Determination Number: AA 257/05
File Number: AEA 1142/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Air8tors Limited (Applicant)
AND	Grant McKenzie Umbers (Respondent)
REPRESENTATIVES	Clive Umbers and Valerie Umbers, Advocates for Applicant Grant Brittain, Counsel for Respondent
MEMBER OF AUTHORITY	Ken Anderson
INVESTIGATION MEETING	20 April 2005
DATE OF DETERMINATION	11 July 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The Applicant Company, Air8tors Limited, seeks an order from the Authority that Mr Grant Umbers must comply with a restraint of trade provision contained in the employment agreement that the parties entered into. The Company also seeks an order for the payment of damages that are alleged to have been incurred due to the breach of the restraint provision.

[2] However, Mr Umbers says that he did not breach the restraint of trade provision, but in any event, it is unenforceable for a number of reasons. Mr Umbers is pursuing two counter-claims. Firstly, he says that the Company has not paid commissions that are due to him and he also says that he was unjustifiably dismissed and seeks to be paid the sum of $5,000 as compensation

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Background

[3] Mr Grant Umbers and Mr Clive Umbers are brothers.

[4] Air8tors Limited (referred to onwards in this determination as "the Company" or "Air8tors") was incorporated in February 2002. Mr Clive Umbers is the sole director. The business was established for the purpose of providing soil aeration services, largely to horticultural enterprises and also to sports turf and race tracks.
Mr Clive Umbers is the sole director of the Company. He is also an employee of the Company.

[5] Another company, Air8tors Whakatane Limited, was incorporated in July 2002. There were five directors of that company, two of whom were the Umbers brothers. However, that company is not directly involved in this action, albeit there appears to have been some interaction between the parties in various forms as Air8tors Limited owned 51% of the shares

of Air8tors Whakatane Limited.

The Employment Agreement

[6] Mr Grant Umbers became an employee of the Company in February 2002. Substantially, his role was to market and sell the services that the Company provided. The parties signed an employment agreement. While the agreement states that it was executed on 1 February 2002, and the parties accept that it was effective from that date, it appears that it was not actually signed until December 2002 or January 2003.

[7] The agreement contains a restraint of trade condition, at clause 15, which provides that:

> "If this agreement is terminated in any way then the employee shall not for a period of three (3) years either directly or indirectly carry on or be interested either alone or in partnership with or as manager, agent, director shareholder or employee of any other person in any business similar to the business conducted by the employer. The employer undertakes that if its present director and shareholder, **CLIVE GRAHAM UMBERS** shall cease his directorship and relinquish his shareholding then it will procure from the said **CLIVE GRAHAM UMBERS** a restraint of trade provision on the same terms and conditions as appearing herein."

[8] At clause 11 of the agreement there is reference to a possible offer of shares in the Company:

> "It is the intention of the employer to offer the employee its shares provided however if such shares are taken the following provisions shall apply:
>
> (a) If the employment relationship is for any reason terminated within two years of its commencement all such shares shall, upon termination of the employment relationship, be transferred back to the employer at the consideration of $1.00 per share.
>
> (b) If the employment relationship is for any reason terminated the employee shall, upon termination of the employment relationship, be free to sell such shares on the open market provided however the employer shall at all times have pre-emptive rights in respect of any sale and purchase."

[9] The wording of the clause is ambiguous. For some reason the parties have departed from the words used in an earlier draft agreement which were clear and specific. Nonetheless, the clause has assumed some relevance in regard to the matter of consideration pertaining to the restraint of trade clause, a matter I will return to later.

[10] The evidence of Mr Clive Umbers is that he provided Mr Grant Umbers with a 20% shareholding in the Company at no cost to the latter and that this shareholding was "signed over" in April 2002. Mr Clive Umbers says that his brother was reticent to sign the employment agreement albeit he had received an allocation of shares in the Company. While that reticence was eventually overcome, it was symptomatic of a relationship that was fraught and destined to soon break down.

[11] There is another matter regarding the employment agreement that has taken on some specific relevance – the term of the agreement. There is some further ambiguity. At clause 1 of the agreement, employment is stated to be for a "continuous period."
However, a handwritten addition has been made above the signatures of the parties. The addition cryptically states: "To be reviewed every 12 months." This addition was required by, added and initialled by Mr Grant Umbers and accepted by Mr Clive Umbers. The former has not been particularly forthcoming as to exactly what he intended. Mr Clive Umbers says that the agreement was intended to be an "annual" one. I took it that he, and his brother, believed

that there would have to be an agreement to renew it each year. Of course it goes without saying, that there is a considerable and important difference between a "review" and a "renewal." Furthermore, there is no indication that the parties turned their minds again to the employment agreement after it was signed, until the relationship became tenuous. I conclude that it can reasonably be implied that the agreement simply remained in place until the relationship eventually terminated.

