IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 329
5382345

	BETWEEN	CHERRY (KANKANOK) NAVANUKUL Applicant
	A N D	PETRINA MARTIN trading as MAGIC TAN AND BEAUTY Respondent

Member of Authority:	K J Anderson
Representatives:	Dr K Martyn, Advocate for Applicant S Aymeric, Counsel for Respondent
Investigation Meeting:	7 March 2013 at Auckland
Submissions Received:	22 March 2013 for Respondent 5 April 2013 for Applicant
Date of Determination:	1 August 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] This matter has had a rather convoluted and at times, confusing, history. It initially came to the Authority via a statement of problem received from the applicant, Ms Navanukul, on 18 May 2012. The applicant claimed that she was seeking unpaid holiday pay and required the respondent, Petrina Martin, trading as Magic Tan and Beauty (the business) to provide wage and time records, in particular, the details of holiday entitlements.

[2] Via a statement in reply received by the Authority on 5 June 2012, the respondent informed that Ms Navanukul's pay rate was inclusive of holiday pay and hence no further entitlements were owed. However, the respondent asserted that the claim by Ms Navanukul for holiday pay was really "a distraction" from the real

issues. It was claimed by Ms Martin that Ms Navanukul had breached the contractual obligations that survived her termination of employment in regard to restraint of trade, confidentiality, and non-solicitation provisions as contained in the employment agreement.

[3] Ms Martin also presented what can effectively be seen as counterclaims. Firstly, a determination was required that confirms that Ms Navanukul is bound by the relevant terms of the employment agreement. And secondly, Ms Martin requires compensation (damages) for the profit loss incurred by her business due to the alleged breaches of the employment agreement by Ms Navanukul.

[4] Following a conference call with the Authority on 3 July 2012, the parties attended mediation. On 17 August 2012, Mr Rivers, Ms Navanukul's representative (and stepfather), advised that due to her expenses now exceeding the value of the holiday pay claim, Ms Navanukul wished to withdraw the claim. Nonetheless, the Authority was informed on 22 August 2012 that Ms Martin wished to continue to pursue the counterclaims raised on 5 June 2012.

[5] As an apparent consequence of the counterclaims continuing to be pursued within the Authority, on 2 September 2012 the Authority was notified by Mr Rivers that Ms Navanukul had engaged a new representative; Dr Karen Martyn.

[6] On 10 September 2012, the Authority convened a conference call with the parties. This was for the purpose of discussing the counterclaims of Ms Martin and the due process that would be followed in regard to the investigation of the claims by the Authority.

[7] Upon the Authority seeking confirmation from Dr Martyn that the holiday pay claim had been withdrawn by Ms Navanukul, Dr Martyn informed that this was not so as it was her view that Ms Navanukul had been badly advised and that she now wished to continue with her claim.

[8] The outcome of the conference call was that Ms Navanukul was required to file an amended statement of problem setting out precise calculations regarding the moneys being claimed and further and better particulars regarding the grounds of the alleged entitlement(s).

[9] The amended statement of problem was received by the Authority on 19 September 2012. This set out a claim for holiday pay allegedly owing and a request was made for wage and time records from 18 July 2010 to January 2012.

[10] On 3 October 2012, the Authority received an amended statement in reply from the respondent. Given that the matter of any outstanding holiday pay legally due to Ms Navanukul has now been paid, and this was confirmed at the beginning of the investigation meeting on 7 March 2013, it is not necessary to record the respondent's response to that claim again. However, it is relevant to record that Ms Martin continues to pursue a counterclaim against Ms Navanukul.

[11] Ms Martin seeks compensation from Ms Navanukul, for the trading profit loss purportedly suffered by her business, as a result of an alleged breach of her duties to her employer, and an associated breach of particular terms of the employment agreement by Ms Navanukul. The sum of damages sought is $30,000, being the assessed loss of profit incurred by Ms Martin's business as a result of the alleged actions of Ms Navanukul. Ms Martin says that as a result of a considerable number of her previous clients now being serviced by Ms Navanukul and not returning to her business, she has lost revenue, for a 12 month period, of $99,340. And allowing for a 35% profit margin being standard for the industry, and that 15-20% of clients could follow their service provider, if they leave to work for another business, then the sum of $30,000 is a reasonable assessment of the loss of profit that can be attributed to the alleged actions of Ms Navanukul.

