients during his employment about his intentions and arousing their interests in retaining his services after his departure from his present employment. This conduct would have been improper even if the clients were the initiators of such discussions and was inimical to the interests of the employer. *Walden v Barrance* [1996] 2 ERNZ 598.

[89] The duty of fidelity continues throughout the employment relationship - even in the employee's spare time as noted in *Hivac Ltd v Park Royal Scientific Instruments Limited* [1946] Ch 169 at 175 and *Schilling v Kidd Garrett Limited* [1977] 1 NZLR 243.

[90] Mr Shovel deposes that Mr Dunstan stated that he had been approached by *his clients* to work for them and he was thinking about it. He is also alleged to have contacted Wormald Limited, Chubb and Compass NZ Limited during his employment; to have stated that he was going to tell Foodstuffs that he had resigned, and that he would be writing to all of his clients regarding his resignation. In addition, Mr Faass deposes that Mr Dunstan negotiated a $6,000 contract with PGG Wrightsons Limited during his employment to rewrite the compliance schedules on all of their buildings, which work has not been carried out by the applicant company.

[91] Mr Shovel also deposes that Mr Dunstan told him that he was going to discuss providing sprinkler system certification to Foodstuffs (SI) Limited himself. Mr Shovel deposes that he was told by Chubb that Mr Dunstan had approached them during his employment to persuade them to transfer their business to Mr Dunstan after he ceased being employed by the company.

[92] Mr Dunstan deposes that he had approached Chubb and Wormald Limited as part of the restructuring proposal which was being discussed with the applicant company in May 2012. He states that he did not negotiate a contract with PGG Wrightsons Limited during work time. He states that he did see Foodstuffs (SI) Limited about sprinkler system certification but did not attempt to take them on as a client. He deposes that he told Mr Shovel that he would see the Foodstuffs (SI) Limited contact outside work hours.

[93] I believe that there is an arguable case that Mr Dunstan has breached his duties of fidelity for the following reasons. The duty of fidelity does not cease to apply outside of work hours. Whilst employed, the employee must act with good faith towards the employer, and must avoid any conduct that a person of ordinary honesty would look on as dishonest. *Robb v Green* [1895] 2 QB 315 (CA).

[94] Furthermore, on the untested evidence, I do not accept that the discussions in May 2012 gave Mr Dunstan the right to approach clients of the applicant company with a view to persuading them to leave and use him, without having first advised the applicant company of what he was doing. In addition, despite Mr Dunstan's explanation that his trip to Auckland was innocent, it appears to have been an underhand operation.

[95] All in all, I believe that there is an arguable case that Mr Dunstan breached his duty of fidelity by activities whilst still employed which amounted to attempts to persuade the company's clients to leave and also to find work for himself that he should have been procuring for the benefit of the company.

Where does the balance of convenience lie?

[96] In considering this question it is necessary to balance the prejudice to the applicant company in not granting the applications against the prejudice to Mr Dunstan in doing so. I am also to take into account whether damages would be an adequate remedy.

[97] Mr Dunstan's counsel argues that, if the relief sought were to be granted, he would be prevented from earning a living. I find that bald statement hard to believe. It is my view that there is likely to be a considerable amount of building maintenance work available in the South Island of New Zealand for an experienced IQP which would not involve him working for the applicant company's clients for a short period of months.

[98] There is ample evidence, albeit untested, to suggest that Mr Dunstan has breached his duty of fidelity. However, the duty of fidelity owed by Mr Dunstan ceased to apply once he ceased to be an employee on 30 June 2012. There is no continuing breach of that duty therefore. In light of this, it is arguable that any damage suffered by the applicant is historic and not on-going. This raises the argument that monetary compensation for such damages would be an adequate remedy to compensate the applicant company for any loss it has suffered as a result of an arguable breach of the duty of fidelity.