Relationship Breakdown

[12] From about mid-2002, the relationship between the Umbers was tense. This was evident in the reluctance of Mr Grant Umbers to sign the employment agreement and also his wish to obtain 50% of the commission that was paid by Air8tors Whakatane Limited to Air8tors Limited. Further tension arose in August 2003 when the Company had a cash flow problem due to the off-season fall off of work and the inability to pay Mr Grant Umbers his wages when they were due. There was also an issue pertaining to monies owed by Mr Grant Umbers to his brother for plumbing done on Grant Umber's house.

[13] The evidence of Mr Clive Umbers is that matters reached a head on 25 November 2003. Mr Umbers says that during a telephone conversation on that day, his brother said that: "it wasn't working out between us." Mr Grant Umbers also wanted Mr Clive Umbers to buy out the 20% shareholding that he held in the Company.

[14] The evidence of Mr Grant Umbers is similar as to his wish to sell his shareholding. He also says that he was prepared to: "go and find a new job."

[15] However, clearly Mr Grant Umbers had a change of mind directly related to the fact that an agreement could not be reached as to the value of his shareholding in the Company. This fact is recorded in the minutes of a meeting that took place on 19 December 2003, where the sale of the shares was discussed. Present at the meeting were Grant Umbers, Clive Umbers and his wife, Valerie Umbers.
The minutes record the following:

Val: *Same with your notice. You said you wanted to go on 25 Nov so that takes you to 25 Dec. Clive says you have holiday* [sic].

Grant: *I haven't given notice.*

Clive: *Yes you did.*

Grant: *I didn't do it in writing so it doesn't count.*

Clive: *No a verbal contract is enough.*

Val: *You said on 28 Nov when Clive asked you what you were going to do you said you would get another job somewhere, that to us confirmed you had given notice.*

Grant: *No I haven't I'm going to piss you about until you come up with an offer I deem acceptable.*

Clive: *You're going if not for resigning for the end of your contract. It comes up for renewal on the 1st Feb we don't have to renew it. Last year we let it roll over don't have to this year. You have to understand your contract comes to an end 1st Feb.*

Grant: *No it just gets renewed, I'm a 20% shareholder you can't do that*.

[16] The minutes further record Mr Grant Umbers stating: *Well if we come to an agreement before 1 Feb then I'm quite happy to go.*

[17] It was accepted that following the meeting, Mr Grant Umbers would be taking holidays due to him until 12 January 2004.

[18] On 29 December 2003, Mr Clive Umbers sent a letter to his brother. It conveyed that: "Your current employment contract which runs until the 1st of Feb 2004 will not be renewed."
Mr Grant Umbers took that to be a dismissal. However, Mr Clive Umbers says that his brother resigned on 25 November 2003, but not withstanding that, the employment agreement was up for renewal each year and he decided not to renew it.

[19] After seeking legal advice, Mr Grant Umbers raised a personal grievance and then returned to work on 16 January 2004. Mr Clive Umbers told him that he should go home until legal advice had been sought regarding the notification of the grievance.

[20] Mr Reginald Umbers, the father of two protagonists, attempted to intervene in an attempt to perhaps introduce a more conciliatory approach. He spoke to Mr Grant Umbers. Mr Umbers Senior has provided a written statement whereby he says that he was told by Mr Grant Umbers that: *"I'm going to do what ever it takes to take that arsehole 4th son of yours down, you just sit on the fence."* Mr Grant Umbers denies making such a statement. I am not required to make a finding on this matter and do not do so. I simply make the observation that it is most unfortunate that this dispute has had such a detrimental effect on family relationships.

[21] As of 16 January 2004, Mr Grant Umbers never returned to work at Air8tors Limited again.

Events following Grant Umbers departure from Air8tors Limited

[22] Following his departure from Air8tors, Mr Grant Umbers approached another company, Gwazae Limited ("Gwazae"), and offered his services. From some time in February 2004, Mr Umbers has been providing services to Gwazae. His evidence is that the services are provided via his company, GM & LM Umbers Limited. However, I note that the invoice that he provided to the Authority simply has the name GM & LM Umbers. Since August 2004, Mr Umbers has also provided services to another company, Ground Probe Aerators Limited ("GPA"). Both of these companies provide aeration services similar to those provided by Air8tors, but as I understand it, GPA is the company that is in direct competition with Air8tors.

[23] The evidence of Mr Clive Umbers is that in May 2004, a driver employed by Air8tors, went to work for GPA as a driver and sales representative. He believes that this person was "poached" from Air8tors through the direct involvement of Grant Umbers but provides no proof that this is so.

[24] Mr Clive Umbers also says that in September 2004 he became aware that some of Air8tors' customers had been approached by his brother. In order to ascertain what Grant Umbers was up to, Clive Umbers hired a private investigator. The investigator's report shows that Grant Umbers visited the farms of at least three of Air8tors' former customers on 6 September 2004.

[25] There is also evidence that there was some confusion among Air8tors' customers as to just

who Grant Umbers was representing during his marketing efforts for GPA and that he was also making reference to Air8tors' customers to potential GPA customers, if they wished to obtain verification of the effectiveness of the aeration process.

[26] Given the overall evidence, I am able to reasonably conclude that for the purposes of the restraint of trade provision that Air8tors seeks the enforcement of, Mr Grant Umbers was and remains, directly involved in a *"business similar to the business conducted by the employer."*

Is the restraint reasonable and enforceable?

[27] Before the matter of the compliance order can be considered, it is necessary to firstly examine whether the restraint of trade provision is reasonable and enforceable, given the overall circumstances pertaining to this matter. The legal framework in regard to restraint of trade covenants is clearly set out by the Employment Court in ***Medic Corporation Ltd v Barrett*** *[1992] 3 ERNZ 523*at pp. 533-534. The Chief Judge held that:

> ["….. I then have to bear in mind that in relation to covenants in restraint of trade there is not the same freedom of contract as exists in relation to employment contracts generally. That is because covenants in restraint of trade, by their very nature, suppress competition and this is seen as potentially harmful to the public interest and is potentially unfair because at the time when such a provision is negotiated it is often the case that party demanding the covenant is in a stronger bargaining position than the party on whom it is imposed. Therefore the law starts with an assumption that a covenant in restraint of trade is unenforceable unless the party seeking to enforce it can show that the covenant was reasonable with reference to the private interests of the parties concerned and the interest of the public at large. Sometimes the part that is unreasonable can be severed from the contract without affecting the rest."

[28] In ***Radio Horowhenua Ltd v Bradley*** *[1993] 2 ERNZ 1085,* the Chief Judge of the Employment Court held that:

> "In considering whether the restraint was reasonable in all the circumstances the Court has regard to the history of the employment, the nature of the employer's interest to be protected, the likely effect on it of the employee taking up a position with a competitor of the employer, the likely effect on the employee of the covenant being enforced, and any relevant considerations of public interest that suggest themselves."

[29] [The two cases above were decided under the regime of the Employment Contracts Act 1991 but the references to the Court can now be taken to apply to the Employment Relations Authority pursuant to its jurisdiction under s.161 of the Employment Relations Act 2000.]

[30] More recently, the Court of Appeal in ***Gallagher Group Ltd v Walley*** *[1999] 1 ERNZ 490* at p. 495, held that:

> "Covenants restricting the activities of employees after termination of their employment are, as a matter of legal policy, regarded as unenforceable unless they can be justified as reasonably necessary to protect the proprietary rights of the former employer and in the public interest: *Mason v Provident Clothing & Supply Co Ltd [1913] AC 724,733.*
> Whether a clause is in its particular circumstances reasonable and thus valid and enforceable is fundamentally a question of law but that can be answered only upon a consideration of the factual setting."

[31] And then at p.496, the Court held that:

> "The law is clear however that the reasonableness of a restraint clause is to be determined at the

time the contract is entered into."

Furthermore,

"Similarly under s 8 of the Illegal Contracts Act the power to modify a covenant is expressly related to that which would have been reasonable at the time the contract was entered into."

[32] The Privy Council also had occasion to examine the appropriateness of covenants of restraint in ***Stenhouse Australia Limited v Marshall William Davidson*** *[1974] AC 391,* and held at p.400, that:

"The accepted proposition that an employer is not entitled to protection from mere competition by a former employee means that the employee is entitled to use to the full any personal skill or experience even if this is acquired in the service of his employer: it is this freedom to use to the full a man's improving ability and talents which lies at the root of the policy of the law regarding this type of restraint ……. the employer's claim for protection must be based upon the identification of some advantage or asset inherent in the business which can properly be regarded as, in a general sense, his property, and which it would be unjust to allow the employee to appropriate for his own purposes, even though he, the employee, may have contributed to its creation. For while it may be true that an employee is entitled – and is encouraged – to build up his own qualities of skill and experience, it is equally his duty to develop and improve his employer's business for the benefit of his employer. These two obligations interlock during his employment: after its termination they diverge and mark the boundary between what the employee may take with him and what he may legitimately be asked to leave behind to his employers."

Application of the Law to the Restraint Clause in the Employment Agreement

[33] As previously set out, clause 15 of the employment agreement states:

"If this agreement is terminated in any way then the employee shall not for a period of three (3) years either directly or indirectly carry on or be interested either alone or in partnership with or as manager, agent, director shareholder or employee of any other person in any business similar to the business conducted by the employer. The employer undertakes that if its present director and shareholder, **CLIVE GRAHAM UMBERS** shall cease his directorship and relinquish his shareholding then it will procure from the said **CLIVE GRAHAM UMBERS** a restraint of trade provision on the same terms and conditions as appearing herein."

The reference to Mr Clive Umbers is somewhat odd but I am not required to take that further, except to note that it seems that he was happy to have a restraint on him in the event that he might assume the status of an employee only and that this was at the insistence of Mr Grant Umbers.

[34] It has been submitted for Mr Grant Umbers that the restraint covenant is unreasonable and unenforceable. In summary, the substantial reasons given for that submission are:

(a) There was no consideration for the restraint
(b) That there is a limited proprietary interest to protect;
(c) That the geographical and industry restraint is too wide;
(d) The time frame for the application of the restraint is too long; and
(e) The bargaining positions were not equal and Mr Umbers did not receive independent legal advice.

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(a) **Was there consideration for the restraint?**

[35] It is established law that an agreement in restraint of trade must be supported by valuable,

legal consideration.[1]Contrary to the argument advanced for Mr Grant Umbers, I find that there was valuable, legal consideration given for the restraint. The consideration took the form of the 20% shareholding in the Company that he was given without any payment having to be made by him. While the parties remain in dispute as to the true value of that shareholding at the time of Mr Umber's departure, it does not appear to be disputed, that as of April 2002, the shareholding was worth approximately $34,000 and depending upon the success of the Company, had the potential to be worth more.

Indeed, Mr Umbers acknowledged at the investigation meeting, that if he had received what he perceived to be fair price for the shares at the time of his departure from the Company, he would have accepted that the restraint should be adhered to.

(b) **Is there a proprietary interest to protect?**

[36] It appears to be generally recognised that the aeration process and the technology associated with that, is constantly evolving and hence any particular advantage that Air8tors may have would have a limited life and/or could be replicated or advanced by another business such as GPA, hence the process and its application is of limited value.

However, I find that the client list that Air8tors has built up since the Company's inception in 2002, of some 500 clients, according to the evidence of Mr Clive Umbers, must be seen to be a proprietary interest that is entitled to be protected.[2]

This is particularly so given Mr Grant Umber's intimate knowledge of the details of Air8tors clients and the blatant and cavalier nature of his attempts to entice them away from doing business with Air8tors and come to GPA.

(c) **The industry, geographical and time frame of the restraint.**

[37] I conclude that the restraint is unreasonable and unenforceable on all three counts. If the restraint was to be upheld, without modification, then the outcome would be that Mr Grant Umbers would be unable to be involved in the soil aeration industry, at least in New Zealand, for a period of three years from December 2003. That is clearly unreasonable and Air8tors has not been able to show that such term is reasonably necessary. I am also unable to accept the submission from Mr Clive Umbers that a restraint for three years is necessary and/or reasonable because it takes that amount of time to show beneficial results in regard to horticultural aeration applications.

[38] Nonetheless, I accept the evidence of Mr Clive Umbers as to the nature of the results that Air8tors has been able to obtain for some of its clients and that it is not until the second year that those results become evident. I therefore conclude that in these specific circumstances, it is reasonable for the restraint upon Mr Grant Umbers to remain in place for two years.

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[1] ***M A Watson Electrical v Kelling*** *[1993] 1 ERNZ 9* at 23, and ***Dillon v Chep Handling Systems*** *[1995] 2 ERNZ 282* at 303.
[2] ***BFS Marketing vField*** *[1992] 2 ERNZ 1105* at 1117.

[39] The Authority has the discretionary ability to modify the term of the restraint pursuant to s.8 (1)(b) of the Illegal Contracts Act and reduce the time that the restraint should apply from three years down to two years. It is now so ordered.

[40] In regard to the geographical application of the restraint, while the present provision is unreasonable, I conclude that it would be reasonable for the restraint to apply within the area where Air8tors obtains the majority of its business. Therefore, pursuant to the provisions of s.8 (1)(b) of the Illegal Contracts Act, the restraint clause should be further modified and should apply only to the province of the Bay of Plenty. It is now so ordered.

[41] Both of the above modifications are to be effective from 25 December 2003, that being the date that the termination of Mr Grant Umber's employment with Air8tors appears to have occurred, following Mr Umbers giving one months' notice from 25 November 2003.

(d) **Bargaining – Legal Advice**

[42] I do not accept that Mr Grant Umbers was disadvantaged in any manner as to his ability to arrive at a bargain in regard to the employment agreement or the restraint provision in particular. Indeed, my observation of Mr Umbers is that he is more than capable of looking after his own interests.

Order of the Authority

[43] I find that the restraint of trade clause, with the above modifications, is enforceable against Mr Grant Umbers and pursuant to the powers available to the Authority under the provisions of s.137 of the Employment Relations Act 2000, he is ordered to comply with it from the date of this determination.

The effect of this order is that Mr Grant Umbers shall not, for a period of two years from 25 December 2003, either directly or indirectly, carry on or be interested in, either alone or in partnership with, or as manager, agent, director, shareholder or employee of any other person, any business similar to the business conducted by Air8tors Limited, operating in the Bay of Plenty province.

Damages

[44] Air8tors claims that the Company has incurred substantial damages due to the actions of Mr Grant Umbers. In particular, Air8tors points to the unfair advantage that Mr Grant Umbers has given to GPA due to his inside knowledge of the business practices and customers of Air8tors, all gained while employed by the Company.
While the conclusions reached by Air8tors as to the actions of Mr Grant Umbers having a detrimental effect on the turnover of the business may have some validity, the evidence available to the Authority does not support an award of damages against Mr Grant Umbers and I decline to do so.

The Counterclaims of Mr Grant Umbers

1. **Unjustified Dismissal**

[45] Mr Umbers says that he was unjustifiably dismissed from his employment but has not been forthcoming as when he believes the alleged dismissal was effective from. But in any event, it has not been necessary for me to take that any further as I accept the evidence of

Mr Clive Umbers that Mr Grant Umbers resigned on 25 November 2003. Indeed, the evidence of Mr Grant Umbers also confirms that he did resign but subsequently there was a disagreement between the parties as to the value of his 20% shareholding in the Company. The value of Mr Umber's shares is a separate and distinct matter that remains in dispute but I conclude that Mr Grant Umbers did resign on 25 November 2003 and that resignation was accepted by his brother as being effective from 25 December 2003, pursuant to clause 13 of the employment agreement.

[46] Mr Clive Umbers has also taken an alternative position regarding the termination of the employment of his brother. That is, he says that the employment agreement was open to renewal an annual basis and he chose not to renew it, as communicated by his letter of 29 December 2003. However, I find that Mr Umbers is mistaken about the agreement having to be renewed each year. I conclude that the employment was for a continuous term with termination on one months' notice.

[47] I find that the termination of the employment of Mr Grant Umbers was brought about by his resignation given on 25 November 2003 and effective from 25 December 2003. He was not dismissed and does not have a personal grievance.

2. **Payment of Commission**

[48] Apart from the fact that Mr Umbers has not identified the sums that he believes are due to him as commission payments, I can find no evidence of the existence of any agreement, written or oral, express or implied, that gives Mr Umbers any entitlement to any commission payments and hence I must decline this claim.

Determination

1. I find that clause 15 of the employment agreement, the restraint of trade covenant, with the modifications set out above, is enforceable against Mr Grant Umbers. Pursuant to the powers available to the Authority under the provisions of s.137 of the Employment Relations Act 2000, Mr Umbers is ordered to comply with the covenant from the date of this determination.

2. The claim by Air8tors Limited for damages to be paid by Mr Grant Umbers is declined for want of evidence.

3. Mr Grant Umbers does not have a personal grievance and the remedy that he seeks is not available to him.

4. Mr Grant Umbers has not been able to provide proof that he has an entitlement to commission payments and his claim is declined.

5. Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions can be made to the Authority for an order, within 28 days of the date of this determination.

Ken Anderson
Member
Employment Relations Authority