Background

[12] At the material times Ms Martin owned and operated a business trading as Magic Tan and Beauty; providing body tanning, nail care and cosmetology services. Ms Navanukul commenced employment on or about 17 July 2010, shortly after the business began trading. Ms Navanukul was employed as a beauty therapist and it appears that she had some recognised skills in regard to finger/toe nail care and presentation.

[13] An unsigned employment agreement has been produced to the Authority. There is a dispute about its application to the circumstances. Ms Martin says that Ms Navanukul signed the agreement, but she has not been able to locate the signed version. Ms Martin alleges that Ms Navanukul took the signed employment

agreement with her when she ceased her employment with the business, along with other material belonging to the business. Ms Navanukul denies this. I note that in an email to Ms Navanukul (18 January 2012) wherein Ms Martin acknowledged Ms Navanukul's resignation, she confirmed that she would provide to Ms Navanukul, upon the cessation of her employment, certain materials, including: *"…a copy of your original signed employment contract …"* Presumably, Ms Martin discovered the absence of the signed employment agreement subsequent to that date.

[14] But even if Ms Navanukul did not sign the employment agreement (the Agreement), I conclude that it is more probable than not that the Agreement applied to her employment. However, there is a dispute about whether the employment relationship continued beyond a certain point and whether Ms Navanukul became an independent contractor to the business. I will return to that issue in due course.

[15] Relevant to the damages claim before the Authority. Ms Martin says that Ms Navanukul remained an employee at all times up to her departure on 27 January 2012. Therefore, Ms Navanukul was bound by the following terms of the agreement:

> 11.1 **Confidential information**
> The Employee shall not, whether during the currency of this agreement or after its termination for whatever reason, use, disclose or distribute to any person or entity, otherwise than as necessary for the proper performance of their duties and responsibilities under this agreement, or as required by law, any confidential information, messages, data or trade secrets acquired by the Employee in the course of performing their services under this agreement. This includes, but is not limited to, information about the Employer's business.
>
> 11.2 **Copyright and other intellectual property**
> All work produced for the Employer by the Employee under this agreement or otherwise and the right to the copyright and all other intellectual property in all such work is to be the sole property of the Employer.
>
> 11.3 **Conflicts of interest**
> The Employee agrees that there are no contracts, restrictions or other matters which would interfere with their ability to discharge their obligations under this agreement. If, while performing their duties and responsibilities under this agreement, the Employee becomes aware of any potential or actual conflict between their interests and those of the Employer, then the Employee shall immediately inform the Employer. Where the Employer forms the view that such a conflict does or could exist, it may direct the Employee to take action(s) to resolve that conflict, and the Employee shall comply with that instruction. When acting in their capacity as Employee, the Employee shall not, either directly or indirectly, receive or accept for their own benefit or the benefit of any person or entity other than the Employer

> any gratuity, emolument, or payment of any kind from any person having or intending to have any business with the Employer.
>
> 11.6 **Non-competition**
> The Employee agrees that for a period of **three months** following the termination of their employment for whatever reason, they shall not, either personally, or as an Employee, consultant or agent for any other entity or employer, carry on business in competition with the Employer within a radius of **15** kilometres from the Employer's premises.
>
> 11.7 **Non-solicitation of clients**
> The Employee agrees that for a period of **six months** following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, seek to solicit or carry out any work of the same nature for any client or customer of the Employer with which the Employee had any contact or dealings whilst employed by the Employer.
>
> 11.8 **Non-solicitation of Employees**
> The Employee agrees that for a period of **six months** following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, solicit or engage or employ any employee of the Employer with whom the Employee had any dealings whilst employed with the Employer.

