IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 320/10
5303053

	BETWEEN	NATUREX LIMITED Applicant
	AND	KATE ROGERS First Respondent
		SKIN INSTITUTE MEDICAL SPA LIMITED Second Respondent
		SKIN INSTITUTE LIMITED Third Respondent
		SKIN INSTITUTE HOLDING COMPANY Fourth Respondent

Member of Authority:	Dzintra King
Representatives:	Anthony Drake and Rosemary Childs, Counsel for Applicant Rodger Pool, Counsel for First Respondent
Hearing:	21 May 2010
Submissions Received:	28 May 2010 and 11 June 2010 from Applicant 4 June 2010 from First Respondent
Determination:	12 July 2010

DETERMINATION OF THE AUTHORITY

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[1] The applicant, Naturex Limited ("Naturex"), seeks to enforce a restraint of trade against the first respondent, Ms Kate Rogers.

[2] The applicant operates appearance medicine clinics. Ms Rogers was employed as an appearance medicine nurse by the applicant's franchise, Caci Medispa ("Caci"). Ms Rogers commenced employment as a registered nurse with Caci

Medispa CBD pursuant to an individual employment agreement, which contained a restraint of trade provision, on 23 April 2009.

[3] Prior to Ms Rogers' signing the agreement she discussed the restraint provision with the Manager of Caci, Ms Paola Ferreira, stating that she felt the geographic area and duration of the restraint were too restrictive. Mr Ferreira amended the clause to reduce the duration from twelve to six months.

[4] From July 2007 to October 2008 Ms Rogers worked for the NZ Institute of Plastic and Cosmetic Surgery ("NZIPCS") and was trained by Allergan, the manufacturer and distributor of Botox and Juvederm, in the administration of the products.

[5] Ms Rogers said the training by Allergan at NZIPCS went over the same theory as at Caci and she learned the basic injecting. She then did practice injecting under the direction of a doctor and then injected practice clients under the direction of qualified nurses within the business.

[6] At Caci Ms Rogers was restricted in the areas she could inject the products, mainly to more common areas; and was restricted to less advanced treatments. That was because at Caci she was working alone. She had a standing order for the products from a doctor but the doctor who authorised the use was not on site. She said the more advanced treatments are usually offered by institutions where plastic surgeons work alongside the nurses, such as NZIPCS.

[7] On 28, 29 and 30 April 2009 Ms Rogers completed the 'Caci Medispa Botox and Juvederm Training Programme.' She said most of the training material was provided by Allergan – five of the six manuals were Allergan manuals.

[8] The remaining manual had been developed by Ms Jacqueline Smith for Micromode Limited, which is the franchisor of the Caci Franchise. This consists of a number of chapters from textbooks and articles from journals. These are in the public domain. There are slides which summarise standard medical information.

[9] The course was run primarily by Ms Diana Morgan, Allergan's Business Development Manager. Ms Rogers said Ms Morgan went over the majority of what

she learned. Ms Morgan took them through the theory, the Allergan slide shows and animations and the instructions on dosing and placement. General treatment was also discussed.

[10] The training included learning about facial anatomy, theoretical and practical elements and a follow up assignment which was marked by a trainer. The course also included going over the Caci consultation processes, the relevant documentation and the consent procedures.

[11] Ms Rogers said the training she received at NZPCIS consisted of the same theory, slide shows and animations. It was a shorter course because at NZPCIS she was not able to inject paying clients immediately after training because she did not have a standing order from a doctor.

[12] On 21 March 2010 Ms Rogers resigned and was due to start at the Skin Institute on 21 April.

Proprietary Interest

[13] In determining whether a covenant is reasonable with reference to the interests of the parties, it is first necessary to determine whether the employer has a proprietary interest which is entitled to protection or whether the covenant is merely an attempt to limit or reduce competition: *Airgas Compressor Specialists Ltd v Bryant* [1998] 2 ERNZ 42.

[14] A restraint is enforceable if the employer has a proprietary interest to be protected. In *Herbert Morris Ltd v Saxelby* [1916] AC 688 (HL) the Court stated that the only reason for upholding a restraint was that the employer had some proprietary right *"whether in the nature of trade connection or in the nature of trade secrets"* for the protection of which a restraint was *"reasonably necessary"*.

