

breached clause 5 of the Settlement Agreement by making disparaging remarks.

D. Mr Bain did not breach the restraint of trade provision in the Settlement Agreement.

E. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.

Employment relationship problem

[1] Murray Bain was approached by Grahame Christian, Managing Director of Smart Environmental Limited (Smart or the company), about the prospect of Mr Bain working for Smart. Both men had extensive experience in the waste management industry. Smart is a refuse and recycling company.

[2] Mr Bain began working for Smart on 16 September 2016 as a commercial manager. After a few weeks he agreed to a promotion to the role of Area Manager for East Waikato.

[3] In November 2017 Mr Bain and Smart's Chief Operating Officer Blair Griffiths agreed an exit package for Mr Bain. This was signed by a mediator from the Ministry of Business, Innovation and Employment (the Settlement Agreement). Mr Bain's final day of work was 16 November 2017 and his employment with Smart finished on 1 December 2017.

[4] Mr Bain claims that Smart has breached the Settlement Agreement by making disparaging comments about him and not paying the full amount required under the Settlement Agreement. Smart denies those allegations and counterclaims that Mr Bain himself made disparaging comments and breached a restraint of trade provision in the Settlement Agreement via his company Coastal Bins Limited (Coastal Bins).

[5] An investigation meeting was held on 1 November 2018 and I heard evidence from Mr Bain and, in support of his claims, a colleague of Mr Bain who previously worked at Smart. A written statement was also received from a technical director who set up the Coastal Bins website. By consent, he was not required to attend the investigation meeting. Mr Bain also filed a letter of 26 September 2018 from a solicitor at Fire and Emergency New Zealand. The solicitor's attendance was not required.

[6] For Smart I heard from Mr Christian, Mr Griffiths, Scott Brown (Area Manager), Dave Fraser (Operations Manager) and Hine Taane (Human Resources Manager).

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[8] The issues for determination are:

- (a) Did Smart breach clause 3.1 of the Settlement Agreement by failing to pay Mr Bain what was owing under that clause?
- (b) If so, should a compliance order be issued?
- (c) Did Smart breach clause 5 of the Settlement Agreement by making disparaging comments about Mr Bain?
- (d) If so, should the company be ordered to pay a penalty, and if so how much?
- (e) Did Mr Bain breach clause 5 of the Settlement Agreement by making disparaging comments about Mr Christian?
- (f) Did Mr Bain breach clause 3.4 (the restraint of trade) of the Settlement Agreement?
- (g) If breach/es of the Settlement Agreement by Mr Bain are established, should he be ordered to pay penalties and if so, how much?

[9] An additional claim of disparaging comments was raised by Smart for the first time in an additional witness statement filed a week before the investigation meeting. The Authority did not grant leave for that issue to be dealt with at the 1 November 2018 meeting. Smart had already filed three amended statements in reply¹ without mentioning that matter, and the new claim looked likely to require the involvement of additional witnesses who were not already giving evidence.

Negotiation of the Settlement Agreement

[10] Towards the end of Mr Bain's employment he went off on stress leave. Mr Bain and Mr Griffiths, along with another Smart manager, met on 24 November 2017 to discuss Mr Bain's continued employment. Mr Griffiths and Mr Bain agreed on an exit package of six months' salary. No dollar figure was mentioned at this point.

¹ One prior to the instruction of counsel

[11] Mr Bain raised the possibility of dividing the amount into salary and compensation components. Mr Griffiths was uncertain about that, so he called the HR manager Ms Taane, who said she would seek advice. Mr Bain said he would speak to his lawyer.

[12] At that time Mr Bain was not aware of the exact salary figure and this is reflected in some of his communications. Mr Bain emailed Mr Griffiths to say that the advice he received was that \$60,000 could be compensation and the balance as wages (\$3,500). He noted his current salary as \$127,000, so six months was \$63,500. The evidence from Ms Taane is that his actual annual salary at that time was \$127,125.