The relevance of the terms of the agreement

[16] On or about 7 January 2012, Ms Navanukul informed that she intended to resign from her employment. The resignation is confirmed in an undated letter from her to Ms Martin, whereby Ms Navanukul informs that her final day of employment would be 27 January 2012. Via an email dated 18 January 2012, Ms Martin confirmed the receipt of Ms Navanukul's written resignation. In addition to confirming to Ms Navanukul that she would be given a copy of her "original signed employment contract" along with other documents, Ms Martin conveyed that:

> I take this opportunity to draw your attention to the following clauses in particular in your employment contract …

The relevant clauses are those referred to above.

[17] In a reference dated 27 January 2012, Ms Martin referred to Ms Navanukul in a very complimentary manner. However, Ms Martin had less complimentary thoughts shortly after the departure of Ms Navanukul as she discovered that Ms Navanukul had

immediately commenced operations at another beauty salon approximately 1.2 kilometres away from Ms Martin's premises.

[18] Ms Martin says that before Ms Navanukul left her employment she informed that she was leaving because she intended to relocate back to her home country of Thailand. Another witness, Ms Sophie McLean, employed by Ms Martin, also told the Authority that Ms Navanukul had told her she was returning to Thailand. Ms McLean also alleges that Ms Navanukul had informed several of Ms Martin's clients that she was going to set up her own business. However, this evidence is largely hearsay by nature and has not been substantively confirmed by any satisfactory corroborative evidence. Nonetheless, combined with the more tangible evidence that is available, it is a reasonable assumption that Ms Navanukul was, most probably, planning to establish her own business and that she was less than honest about her intentions.

[19] In an iPhone message sent to Ms Navanukul on 7 February 2012, Ms Martin informed that:

> It appears that you have been dishonest in your dealings with my intellectual property including taking client's phone numbers.

[20] Ms Martin again drew attention to the relevant terms of the agreement and advised that she would be seeking legal advice.

[21] Ms Navanukul responded the next day (8 February 2012) informing that Ms Martin never gave her a copy of the original employment agreement and has also failed to supply a copy upon the request of Ms Navanukul. It was also alleged that Ms Martin asked Ms Navanukul to sign a "backdated" copy of the "amended" employment agreement approximately two weeks before Ms Navanukul left. In responding the same day, Ms Martin informed that all communications would be through her lawyer and it was suggested that Ms Navanukul should also obtain a lawyer.

[22] It seems that Ms Navanukul acted on this advice and via a letter dated 14 March 2012, her lawyer informed Ms Martin that (among other things) Ms Navanukul confirms that she does not have in her possession any intellectual property or any information, in any form, that belongs to Ms Martin. Ms Martin was invited to provide the details to support her earlier allegation.

[23] Ms Martin's lawyer responded via a letter dated 16 March 2012. In summary, and relevant to the matters before the Authority, it was said that:

(a) Ms Navanukul may have taken various documents when she left the employment of Ms Martin;

(b) Under the terms of her employment agreement Ms Navanukul was obligated to fulfil certain contractual requirements (as previously expressed);

(c) Although Ms Navanukul indicated she was relocating back to Thailand, she had commenced working at another salon, in breach of her employment agreement;

(d) That while still employed by Ms Martin, Ms Navanukul had personally approached customers informing them she was leaving, setting up elsewhere, and she would be in contact with the customers;

(e) That Ms Navanukul left her employment with a list of Ms Martin's customers and their contact details and these were being used to solicit business for her new venture;

(f) In addition to soliciting Ms Martin's clients while still employed by her, Ms Navanukul continued to solicit Ms Martin's clients post-termination, in breach of her employment agreement, with the result that Ms Martin's business had suffered financial loss.

[24] A reference is also made to a "significant" quantity of products having disappeared from the business and to Ms Navanukul contacting several of Ms Martin's staff against their wishes. In regard to the former matter, the Police became involved and apparently, found nothing untoward.

[25] In conclusion, the following undertakings were sought from Ms Navanukul[1] by 24 March 2012:

(a) Relocate her business to a place further than 15 kilometres from Ms Martin's business;

[1] In order to comply with the employment agreement.

(b) Immediately cease advertising or promoting Natural Tan (or any other like business regardless of name) in any way for a period of three months;

(c) Cease all contact with Ms Martin's clients;

(d) Return to Ms Martin all information and documentation taken without authorisation; and

(e) Cease all contact with Ms Martin's staff.

[26] A response was provided by Ms Navanukul via a letter from her lawyer dated 28 March 2012. Ms Navanukul informs that she has no recollection of the 2010 agreement containing alleged restraints of trade, and that Ms Martin has failed to provide Ms Navanukul with any evidence showing that she agreed to a restraint of trade; despite the requests being made for the evidence of such.

[27] It is further asserted that because it is the view of Ms Navanukul that an enforceable restraint of trade does not exist, she is free to compete with Ms Martin and is not restrained from doing so. Hence the undertakings sought by Ms Martin would not be provided.

[28] The parties exchanged further correspondence without any accommodation being reached and hence the matter is before the Authority.

Analysis and conclusions

[29] It is established to the satisfaction of the Authority that Ms Navanukul, more probably than not, did sign an employment agreement shortly after the commencement of her permanent employment with Ms Martin in July 2010. This is confirmed by Ms Navanukul in her *Amended Statement of Problem* received by the Authority on 19 September 2012; thus:

> I worked for Petrina Martin as a permanent employee July 2010 through January 2012. Although I made repeated request[s] to her for a written employment contract, she did not offer me one until, after asking for it several times, a contract was produced at least two months after starting which I signed …

[30] I am also satisfied that it is more probable than not that the employment agreement is the same as the one produced to the Authority containing the provisions

that Ms Martin seeks to have recognised. However, matters become more problematic in regard to whether the employment agreement applied at the time of Ms Navanukul's departure from the employment of Ms Martin; and by extension, subsequently.

[31] This is because the evidence shows that on 15 September 2011, via an exchange of text messages, Ms Navanukul and Ms Martin explored a possible change in the working relationship. That is, rather than Ms Navanukul remaining as an employee she would become an independent contractor. Ms Navanukul indicates (via the texts) that she had been thinking about part-time working for a while and that she would have *"*time to rest*"* rather than having to worry about her hours of work. It appears that Ms Navanukul had observed another person (Krystal) working on an independent contract basis, and hence wished to enter into a similar arrangement with Ms Martin. Ms Navanukul indicated that Ms Martin would not have to worry about statutory days or sick leave. In response, Ms Martin indicated:

> Okay so like a contractor? Good idea let's talk and work it out.

[32] Ms Navanukul then indicated that she would like to be paid *"*by cash*"* because the hours of work would be less and she did not want to pay tax. Ms Navanukul indicated that she could just come in if there was *"*extra booking*"*.

[33] The Authority notes that the wage records provided by Ms Martin only go as far as the week ending 15 September 2011, the same day as the exchange of text messages occurred. However, at no time prior to the investigation meeting on 7 March 2013, did Ms Navanukul ever express the view that she was an independent contractor, despite having numerous opportunities to do so via the exchanges between the representatives of both parties. Also, the evidence of Ms Navanukul is that she sought advice from a leading employment lawyer as she was not sure what her rights were with regard to setting up her own business. As has been submitted for Ms Martin, the only constant defence advanced by Ms Navanukul to Ms Martin's counterclaim, until the investigation meeting, was that Ms Martin was unable to produce a signed employment agreement. Also, the amended statement of problem contains the statement recorded above at para [29]: the plain words speak for themselves.

[34] Also, the amended statement of problem alleges that:

> Petrina Martin has failed to provide pay slips for the periods July 2010 to March 2011 and August 2011 through January 2012.

[35] Then, as a resolution to her problem, Ms Navanukul requests a copy of all wage and time records: *"...*for the full time of my employment (July 2010 to January 2012) …".

[36] It is clear from the claims advanced by Ms Navanukul, in regard to her holiday pay entitlements, she considered herself to be an employee at all times. Furthermore, there is no conclusive evidence of Ms Navanukul operating a business on her own account at any time while she was working for Ms Martin, such as tax records and the purchase of supplies, albeit it appears that she may have been servicing some private clients in September 2011; and possibly onwards. Also, while it may have been agreed that Ms Navanukul could just come into the salon when client bookings warranted it, it seems that Ms Navanukul remained under the "control" of Ms Martin in regard to working when required and the hours of work remained constant. And she did not have the freedom to come and go as she pleased. In regard to how Ms Navanukul was paid from 15 September 2011 to January 2012, the evidence is inconclusive, but apart from that particular factor, applying the usual legal tests, I find that the weight of the evidence suggests that it is more probable than not that Ms Navanukul remained an employee at all times. Indeed, the claims for holiday pay monies by Ms Navanukul, and subsequently paid by Ms Martin,[2] were predicated on Ms Navanukul asserting that she was an employee for the totality of the relationship.

[37] Combined with my earlier finding that it is more probable than not that Ms Navanukul entered into the applicable employment agreement, the above finding now leads to a closer analysis of the particular terms of the agreement that are in dispute.

The relevant terms of the agreement

[38] First, Ms Martin says that Ms Navanukul is in breach of clause 11.6 of the agreement. It provides that:

> 11.6 **Non-competition**
> The Employee agrees that for a period of **three months** following the termination of their employment for whatever reason, they shall not,

[2] Following the involvement of a Labour Inspector. It is probable that Ms Martin quite genuinely (and reasonably) believed that she was meeting her legal requirements in regard to "pay-as-you go" holiday pay and she was unaware of the requirements of section 28 of the Holidays Act 2003.

> either personally, or as an Employee, consultant or agent for any other entity or employer, carry on business in competition with the Employer within a radius of **15** kilometres from the Employer's premises.

[39] It appears to be commonly accepted that immediately upon leaving the employment of Ms Martin; Ms Navanukul began working from another salon, on her own account. The new premises are 1.2 kilometres from those then operated by Ms Martin; hence it is argued that Ms Navanukul breached the terms of clause 11.6 of the agreement.

[40] It is the further argument for Ms Martin that Ms Navanukul breached clause 11.7 of the agreement. It provides that:

> 11.7 **Non-solicitation of clients**
> The Employee agrees that for a period of **six months** following the termination of their employment for whatever reason, they shall not, either personally, or as an employee, consultant or agent for any other entity or employer, seek to solicit or carry out any work of the same nature for any client or customer of the Employer with which the Employee had any contact or dealings whilst employed by the Employer.

[41] Ms Martin says that Ms Navanukul solicited clients, for her subsequently established business, whilst still in Ms Martin's employment. It is further posited that Ms Navanukul breached clause 11.1 of the agreement. It provides that:

> 11.1 **Confidential information**
> The Employee shall not, whether during the currency of this agreement or after its termination for whatever reason, use, disclose or distribute to any person or entity, otherwise than as necessary for the proper performance of their duties and responsibilities under this agreement, or as required by law, any confidential information, messages, data or trade secrets acquired by the Employee in the course of performing their services under this agreement. This includes, but is not limited to, information about the Employer's business.

[42] It is the evidence of Ms Martin that she had an electronic record of her clients including information about the history of the services provided and how much each client would spend. Ms Martin produced to the Authority a list of 63 previous clients and she says that none of these people ever rang again for an appointment after the departure of Ms Navanukul. Ms Martin accepts that up to 20% of the clients serviced by Ms Navanukul could follow her, when they discovered she had left, but it is Ms Martin's view that Ms Navanukul obtained a record of her clients and then actively canvassed them before and after her departure. Ms Martin gave evidence

about the content of Ms Navanukul's *Facebook* page (September 2011) including photographs of the fingers of a previous client of Ms Martin, identified by a distinctive ring on one of the fingers.

[43] But Ms Navanukul says that when she became an independent contractor she was entitled to set up her *Facebook* page. There is also evidence of a website (Cherry Nails)[3] and testimonials from people who were identified as being previous customers of Ms Martin.

Did Ms Navanukul breach the terms of her employment agreement?

[44] There is a plethora of case law pertaining to restraint of trade disputes and the application of the law largely depends on the circumstances of each situation. Nonetheless there are some clearly established principles that can be applied to this particular matter.

[45] Taking firstly the provisions of clause 11.6 of the agreement, the Court of Appeal has found that restraint of trade and/or non-competition covenants restricting the activities of employees after the termination of their employment are, as a matter of legal policy, regarded as being unenforceable unless they can be justified as reasonably necessary to protect the proprietary rights of the employer; and are in the public interest[4]. This is because depriving a person from working in their chosen occupation is not something that can be taken lightly.

[46] It is also established that an employer is not entitled to protection from mere competition by a former employee; and that the employee is entitled to fully use any personal skill or experience, even if this is acquired while working for the employer[5]. Among other things, it was held in *Stenhouse* that (paraphrased):

> … 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 [Ms Martin's] property, and which it would be unjust to allow [Ms Navanukul] to appropriate for [her] own purposes ...

[47] Apart from her client base (a matter I will return to), there was nothing particularly novel or commercially valuable about the nature of Ms Martin's business.

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[3] Ms Navanukul's proper first name is Kankanok but she is commonly known as Cherry and/or Shirley.
[4] *Gallagher Group Ltd v. Walley* [1999] 1 ERNZ 490 at 495
[5] *Stenhouse Australia Ltd v. Marshall William Davidson* [1974] AC 391

[48] While it is accepted that Ms Martin had worked hard to establish her business, it was not unlike many others that exist in that there were no particular trade secrets and/or business and trade connections that can be seen to be a proprietary interest that is entitled to the protection envisaged by clause 11.6 of the agreement. Indeed, it appears that the skills of Ms Navanukul may have become a major asset of the business, albeit it must be appreciated that Ms Martin gave her the opportunity to develop those skills, at least to some extent.

[49] However, I am bound to conclude that Ms Martin's business did not have a proprietary interest that was entitled to the protection sought by clause 11.6. Nor does it appear that any unique or special training was provided to Ms Navanukul[6] and hence this particular provision is unreasonable and unenforceable against Ms Navanukul.

Non-solicitation of clients/confidential information

[50] The Authority has been informed by Ms Martin that the relationship between a beauty therapist, such as Ms Navanukul, and her customers can become quite personal due to the intimate nature of the treatments or services provided. Hence it is essential to have a non-solicitation clause in employment agreements in the industry.

[51] Ms McLean worked for Ms Martin from November 2011. The evidence of Ms McLean is that she *"*heard and witnessed*"* six occasions where Ms Navanukul told clients that she was opening a salon and/or she would be in contact with these clients. However, while Ms McLean's evidence was credibly imparted, most of it is hearsay. While the Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not[7], there is a limit to the weight that can be given to such evidence as this. While I am satisfied that Ms Navanukul more probably than not made it known to some of Ms Martin's clients that she was leaving and going into business on her own account, the evidence as to whether she in fact "solicited" the work from Ms Martin's existing clients is inconclusive. But in any event, the wording of clause 11.7 of the agreement refers to a period of six months "following" the termination of employment.

[6] As compared to the barista in *Fuel Expresso Ltd v Hsieh* [2007] ERNZ 60 (CA)
[7] Section 162 Employment Relations Act 2000

[52] Also, the Authority has the evidence of two of Ms Martin's former clients, Ms Gurunathan and Ms Verdouw. The evidence relates to when Ms Navanukul remained employed by Ms Martin and also post-termination of her employment. The former witness says that Ms Navanukul told her that she was leaving and Ms Gurunathan says she was "horrified" and did not want to be treated by anyone other than Ms Navanukul as she felt she was "irreplaceable". Ms Gurunathan relates to asking Ms Navanukul for her cellphone number and says that it was entirely her decision to follow Ms Navanukul to her new business and that Ms Navanukul did not try and "convince" her to leave Ms Martin's business.