[15] A trade secret was defined in *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418 at 425 as:

> *information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret… it must be information used*

in trade or business, and … the owner must limit the dissemination of it or at least not encourage or permit widespread publication.

[16] In *Airgas* at 54 Goddard CJ said:

The employer may possess a proprietary interest in trade secrets, confidential information, and its business or trade connections. The employer is permitted to protect its business connection — that is, to prevent the departing employee from enticing its clients or customers. These are the most obvious but not the only examples of legitimate proprietary interest.

[17] Mr Drake submitted that Shaw J in *Fuel Espresso Ltd v Hsieh* [2007] 2 NZZLR 651 had held that there was proprietary interest in the skills provided in the employer's training and that this could attract the protection of a restraint clause. Mr Pool contested that view.

[18] The head note to the case says that it was held that there was an arguable case that FEL was protecting a proprietary interest in its specialised barista training. However, the judgment itself does not say that. Addressing the issue of a proprietary interest at para [16] Shaw J said:

Mr Cullen argued with much force that there was such an interest in the skill provided by Fuel's training. He also relied on the employees' influence over Fuel's customers in a small area where customers are coming to get their coffee from one place and another place opens up very close by. There is an arguable case that the interest in those customers could be taken by the competing business. This arguably gives Fuel a proprietary interest to protect.

[19] "This" refers to the interest in customers, not to the training. I accept that there may be situations where a training course could constitute a proprietary interest.

[20] The applicant says the information is of a commercially sensitive and confidential nature. The confidential information constitutes specialized skills and practical training, a training manual and training in optimal customer care. It says the training is greater in scope than that offered by Allergan as Caci's programme focuses

on establishing the nurses as independent practitioners rather than training them to work alongside doctors. The training is also said to focus more on client management including setting expectations and problem solving. The training also deals with adverse reactions and the Caci consultation process. Caci is not the only appearance medicine clinic where Botox is administered by registered nurses.

[21] The applicant argues that although some of the content of Caci's training programme may be similar to that provided by other clinics it is the whole package which makes it unique. The proprietary information is contained in the fact that the training is delivered to nurses rather than to doctors, the structure of the training programme and the speed at which nurses are then able to practise aspects of appearance medicine without doctors being onsite.

[22] Ms Diana Morgan, the Business Development Manager for Allergan, said the Allergan training sessions were run across a number of clinics outside the Caci franchise. Micromode was not the only organisation that did a broad range of Botox injections. Ms Rogers would have access to the same information in another institution but with a different format. Ms Morgan said she believed that having a three day format would result in faster up skilling but that there would be access to the same information in other clinics; the difference would be the speed. Ms Morgan said she was not aware of anything that Ms Rogers would not have access to if she went to another clinic. She agreed that the information collated was standard medical information and that she would expect training to be provided in the same way at non Caci clinics.

[23] It is difficult to see how it could be other than this. In order to administer Botox and Juvederm (or any other prescription medication) knowledge of the product is required. This includes the appropriate uses, contraindications and how to deal with bad reactions. Knowledge of human anatomy and physiology is required. Understanding why people wish to alter their appearance and how to deal with situations where expectations exceed outcomes is required as is sensitivity in dealing with patient concerns. A knowledge of the requisite legal requirements, for example, consent to treatment, is also necessary.

[24] The training provided to Ms Rogers was not more specialised than the knowledge she would have acquired elsewhere in the area of appearance medicine. The fact that the training was delivered over a three day period does not alter that. The nature of the information and the knowledge provided and acquired does not change.

[25] It is clear that the same information is provided elsewhere. The argument is that Caci has a unique and more comprehensive way of providing it. I am not persuaded that the packaging of the information and the speed at which it delivered render it confidential information.

Potential harm

[26] The applicant maintains that it would suffer harm if its skills and training were disclosed to a competitor as the applicant would lose its competitive advantage. If Ms Rogers were in a position to disclose the details of the training it is difficult to see what competitive advantage other clinics would gain. Ms Rogers does not have the Micromode manual.