[13] Mr Bain's lawyer drafted a settlement document to that effect. Mr Griffiths was surprised at this as he thought the parties had agreed at the 24 November meeting that Smart would draft the agreement. The proposal had Smart making two more weekly salary payments to Mr Bain and a compensatory sum of \$60,000 to be paid.

[14] Smart rejected that offer. It drafted its own version of a settlement agreement, which contained a number of the same issues as Mr Bain's version, although the wording was not identical. Smart's agreement provided for payment of \$38,562.46 "being the equivalent of 4 months' salary" in clause 3.1, as well as \$25,000 compensation in clause 3.3. Smart says it calculated that six months' annual salary was \$63,562.50, with \$25,000 deducted from that, leaving \$38,562.50 to be paid as salary.

[15] Mr Bain received this draft and emailed Ms Taane that he was ok with it other than he wanted to see the clause 3.1 amount reduced by \$10,000 and the clause 3.3 payment increased by \$10,000. That was not accepted by Smart.

[16] The parties and the mediator signed the Settlement Agreement.

Mr Bain's claim for payment under the Settlement Agreement

[17] Clause 3.1 of the Settlement Agreement provides that:

within seven days of the date of cessation, the Employer will pay the Employee \$38,562.46 (less applicable tax and other deductions required to be made by law), being the equivalent of 4 months' salary; ...

[18] Mr Bain says that the agreement should have said \$42,500, as that was four months' salary. He claims that Smart owes him \$3,937.54 being the difference between four months' actual salary and the \$38,562.46 he was paid.

[19] In his witness statement Mr Bain said that he did not check the numbers himself. He realised the difference in amounts once he had left the job and his stress levels came down.

[20] However, at the investigation meeting Mr Bain raised for the first time that during his phone discussion with the mediator who was going to sign the agreement off, he mentioned that the agreement document was different to what was agreed, in that there was a reference to four months' salary.

[21] Both parties agree that there had been no mention of four months' salary during their discussions. Mr Bain says that the mediator asked if he was prepared to accept the deal. He replied that he was if Smart paid it. He was surprised when Mr Griffith signed the agreement. At the investigation meeting he accepted that the deal (referring to four months' salary) was obviously better for him than the one which had been reached with Mr Griffiths. My impression was that Mr Bain saw himself at the time of the discussion with the mediator as getting a bit of a windfall, had four months' salary actually been paid.

[22] Smart says that the dollar figure in the agreement, which it paid, reflects the discussions the parties had about amounts to be paid and that the agreement was not that Mr Bain would get whatever four months' salary was.

Conclusion on the payment issue

[23] The references in clause 3.1 to the dollar amount and to four months' salary equivalent, cannot be read together. They are inconsistent. I am satisfied from all the evidence that the agreement between the parties was that Mr Bain would receive the value of six months' salary, to be divided into a salary payment and a compensation payment.

[24] The figure of \$38,562.46 in clause 3.1 accurately reflects six months' salary less the \$25,000 which the parties agreed was to be allocated as compensation. Thus the dollar figure paid accurately reflects the parties' agreement. I find that Smart has

not breached clause 3.1 of the Settlement Agreement and has paid Mr Bain all that is due under the clause.

Disparaging comments claims

[25] Clause 5 of the Settlement Agreement states that:

Neither the Employee nor the employees of the Employer who are aware of this Agreement shall make any disparaging comments about the other to any other person.

[26] Both parties claim that the other made disparaging comments about them. Mr Bain claims that a Smart memorandum disparaged him. Smart says that Mr Bain disparaged Mr Christian during a telephone call, which was made to someone he described as the local fire chief.