[53] The evidence of Ms Verdouw is in a similar vein in that she discovered Ms Navanukul was leaving the employment of Ms Martin and asked for her contact details. Ms Verdouw says it is quite normal for a customer to follow the service provider and that Ms Navanukul never called or approached her to offer her services. Ms Verdouw also made the point that Ms Martin never contacted her in regard to retaining her custom.

[54] In this particular case, the matter of non-solicitation of clients post-termination of employment, and the existence of confidential information, namely the database of Ms Martin's clients, need to be examined together. Firstly, the definition of what constitutes confidential information depends on the facts of each case[8]. When one looks at the nature of Ms Martin's business, it seems to me that the client list and the associated details was the core component of the business; hence it is a proprietary interest that can legitimately be protected by the provisions of clause 11.1 of the employment agreement. I conclude that Ms Navanukul was prohibited from using "information about the employer's business" during the currency of the agreement and after its termination.

[55] The difficulty associated with this matter though is whether Ms Navanukul breached clause 11.1 by using information that could only have come from Ms Martin's client database. As previously set out, Ms Martin has provided a list of 63 clients and the details of how much they spent with the business. And Ms Martin (along with Ms McLean) says that none of these clients ever used the services of the business again after Ms Navanukul left on 27 January 2012. I note that Ms Verdouw

[8] *Peninsular Real Estate Ltd v. Harris* [1992] 2 NZLR 216

and Ms Gurunathan are two of the clients on the list and we have the evidence about their reasons for becoming clients of Ms Navanukul.

[56] Ms Navanukul says that she did not take Ms Martin's client list and indeed Ms Martin has not produced evidence regarding the form that the database was in, except to say that it was electronic. And when Ms Navanukul was questioned about the names on the list, she told the Authority that some of the people never came to her business, whilst other clients came to her via the use of social media such as *Facebook* and *Twitter*; and she received some assistance from Ms Gurunathan who, apparently, is a model.

[57] While I suspect that Ms Navanukul was not being entirely honest about how she was able to achieve a viable client base for her business and build revenue so quickly, it is inconclusive whether she had access to Ms Martin's client base, or whether instead, she attracted Ms Martin's clients by word of mouth; and/or people followed her to her new business because they wished to retain her services, which appear to have been generally highly regarded.

Determination

[58] I accept that Ms Martin's business suffered a marked financial detriment immediately following the departure of Ms Navanukul and I find that her suspicions about Ms Navanukul's actions regarding the clients of Ms Martin's business may well be validly held. However, those suspicions, based, to a large extent, on circumstantial evidence, are not of sufficient substance for the Authority to properly conclude that the cause of the loss of income and associated profit from the business was a direct result of a breach by Ms Navanukul of her terms of employment. Unfortunately, Ms Martin has not been able to produce corroborative evidence, such as a reasonable number of previous clients attesting as to why they sought Ms Navanukul's services rather than remain with Ms Martin's business. Nor is there any evidence of Ms Martin attempting to contact her previous clients to inquire as to why they did not continue to use the services offered by her business.

[59] In conclusion, I feel bound to say that I have considerable empathy for Ms Martin in regard to the circumstances that have been visited upon her, culminating in the loss of the business. And while I can accept that the actions of Ms Navanukul may have, possibly, contributed to those circumstances to some extent, there is not

evidence, of sufficient weight, before the Authority to find that the actions of Ms Navanukul were of such a culpable nature that she should be made accountable by making an order for damages, as sought by Ms Martin.

Costs

[60] While the Authority has not been able to conclude that Ms Navanukul was, on the balance of probabilities, legally accountable for the substantial loss of Ms Martin's client base, I find that the overall circumstantial evidence warrants the exercise of the equity and good conscience jurisdiction of the Authority; hence I find that costs should lie where they fall.

K J Anderson
Member of the Employment Relations Authority