[27] In *Nedax Systems v Waterford Security Ltd* [1994] 1 ERNZ 491 Goddard CJ excluded from the concept of confidential information:

> *…skill, techniques, knacks, and know-how generally, learned, assimilated, or enhanced during the employment… once acquired, these become a part of the employee who may do with them as he, or she, pleases*.

[28] In *Westminster Chemical NZ Ltd v McKay* [1973] 1 NZLR 659 Speight J said:

> *The law will restrain a former employee from using knowledge acquired during employment but not knowledge which might be acquired in the trade generally. He also referred to knowledge being of such a specialised nature that the employee could not have known of it but for hi employment and that it was of a private and specialised nature rather than general training or knowledge which might be expected within the trade.*

[29] In *NZ Needle Manufacturers Ltd v Taylor* [1975] 2 NZLR 33 McMullen J stated that the distinction is between:

> *…information which is secret to the extent that an employee would not have acquired it had he not been in the employment of the first employer and information which an able employee might have acquired in the course of his experience within the trade. In the first class the information is protected. In the second it is not.*

[30] There is nothing that is the applicant's property as distinct from the skill, experience and know-how of Ms Rogers.

[31] The information which Ms Rogers acquired is information she could acquire in the course of working in the area of appearance medicine. It is not of a private and specialised nature.

Client knowledge

[32] In *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 (HL) at 704 the Court said:

> *Whenever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained.*

[33] I had no evidence that there were personal relationships developed. Ms Rogers worked between four and eight hours a week and said that there were few return customers. Hairdressers will see clients on a regular basis. However, the treatments given by Caci can last from three to eighteen months. Ms Rogers's employment was less than a year in duration.

[34] Ms Katharine Anderson said that Ms Rogers could not deliver advanced techniques because she had insufficient experience, due to the limited number of hours she worked, to qualify for advanced training.

[35] On the evidence available, Ms Rogers did not have a sufficient client base for there to be a risk to Caci were she to go to a competitor.

Compilation

[36] In *Coco v A N Clark (Engineers) ltd* (1969) RPC 491 Meggary J stated:

> *Something that has been constructed solely from materials in the public domain may possess the necessary quality of confidentiality: for something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain. Novelty depends upon the thing itself, and not upon the quality of its constituent parts.*

[37] In similar vein is *Ceiling Clean (NZ) Ltd v Jensuelynn Enterprises Ltd*, 9/10/87, Wylie J, HC Auckland A1337/83. This dealt with claims that a ceiling cleaning system and formula was confidential. The Court found there was nothing secret about the equipment and that the evidence was information regarding appropriate chemicals for cleaning purposes was available in text books or from analytical and industrial chemists or form the trade. The Court went to say that:

> *That, however, does not necessarily preclude a claim for confidentiality because the combining into a previously undeveloped process of matters readily available or within the public knowledge may of itself be enough: A.B. Consolidated v Europe Strength Food Pty Ltd [1978] 2 NZLR 515 where Woodhouse, J delivering the judgment of the Court said at page 521:*
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> > *"The kind of information which will be protected must have 'the necessary quality of confidence about it' in the sense that it is not 'something which is public property and public knowledge': Saltzman Engineering Co. Ltd v Campbell Engineering Co. Ltd (1948) 65 RPC 203, 215; [1963] 3 All ER 413, 415. Nevertheless, the mere fact that a concept is a simple one or that the individual or discrete parts of a wider process are publicly known or are used by a trade will not prevent the overall process itself or the concept as a whole from being protected. Nor is it necessary for the information to possess the character of novelty or invention that would be required in the case of a successful patent application."*

[38] I accept that something new and confidential may be created from existing materials. Wylie J found that the cleaning process fell into the category of "know how" which differs from secret and confidential information. When I consider the material in the training manual and the content of the training course I am hard pressed to be able to view it as new and confidential. It consists largely of excerpts fro textbooks and journals which are in the public domain. The exceptions do not amount to the creation of something novel.

Reasonableness of the restraint.

[39] Given that I have found that there is no proprietary interest to be protected the restraint of trade is not enforceable.

Costs

[40] The parties should attempt to resolve the matter of costs. If they are unable to do so the first respondent should file a memorandum within 28 days of the date of this determination. The applicant should file a memorandum in reply within 14 days of receipt of the first respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority