

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Swift New Zealand Limited (Applicant)
AND Dean Campbell (Respondent)
REPRESENTATIVES Jane Latimer and Anna Clark, Counsel for Applicant
Philip Skelton and Gillian Service, Counsel for Respondent
MEMBER OF AUTHORITY Robin Arthur
INVESTIGATION MEETING 3 November 2005
SUBMISSIONS 10 November 2005 (applicant); 11 November 2005
(respondent); 14 November 2005 (applicant in reply); 15
November 2005 (respondent in reply)
DATE OF DETERMINATION 25 November 2005

DETERMINATION OF THE AUTHORITY

[1] The applicant seeks a declaration on the enforceability of a restraint of trade provision in the respondent's employment agreement.

[2] On 12 April 2005 the respondent resigned from his position as an Account Manager in the applicant's food ingredients division and began work for a new firm on 1 June 2005. He resigned because he believed he had missed out on a promotion he wanted. His new job is to develop a food ingredients sales business for a company competing with his former employer, the applicant.

Employment relationship problem

[3] On 28 July 2005 the applicant sought an interim compliance order. Parties attended mediation on 8 August and continued to attempt to resolve the issue between themselves. In late August the applicant indicated an investigation meeting would be required and the respondent filed a statement in reply on 8 September. Shortly thereafter a timetable for the filing of briefs of evidence and a date for an investigation meeting was set. At the parties' request the initial investigation was limited to the issue of the enforceability of the restraint. A further investigation meeting was tentatively scheduled for early February 2006 so that allegations of breach and damages may then be investigated should the restraint be found to be enforceable to any extent. There is also an issue between the parties regarding payments for superannuation. That issue will be investigated at the further investigation meeting, if not resolved by the parties before then.

[4] The investigation meeting held on 3 November heard evidence from the applicant's general manager Philip Swanepoel ("Mr Swanepoel"); the applicant's food division manager Julie Thomas

(“Mrs Thomas”); the applicant’s human resources manager Stewart Green (“Mr Green”); and the respondent (“Mr Campbell”). Mr Green’s evidence was taken by video link from Melbourne. The witnesses provided written briefs and answered questions from the Authority and counsel. Counsel provided concise opening submissions on the legal issues raised by restraints of trade. Written closing submissions were provided after the meeting.

Legal framework

[5] The applicant is the New Zealand subsidiary of an international corporation, headquartered in the Netherlands, which trades in materials and products used in a number of industries. In New Zealand it operates with four divisions importing and distributing general industrial chemicals, surface coatings, plastics and food ingredients.

[6] Mr Campbell’s employment agreement, signed on 10 February 2003, contained these confidentiality and restraint of trade provisions:

... you will observe and maintain secrecy and confidentiality of information relating to Company processes, operations, procedures and transactions. You will not, either during your employment with the Company or subsequently, except as required in the ordinary course of your duties ... utilise or divulge for your own benefit or the benefit of any other person or organisation such information which you may have acquired as a result of your employment ...

You will not, either during your employment with the Company, nor within a period of 12 months after the termination of such employment, entice away from the Company the business of any supplier to, or customer of the Company for your advantage or the advantage of any other person or organisation.
[emphasis added]

[7] A restraint of trade is *prima facie* void and unenforceable. However it may be enforceable to the extent that the former employer is able to establish that the restraint, in its particular circumstances, is reasonable between the parties and in the public interest. This inquiry includes considering whether:

- the former employer has proprietary interests, such as trade connections developed and invested in over time, which may properly be protected by a restraint and;
- the former employee has developed or maintained, while in his former employer’s service, relationships through those trade connections which would unfairly enable him to secure that business for the benefit of himself or his new employer.

[8] A restraint may reasonably only be imposed for the extent necessary for the former employer to prepare to meet the competition of its former employee. It must be no more than adequate to meet that purpose.