[99] There is, however, a countervailing argument that the breach of fidelity is likely to have given Mr Dunstan an inequitable springboard advantage or head-start over the applicant company that goes beyond legitimate competition, and which will continue for a limited period into the future. This could give rise to a right to interim relief (see, for example, *SSC & B Lintas Ltd v Murphy*, (1986) 3 NZCLC 99, 546), *Schilling v Kidd Garrett Limited* [1977] 1 NZLR 243; *Satterthwaite & Co Ltd v Gay* (1987) 1 NZELC 95, 356; *Bradford & Bingley Plc* v *Holden* [2002] EWHC 2445; *Pacifica Shipping Co Ltd v Andersen* [1986] 2 NZLR 238 and *Bradford Trust Ltd v Roebeck Ltd* [2006] 4 NZELR 635.

[100] Priestley J noted in *BDM Grange Ltd v Parker* [2005] 2 NZELR 523 that

> *These authorities were generically described by Mr Stevens as "springboard" cases. As I understand the principle, which I accept, courts tend to be vigilant in ensuring, where there has been a serious breach of the type I have described, that down-stream benefits do not flow to a party as a result of that party's unlawfulness. This observation additionally applies to an assessment of damages as a remedy, it being very difficult to quantify losses which might flow from departing customers and matters of that sort.*

[101] The applicant company has not deposed in its affidavit evidence any detailed evidence regarding the advantage gained by Mr Dunstan by his alleged breach of duty of fidelity. However, it is not stretching matters too far to infer that the applicant company has lost ground to Mr Dunstan competitively as a result of arguable breaches of fidelity.

[102] On balance, I am satisfied that damages would not be an adequate remedy, especially in light of the generally accepted difficulties of quantification in these sorts of cases. (See *BDM Grange* Ltd).

[103] In addition, although no evidence has been deposed as to the ability of the applicant company to honour its undertakings if interim relief is granted but the applicant company fails at the substantive stage, no evidence has been put forward by Mr Dunstan, who worked with the company for many years, that it is not in a position to meet its obligations.

[104] I therefore believe that the balance of convenience favours the granting of an interim injunction for a limited period of time.

Overall justice

[105] Taking into account all the evidence that has been produced by the company and Mr Dunstan, I am of the view that there appears to be ample evidence to suggest that Mr Dunstan took steps during his employment, and after it ended, to persuade clients of the applicant company to terminate their arrangements with it and to give their business to Mr Dunstan. Although there were discussions with Mr Dunstan about him becoming a contractor, I do not believe that those discussions went so far as to sanction Mr Dunstan approaching the applicant company's clients without any fetter on what he said. The untested evidence suggests that Mr Dunstan's approaches went beyond mere enquiry, and strayed into enticing away.

[106] In conclusion, I believe that the overall justice of the case is currently best served by an interim injunction being issued for a limited period, to neutralise the effect of the breaches of the duty of good faith that have arguably occurred, and to prevent further breaches of the restraints that have been entered into by Mr Dunstan.

Orders

[107] Pending the substantive hearing of this matter, or earlier order, I order Mr Dunstan:

a. Not to provide building management services to any of the clients of the applicant company set out in document 43, exhibited to the Second Affidavit of Gail Shaw (*the Prohibited Clients*);

b. Not to endeavour to entice away from the applicant company any of the Prohibited Clients;

c. Not to employ or solicit the services or offer employment to any person who was employed by the applicant company at the time of, or who was employed by the applicant company within the 12 months preceding the date of the termination of Mr Dunstan's employment;

d. Not to use or disclose any information relating to the clients of the applicant company; and

e. To deliver up to the applicant company, or its counsel, all copies of any information relating to the applicant company or its clients other than such information that has come into the public domain through no fault of Mr Dunstan.

[108] I direct the parties to attend mediation on an urgent basis.

[109] The substantive investigation of this matter has been set down for 5 and 6 November 2012. Despite the fact that the parties discussed at the interim investigation meeting moving the substantive fixture to an earlier date, and that the Authority is in a position to accommodate an earlier substantive investigation, counsel for the applicant company say that they (counsel) cannot accommodate the earlier dates which have been suggested by the Authority and which counsel for Mr Dunstan

can accommodate. Therefore, I reluctantly agree that the original dates shall have to be retained, with a third day (7 November) being set down in reserve.

Costs

[110] Costs are reserved.

David Appleton
Member of the Employment Relations Authority