Smart's memorandum

[27] In January 2018 Mr Christian sought the phone records from Smart's provider for staff phone use. Around lunchtime on 25 January 2018 he received a report compiled by Ms Taane, of Smart employees who had called Mr Bain. This included the phone use of the colleague who gave evidence on Mr Bain's behalf, which contained a substantial number of calls to Mr Bain's phone. The two men were friends. Also, as the colleague had to temporarily take over Mr Bain's work at short notice when Mr Bain stopped working at Smart, he frequently phoned Mr Bain for advice or information.

[28] Mr Christian proceeded to type a memorandum. The memo runs to over a page of single spaced text. At 1.29pm Mr Christian sent the memo by email to an email group of all Smart employees and contractors.

Distribution of Mr Christian's email

[29] Smart had difficulty retrieving the list of the email group members in the state it had been in as at 25 January 2018. It accepted that the email went to all Smart employees with a Smart email address. This was not all employees as some groups of employees, such as labourers, did not use email for work purposes. Mr Christian estimated that about 200 people received it.

[30] The email also went to contractors such as owner-drivers. Smart's evidence was that companies which contracted with Smart were not on the list. Mr Bain received the email when someone anonymously dropped it in his letterbox.

[31] There was a suggestion that the email could have been placed on notice boards at Smart sites as that happened with such things as health and safety notices. To his credit Mr Christian accepted that he could not rule out that having happened here. However, there was no direction that it be put on notice boards. In other situations such a direction had been made. There was no evidence of anyone having put the email on a notice board or seen it there.

The memo

[32] Mr Christian's memo began:

Phone and Text.

I am very disappointed to learn that some of our team have been in contact with some ex-employees of the company. Those employees left disgruntled or under less than normal circumstances and we as a team generally know who they are.

[33] The memo goes on to express dismay at the frequency of contact between a current and a former employee. Neither is named. After some probing at the investigation meeting Mr Christian accepted that this referred to Mr Bain and the colleague who gave evidence on his behalf.

[34] The memo goes on to give warnings about the company having access to emails and staff being discouraged from commenting negatively about the company on social media. Directives are issued about phone, text, email and social media use.

[35] Mr Christian continues:

For me as the founder as Managing Director, it has been extremely sad and disappointing to **have several employees leave under a cloud, we have uncovered irregularities and in some cases straight out dishonesty.** We are currently reserving our position as to **whether we will take proceedings or report the matter to the Police.** (*emphasis added*)

Were the comments directed in a way that is captured by clause 5?

[36] Smart argues that the memo was sent only internally and so does not come within the description in clause 5 of comments directed to "any other person". However, the whole of the clause needs to be considered. It starts with Mr Bain and then refers to employees (of Smart) who are aware of the Agreement not making

comments to “any other person”. To put it colloquially, this prevents disparaging comments being made by those at Smart in the know to those not in the know.

[37] A substantial majority of the 200 or so recipients were, as far as the evidence shows, not aware of the Settlement Agreement. Disparaging comments to them would be in breach of clause 5. In addition, Smart contractors received the email and they were not within the description of employees of Smart, the employer. Thus the memo was sent to many people who were not Smart employees and/or not aware of the Settlement Agreement and the memo is captured by the clause.

Were the comments disparaging?

[38] In considering whether Smart’s memo was in breach of the non-disparagement clause I look at the wording of the clause and have also gained assistance from defamation law, particularly Todd’s Law of Torts in New Zealand.²

[39] Clause 5 requires employees of Smart who are aware of the Settlement Agreement not to make any disparaging comments about Mr Bain to any other person. There was no suggestion that Mr Christian was not an employee or was not aware of the terms of the Settlement Agreement.

[40] To disparage includes to discredit or degrade. Clearly the memo’s comments were disparaging. There are imputations of fraud or dishonesty, and of criminal conduct. When read as a whole the memo paints a sombre picture of serious wrongdoing. Even the reference to employees having left under a cloud could be enough to be a disparaging comment.

Could the disparaging comments be taken as being about Mr Bain?

[41] The more difficult question is whether the comments can be associated with Mr Bain in particular.