[9] The issue was put this way by Lord Wilberforce in *Stenhouse (Australia) Limited v Phillips* [1974] AC 391, 402 (PC):

The question is not how long the employee could be expected to enjoy a competitive edge over others seeking the client’s business. It is, rather, what is a reasonable time during which the employer is entitled to protection against solicitation of clients with whom the employee had contact and influence during employment and who were not bound to the employer by contract or by the stability of association. This question their Lordships do not consider can advantageously form the subject of direct evidence. It is for the judge, after informing himself as fully as he can of the facts and circumstances relating to the employer’s business, the nature of the employer’s interest to be protected, and the likely effect on this of solicitation, to decide whether the contractual period is reasonable or not. An opinion as to the reasonableness of the elements of it, particularly of the time during which it is to run, can seldom be precise, and can only be formed on a broad common sense

viewing. [emphasis added]

[10] I have no hesitation in finding that the restraint provision in this employment agreement is too long, too broad and too wide to be enforceable to the extent expressed. Mr Campbell was essentially a sales representative for a little over two years and did not have contact with every supplier and every customer of the applicant, not even of its food division. He could not have sufficient sway or influence with all the applicant's suppliers and customers to warrant such a wide-ranging restraint for 12 months. It is immediately apparent that the restraint would fall at that hurdle, if not others. To that extent it is not enforceable.

[11] However the inquiry does not end there. I must consider whether there is any lesser extent to which the restraint is reasonable and therefore enforceable. In doing so I am considering what are really two purported restraints – firstly, one on business connections with the applicant's suppliers ("the supplier restraint") and secondly, one on customer connections with the applicant's customers ("the customer restraint").

Proprietary interest

[12] To establish the reasonableness, if any, of those restraints I must first establish whether the applicant has any properly protectable proprietary interest in those connections.

- Suppliers

[13] The respondent's role in the applicant's food division involved seeking orders from customers throughout New Zealand for products provided primarily from Europe and North America by more than 30 suppliers.

[14] According to Mr Swanepoel, the applicant has exclusive agencies for the distribution in New Zealand of the products of around 20 of those suppliers. These suppliers were identified in document "G" produced by Mr Swanepoel in the investigation meeting. These exclusive agencies are the result of business relationships between the applicants and those suppliers for periods ranging between four and 20 years.

[15] I do not accept the respondent's submission that these agencies fall outside of the restraint because the applicant's relationship with them is, to use Lord Wilberforce's phrase cited at paragraph [9] above, "by contract or by stability of association". That reference is to whether the restraint *extends* to customers other than those with such associations, rather than *excludes* them. Even if that view of his lordship's proposition is incorrect, the applicant's evidence was that those suppliers could take their agencies elsewhere and are not bound to the applicant in that sense.

[16] **I find that the applicant has a proprietary interest in its trade connections with those suppliers for which it has exclusive agencies to distribute products in New Zealand.** There was little evidence in respect those suppliers who use other distributors in New Zealand as well as the applicant and I do not find the applicant has a proprietary interest in those trade connections.

- Customers

[17] As an account manager, the respondent had a portfolio of customers with whom he dealt with on behalf of the applicant. He made regular visits and phone calls to those customers. Mr Campbell was a trade baker earlier in his working life and had 16 years experience in sales in the food ingredients business before joining the applicant's staff. Most of the customers in his portfolio were existing customers of the applicant's when Mr Campbell was employed. He identified at least

seven customers that he won business from but accepts that this was in his role as a representative of the applicant.

[18] It is clear however from Mr Campbell's evidence at the investigation meeting that he regards the customers he dealt with in his time as an employee of the applicant as "his" customers. This is a common misconception in cases of these types and I adopt, with adaptations, a description of such situations given in *BFS Marketing Ltd v Field* [1992] 2 ERNZ 1105 at 1116:

Although I accept that in his former employment ... [the respondent] had done business with the ... [customers] ... at issue in this case, they cannot have been regarded then or during his period of employment with the [applicant], as [the respondent's] own clients in which he had a recognised proprietary interest. Although on a day to day basis [the respondent] no doubt thought of these customers as his and the representatives of those companies with whom he dealt ...regarded [him] as the person with whom they had a commercial relationship, the reality is that they were customers of the [applicant].

[19] Although Mr Campbell may have had an historical relationship with some of "his" customers, largely as a representative of various former employers, the maintenance and development of that relationship during his employment with the applicant was paid for by the applicant in meeting his salary during that time. The applicant is entitled to retain the benefits of that work in the sustained or developed customer relationship.

[20] **For these reasons I also find that the applicant had a proprietary interest in the customer relationships developed and maintained by Mr Campbell during his employment with the applicant.** Those customers were identified during the investigation meeting in Document "H", a list of customers Mr Campbell dealt with on behalf of the applicant as at August 2004.

Trade connection

- Suppliers

[21] Mr Swanepoel and Mrs Thomas gave evidence, contested by the respondent, of Mr Campbell's frequent contact with key suppliers. They say that through phone and email contact, and the hosting of suppliers' representatives on visits to New Zealand, he developed a profile or reputation with a number of suppliers with whom the applicant's business relationship is at risk if the restraint is not enforceable against Mr Campbell.

[22] I do not accept Mr Campbell's contention that he has no influence with any of the applicant's key suppliers because, at the time he worked for the applicant, all orders of suppliers' products had to be placed through Mrs Thomas. He says that because Mrs Thomas was officially responsible for liaising with the suppliers, he could not have developed a sufficient connection with them to pose any risk to the applicant's relationship. That is a disingenuous argument. The suppliers' order books depended on him persuading customers that the various suppliers' products would best meet the needs of their recipes and formulas. In that respect Mr Campbell was the "face" of both the applicant and its suppliers' products. As a matter of commercial reality, the suppliers' representatives would know Mr Campbell was more important to them than the person who formally signed the order to them for their products.

[23] The applicant provided some evidence of how Mr Campbell has developed connections with a number of suppliers' representatives. He met the principal of one supplier while at a trade conference in the United States, attending at the applicant's expense. He later successfully pitched that supplier's products to a New Zealand customer developing a new product. His profile with

another supplier was sufficient that, when it wanted a report on the New Zealand market for the development of part of its global strategy, it was Mr Campbell that was contacted directly to provide the information.

[24] Mr Campbell also had direct contact with suppliers when Mrs Thomas was on leave or away on work trips – a period that she calculated totalled around ten weeks over two years.

[25] The applicant identified a number of occasions on which Mr Campbell took supplier representatives on visits to customers throughout New Zealand. I accept the evidence of Mrs Thomas that both the personality of a sale representative and working closely with a supplier on a project (resulting in more direct contact than usual) can enable that representative to quickly develop influence with a supplier, despite the much longer business relationship between the applicant and that supplier. Particularly, I accept that Mr Campbell's hosting role on the visits of representatives of five suppliers (JRS, DB Williams, Tastetech, Butterbuds, Advanced Ingredients and AB Enzymes) was sufficient to develop an influence with those particular suppliers that warrants restraint. However the applicant's evidence of the respondent's likely or actual sway with other suppliers was slight. I do not accept that the instances given in the evidence of Mr Swanepoel and Mrs Thomas were only a sample. If there were more and better examples, the applicant's witnesses could have provided them. What there was demonstrated no more than what could be described as routine interactions between those other suppliers and a staff member of their New Zealand agent. It was not sufficient to render reasonable a restraint on the activities of Mr Campbell in respect of those other suppliers. **I find that restraint on Mr Campbell is reasonable in respect of trade connections with only the five identified suppliers.**

- Customers

[26] I accept the evidence of the applicant's witnesses that Mr Campbell's close and frequent contact with the customers within his account portfolio was sufficient to establish an influence on them that would warrant a restraint for a certain period. The food ingredients industry was said to be highly competitive, with about 20 key competitors, and sales highly dependent on the quality of relationships with the customers' decision-makers. A change in representative can easily unsettle a customer, unless the employer has an opportunity to restore the relationship through a new representative or other means. Mr Campbell was well-regarded in the baking industry. His own evidence was that he knew "most of the key players and they know me" and that he had "an industry profile" through his role as a Bakers Society judge over recent years.

[27] However these circumstances support only a quite limited restraint. More evidence is needed to support an expectation that the former employee may have such sway with customers that longer restraint is justified. Mrs Thomas identified three particular customers (Couplands, Mt Arthur Currents and Mary Gray Confectionary) that Mr Campbell had worked closely with on projects to develop new products. Mr Campbell accepted in the investigation meeting that he worked with those customers – using his baking experience to suggest how the recipes or formulas might be developed – in order to generate future possible sales of the applicant's suppliers' products. I accept that such work would result in more sway or influence with those customers than others. **I find that the respondent's contact with customers was such that only a shorter restraint is reasonable, with the exception of the three identified customers where his likely influence supports restraint for a longer period.**

Duration

[28] The time needed by the applicant to effectively replace the respondent is a factor in determining the reasonable duration of a restraint: *Century Yuasa Batteries (NZ) Limited v Johnson*

(unreported, EC Auckland, AC 65/04, 11 November 2004, Colgan J) at para [24].

[29] Mr Swanepoel and Mrs Thomas said the particular requirements of the applicant's food ingredients business meant it took 12 months to recruit and train of an account manager and familiarise him or her with the suppliers and customers. Mrs Thomas had been involved in the recruitment of three account managers in the division during her time with the company. She said the suppliers' products were not simply commodities, such as flour or nuts, but more complex ingredients. Greater training was required to understand the uses of those products in order to promote them, and new or potential uses, to customers. To "learn enough to sell" took a year, in her experience.

[30] The length of time allowed to effectively replace the departed representative should, however, be no more than adequate. It allows time to recruit and train a replacement and to establish contact with customers. It is to provide the employer with an opportunity to meet the competition, not a certainty.

[31] At the time of Mr Campbell's departure, Mrs Thomas had announced she was leaving and the applicant appointed Trevor Gleeson, already working in another division of the applicant, to join its food ingredients division. In the event however Mrs Thomas stayed. She and Mr Gleeson took over the work of Mr Campbell. Mr Gleeson undertook some food technology training and took up some of Mr Campbell's former work from August, that is around two months after Mr Campbell left. The applicant also restructured its food ingredients division and did not recruit an additional account manager, partly to replace Mr Campbell, until around six months after he left the job.

[32] However the reasonable duration, if any, of a restraint is not set subjectively by what the former employer actually does during the period. Rather it is attempts a more objective and assessment of the minimum period reasonably necessary to give the former employer an opportunity to prepare to meet the competition of its former employee. In light of my findings regarding the likely potential influence of the respondent's suppliers and customers, I consider the adequate, reasonable duration of restraints in the circumstances of this case would be:

- 12 months in respect of the five identified suppliers (referred to in paragraph [25]);
- 3 months in respect of those customers for which the respondent managed the applicant's accounts (as identified in document "H");
- 6 months in respect of the three identified customers (referred to in paragraph [27])

[33] While the reasonableness of a restraint must be assessed on the facts of the particular case, the durations found reasonable here are also consistent with the broad range of restraint durations set by this Authority and the Employment Court in similar sales representative cases. A longer period in respect of the identified suppliers is reasonable in light of the evidence that the representatives tended to visit New Zealand only on an annual or twice-yearly basis.

[34] Although having no bearing on my assessment of the reasonableness of the restraint, I note that Mr Campbell stated during the investigation meeting that he did not "*give a damn*" about being restrained from dealing with the applicant's agencies (the suppliers), only its customers.

Scope

[35] While the applicant's suppliers are overseas companies, it is not really correct to describe a restraint in respect of them as being "world-wide". The restraint is in respect of a particular trade connection – it applies to the business relationship with the particular supplier, which would exist whether they were in Frankfurt or Fielding, California or Canterbury. The nature of the applicant's business with its suppliers is such that to restrict the restraint geographically would be to defeat its

validity: *Walley v Gallagher Group Limited* [1998] 3 ERNZ 1153, 1188-9 (EC, Colgan J). The restraint would not prevent the respondent dealing with any other suppliers anywhere in the world.

[36] Similarly the restraint is no wider than necessary in respect of the location of the customers within New Zealand. While it is national in that sense, it is again restricted to those customers with whom the respondent dealt as the applicant's account manager. It would not prevent the respondent dealing with any other potential customers anywhere in New Zealand. It also does not prevent the respondent dealing with customers in Australia, the home country of his new employer. The restraint would also not apply to any customers of the applicant in Australia that the respondent did not deal with in the course of his duties for his former employer.