[42] Smart says that the references to irregularities and dishonesty were not intended to refer to Mr Bain. However, it is clear that it was the results of the investigation into calls made to Mr Bain which triggered the creation of the memo.

² Ursula Cheer “Defamation” in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th edition, Thomson Reuter, Wellington, 2016).

[43] In defamation cases the plaintiff must establish that the defamatory words were published about him or her. The test is whether reasonable people would reasonably believe that the words referred to the plaintiff. The High Court of Australia put the question this way:

Are [the words] such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to?³

[44] The person claiming to be defamed does not have to be named, so hints or oblique indications of identity may be enough. Also, not all readers need to make the connection; it is enough if some people knew sufficient facts to enable them to do so.⁴ With a smaller group comes a greater likelihood that the person claiming to be defamed will be able to show that the words are directed towards him or her.

[45] Here the memo refers to several people leaving under a cloud. 'Several' is generally used to refer for a small group of more than two. The memo narrows the references down with, referring to there being “**in some cases** straight out dishonesty”⁵, with the use of the plural suggesting that there was more than one case of dishonesty. This makes it more likely that Mr Bain would have been identified with that description than if only one case was referred to.

[46] Some Smart witnesses suggested that Mr Bain did not leave under a cloud as there was some desire that he stayed working at Smart. However, having heard evidence regarding his departure, including Mr Christian's involvement and Mr Bain being off work on stress leave, I am satisfied that those knowing of at least some of the circumstances could have inferred that Mr Bain was included in that group.

[47] To get a sense of who the memo could be referring to it is necessary to look at how many people left around this time and, without identifying them individually, whether the memo could be taken as referring to them, rather than to Mr Bain.

[48] Mr Bain says that he was only aware of two employees other than himself leaving Smart around the same time as him. He believes that he was the only one of the three who exercised significant financial control and so recipients of the memo would have associated the comments regarding dishonesty and possible criminal behaviour with him.

³ *David Syme & Co v Canavan* (1918) 25 CLR 234 at 238 per Issac J.

⁴ Todd referring to *Clarke v Vare* [1920] NZLR 430 (SC).

⁵ Emphasis added.

[49] Smart identified four additional people who left around the same time as Mr Bain. However, the evidence regarding when they actually left was sparse.

[50] I accept Mr Griffiths' evidence that at least two other people who left had ordering authority, suggesting more room for dishonesty. However, Mr Bain had the most senior position and the highest level of financial control. Because of his role, it seems likely that he was more widely known than others who left.

[51] Mr Bain's colleague, who gave evidence on his behalf, considered that the reference in the memo to someone leaving under a cloud was to Mr Bain. Likewise the reference to dishonesty, although the colleague was not aware of Mr Bain doing anything dishonest. His impression from discussions with staff is that they considered the memo to relate to Mr Bain.

[52] When Mr Bain's lawyer challenged the memo and sought a retraction, Smart replied in such a way that Mr Bain considers to be confirmation that he was a target of the email. That is because there was no denial that the memo was about him. Rather the focus is on justifying Smart's approach and disregarding Mr Bain's concerns about defamatory and disparaging comments. Smart did offer to provide a statement of clarification as requested but only if Mr Bain met certain conditions. These included having no further communication with Smart employees and that he identified from whom he received the memo.

[53] The risk of using of general descriptions of people without names is demonstrated by the situation of one of Smart's witnesses, Area Manager Mr Brown. He had also been in contact with Mr Bain and wondered if the memo's comment about phone contact related to him. He approached Mr Christian to discuss the issue. It is accepted that the memo was not aimed at Mr Brown.

[54] Clearly parts of the memo are about Mr Bain. He was the most senior staff member to leave within a few months before the memo was sent out. I find that there was sufficient to lead at least some of the memo's recipients to consider the comments on dishonesty and possible criminal matters to refer to Mr Bain. Thus the memo breaches clause 5 of the Settlement Agreement.

Penalty against Smart

[55] Mr Bain seeks that a penalty be imposed against Smart. I consider that this is a suitable case for a penalty. The statements have the potential to seriously damage Mr Bain's reputation.

[56] I now consider the relevant matters in assessing an appropriate penalty, including s 133A of the Act, taking into account the Employment Court's approach in recent cases *Nicholson v Ford*⁶ and *A Labour Inspector v Daleson Investment Ltd*⁷.

[57] The maximum penalty is \$20,000 against a company. There was only one breach.

[58] Included in the objects of the Act in s 3 is the promotion of mediation as the primary problem-solving mechanism.⁸ Non-disparagement clauses are very common in mediated settlement agreements. Parties must feel confident that agreements they enter into will be honoured.

[59] The nature and extent of this breach is significant. Although only one email was involved, it contained very serious allegations, which Smart accepts were not about Mr Bain. The email went to about 200 people, including contractors. I regard this as being at the more serious end of the scale.

[60] I do not find it to be established that Smart intentionally linked Mr Bain to the most extreme comments in the email. However, the memo was issued shortly after getting the phone information and Smart was reckless to distribute the memo so quickly without properly considering the possible links that could be made between the statements and people who had left Smart.

[61] I now consider any loss or damage suffered by Mr Bain. There was evidence from Mr Bain's former colleague of the matter being discussed in the workplace and at haulage companies which Smart dealt with. Relationships between witnesses for both parties indicate that this is a closely connected industry with the potential for word to spread easily.

⁶ *Nicholson v Ford* [2018] NZEmpC 132.

⁷ *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

⁸ Section 3(a)(v) of the Act.

[62] Mr Bain also says that his future employment was jeopardised. At Christmas or New Year he applied for a similar position to the one he held at Smart. This was with a company where he had previously worked for a number of years. Mr Bain did not even get an interview and was shocked.

[63] The person who got the job came from overseas. Although the evidence was limited regarding the reasons for his appointment, it seems unlikely that Mr Bain would not even be seen as meriting an interview.

[64] However, as it turns out Mr Bain could not have fully undertaken that job whilst the restraint of trade in the Settlement Agreement was in place, as part of the job would have been in breach of the restraint. Mr Bain says he was not aware of that aspect when he applied, relying on his previous knowledge of the role.

[65] Exacerbating the prospect of Mr Bain's reputation being damaged was Smart's approach once the issue was raised with them. Mr Bain sought an urgent retraction and clarification to all recipients of the memo to confirm that it was not targeted or related to Mr Bain.

[66] The response from Smart, which appears not to have been legally represented at that point, was to make only a conditional offer to clarify. As a result no retraction was ever issued. Smart did not take steps to mitigate any actual or potential adverse effects of its breach.

[67] Finally I consider proportionality. Recent cases regarding non-disparagement clauses provide a range of penalties from \$250 to \$8,500.⁹ I consider that there is a need for specific deterrence against Smart as well as general deterrence. This is a serious breach which warrants a penalty towards the higher level. A penalty of \$8,000 is appropriate, which should be paid to Mr Bain. I order Smart to pay a penalty of \$8,000 to Mr Bain within 21 days of the date of this determination.

Smart's claim of disparaging comments

[68] Smart's claim concerns comments allegedly made by Mr Bain during a phone call when two Smart employees were present. Mr Bain is alleged to have said during the call that the other person on the call needed to investigate Mr Christian regarding a

⁹ Including those referred to in *Lumsden v Skycity Management Ltd* [2017] NZEmpC 30.

fire. Mr Bain is said to have identified the person on the other end of the line as his mate, the fire chief.

[69] These events occurred the day after a serious fire at the Smart refuse station where Mr Bain had previously been based. This was close to his home. Mr Brown and Operations Manager, Mr Fraser from Smart arrived at Mr Bain's home unexpectedly for a visit. There was discussion about the fire, some of it jovial.

[70] The onus of establishing that the comment was made is on Smart. I found the evidence called by Smart to be inconsistent. Mr Brown recalled the statement that Mr Christian should be investigated regarding the fire. Mr Fraser did not recall that comment, even though the two men were sitting together with Mr Bain only a couple of metres away.

[71] Attempts to determine how Mr Brown became involved in this proceeding did not clarify that question. Mr Brown was unsure who prepared a 2 May 2018 letter that he signed setting out events. The letter is addressed: "to whom it may concern". The letter is dated after Mr Bain's proceeding, including his disparaging comments claim, was filed in the Authority although the letter was only filed with the First Amended Statement in Reply.

[72] Mr Bain denies making the comment. He says that he did not take a phone call during the time when the Smart employees were there, other than he may have been on the phone when they arrived. Further Mr Bain says that he has not met the local fire chief and/or the man of the name Smart understood to be involved.

[73] Even if I accepted that Mr Bain was on a call and made the comment Mr Brown alleges, it was not established whether any call was actually made to the fire chief. After a request for particulars Smart identified the name of the man it understood to be involved. However, the letter from the solicitor for Fire and Emergency New Zealand says that the man named did not meet with Mr Bain on that date Mr Brown gave and has not had a conversation with Mr Bain along the lines suggested. There was no evidence of any follow up from such a person or anyone else for Fire and Emergency New Zealand with Mr Christian. Mr Christian's evidence was that such insurance as there was for the property was paid out on.

[74] In conclusion I am not satisfied that Smart has established its claim.

The restraint of trade claim

[75] Mr Bain agreed in clause 3.4 of the Settlement Agreement that:

For six months following the cessation date, a Restraint of Trade agreement will be in place. The Employee will not undertake, carry on or be employed, engaged or interested in any capacity in a business which competes, either directly or indirectly, with the Employer in the greater East Waikato region.

[76] Smart alleges that Mr Bain incorporated Coastal Bins Ltd and through that company operated in direct competition with Smart.

[77] It is clear that clause 3.4 forbids Mr Bain's direct or indirect involvement in any capacity in a business which competes. Coastal Bins was intended to operate in an area of business which was in competition with Smart. Mr Bain accepts that he had undertaken preparatory or set-up tasks for Coastal Bins prior to 1 June 2018 on the basis that he did not consider this to be competing with Smart. However, the crucial question is whether Coastal Bins competed within the six months following the cessation of Mr Bain's employment.

[78] Coastal Bins was incorporated on 24 January 2018. Mr Bain and another former Smart employee, who I did not hear evidence from, were the directors and shareholders. That company's business classification in the Companies Office records is "rubbish and waste removal", although as at 18 May 2018 there were no website, phone, email or premises address details, other than the registered office, listed on those records. I now move on to consider aspects of Coastal Bins' activities.

Vehicles and equipment

[79] Mr Christian visited Mr Bain's property on 24 May 2018, he says, in an attempt to amicably resolve the dispute. Mr Christian saw a gantry truck, a rear loading rubbish truck and a gantry bin trailer all branded with Coastal Bins signwriting. The trucks were parked behind a shed and backed up to a fence, which Mr Christian regarded as a sign that Mr Bain was trying to hide them.

[80] Mr Christian considered that the gantry truck, which required several months to build and get signs written, would need to have been started in February 2018 at the latest.

[81] Mr Bain says that the trucks were parked away from the public so the signs were not visible. The signwriting was arranged to be done outside the region and the branded vehicles and equipment remained on Mr Bain's property until the restraint period finished.

[82] Mr Christian says that ordering of bins and other large equipment would have taken some months. Mr Bain disagreed with aspects of Mr Christian's evidence and provided some documents in support of his position. Bins were ordered before 1 June 2018 but did not arrive and were not paid for until 1 June 2018. An invoice was filed in support.

Accounts

[83] Mr Bain filed Coastal Bins' profit and loss report, sales transactions report and GST return for the period from 1 January 2018 to 31 May 2018. These show a total trading income of \$1.13 which Mr Bain explains as occurring when he tested the Eftpos machine.

Employees

[84] In his witness statements Mr Christian suggested that Coastal Bins had employees prior to 1 June 2018. Mr Bain denied that Coastal Bins had employees prior to that date and filed some payroll information which showed start dates for employees after that date. Mr Christian says that his comment was based on the assumption that Mr Bain was an employee prior to 1 June 2018. There is no evidence that this was the case, although Mr Bain was obviously undertaking set-up tasks for Coastal Bins.

IT

[85] The technical director who set up the Coastal Bins website confirms that Mr Bain was very particular that the website not be visible to the public until 1 June 2018 as he was subject to a restraint of trade. The site was blocked and password protected so could not be accessed without a username and password. It could not be indexed by Google and other search engines. The protection was removed and the site submitted to search engines in the early hours of the morning of 1 June 2018. The first public visitors visited the site on 1 June 2018. The first sale via the website occurred on the same day.

[86] The Coastal Bins Facebook page was blocked until 1 June 2018. For testing purposes the technical director gave the page a like on 3 May 2018 and the company's other director responded the next day, but these were not visible until the page went live on 1 June 2018.

Receiving orders from customers

[87] Mr Bain confirms that Coastal Bins did not compete with or attempt to compete with Smart prior to 1 June 2018. It did not approach members of the public, did not advertise, and did not have a publicly advertised method of contact or other advertising prior to 1 June 2018.

[88] Mr Christian was aware of who the first Coastal Bins customer was, as she was a former Smart employee. He accepted that the first order was in June 2018.

Conclusion on restraint of trade claim

[89] The restraint provision has a wide description of acts which Mr Bain is prevented from doing. These are undertaking, carrying on, or being employed, engaged or interested in any capacity in a business. Mr Bain, as a director and shareholder of Coastal Bins, and someone undertaking set-up tasks for that company would clearly meet that description, even if he was not an employee prior to 1 June 2018.

[90] The clause specifies that competition can be direct and indirect. In this case once Coastal Bins was accepting work it was in direct competition with Smart and some Smart customers moved their business to Coastal Bins.

[91] The critical question though is whether Coastal Bins was a "business which competes" with Smart in the period before 1 June 2018.

[92] Smart says that Coastal Bins was trading prior to 1 June 2018, as it was set up as a company, registered a domain name, borrowed money, purchased capital items and engaged consultants, accountants and lawyers. The Inland Revenue Department, the Companies Office and the Personal Property Securities Register were said to all have known that Coastal Bins traded prior to 1 June 2018, although no details were provided about those organisations' definitions of trading.

[93] Mr Bain accepts that prior to that date he took steps in preparation for commencement of a business. He says that he was careful to avoid any commencement of competitive activity prior to 1 June 2018.

[94] Mr Bain relies on *Lancom Technology Ltd v Forman & Kang*¹⁰, where preparatory steps, including registering a company and developing a website, were found not to have breached a restraint of trade.

[95] The restraint of trade clause here did not prevent Mr Bain being involving in setting up a business as long as it was not a business which competes with Smart.

[96] There is no evidence of Coastal Bins competing with Smart during the restraint period. Rather the evidence supports Mr Bain being careful not to compete until immediately after the restraint expired. I do not accept that the establishment of a trading entity and the provisioning of it so it is ready for business are sufficient of themselves to amount to competing. I conclude that Mr Bain did not breach the restraint of trade.

Costs

[97] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so a party wishing to apply for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply. All submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[98] The parties could expect the Authority to determine costs taking into account the mixed success of each party.

Nicola Craig

Member of the Employment Relations Authority

¹⁰ *Lancom Technology Ltd v Forman & Kang* [2017] NZERA Auckland 221.