Knowledge of restraint

[37] While the restraint may be reasonable to the extent described above, there are other factors which may nevertheless render it unreasonable, or only reasonable to a lesser extent. One such factor is the circumstances surrounding the formation of the employment relationship.

[38] There is a sharp clash of evidence on this point. The applicant's witnesses say that the respondent was provided with the agreement, had it explained to him (including the terms of the restraint) and was given an opportunity to seek advice before signing it. The respondent says he was only shown the agreement, checked the front page, and encouraged to sign immediately.

[39] I prefer the evidence of Mr Swanepoel and Mr Green on this point for this reason. In the investigation meeting I carefully asked Mr Campbell whether each of his employment agreements with several previous employers had contained restraints of trade. He emphatically answered one-by-one that they had not. I then asked whether he had read each of those agreements before signing them. He answered, with appropriate frankness, that he had not. I consider it more likely than not that Mr Campbell is a man who, until now, has taken little care about the formalities of entering an employment agreement and is less likely to clearly recall the details of doing so. He told me that he had, this time, taken the trouble to carefully read the employment agreement offered by his present employer before signing it.

[40] I also accept the evidence of Mr Swanepoel and Mrs Thomas that restraints of trade are "very common" for sales representatives in this business. Mrs Thomas has a 12-month restraint in her employment agreement with the applicant and she says "colleagues" in other firms in the industry commonly have restraints. This is confirmed by Mr Campbell's evidence. He told me that his new employer had checked with him before employing him whether he had a restraint of trade with the applicant and his new employment agreement has a restraint of 12-months' duration.

[41] The common industry practice does not make those restraints necessarily enforceable but it does make it likely that Mr Campbell did know, or should have known, even without reading the employment agreement offered by the applicant, that it would contain a restraint of trade.

[42] Both parties accept that the provisions of s64(2) of the Employment Relations Act applied at the time that Mr Campbell signed his employment agreement. However s64(4) also stated that failure to provide the required opportunity to seek advice did not affect the validity of the employment agreement. Accordingly, while it might be a relevant factor as to reasonableness in circumstances where there was reliable evidence that the employer had not provided the appropriate opportunity, it does not apply to what I have found to be the circumstances of this case.

Consideration

[43] The absence or presence of some valuable consideration for entering a restraint is a factor to be weighed in assessing its reasonableness, but is not of itself determinative of its reasonableness.

[44] Consideration may be express or reasonably inferred from the agreement. A restraint entered into after the commencement of the employment relationship requires identified consideration. A restraint entered freely from the start of employment need not have separately identified consideration as consideration may be reasonably inferred in the offer of employment and package of benefits found in the employment agreement.

[45] I find consideration for the restraint in Mr Campbell's employment agreement may be reasonably inferred from the terms of his freely-entered agreement. This included a significant salary, eligibility for a subsidised superannuation plan, eligibility for incentive payments, provision of a motor vehicle, four weeks annual leave, and a long service leave entitlement.

Termination of employment

[46] The circumstances of the termination of employment may be a factor in assessing the enforceability of a restraint: *Grey Advertising (New Zealand) Ltd v Marinkovich* [1999] 2 ERNZ 844, 858.

[47] Mr Campbell resigned from his job with the applicant because he was disappointed not to be selected to replace Mrs Thomas as Business Manager. He says he was told that Mr Gleeson was to get the post. Mr Swanepoel says that he told Mr Campbell that the Business Manager role would be split between the two men. Either way, the applicant was entitled to make its decision about the appointment. Mr Campbell's mere disappointment about what he saw as missing out on a promotion is not grounds in itself to void the terms of his employment agreement, including the restraint.

[48] Two days after Mr Campbell resigned, and after attempting to persuade him to stay, the applicant exercised a provision of the employment agreement allowing it to pay him one month's pay in lieu of notice. Again I find that action has no bearing on the reasonableness of the restraint in this case. However whatever period the restraint may reasonably run, if any, starts from that day, that is 14 April 2005.

Confidential information

[49] The protection of a former employer's interests provided by implied or express duties of post-employment confidentiality may be a factor in assessing the reasonableness of a restraint.

[50] It may be reasonable because "the restraint does make the other contractual restrictions on confidentiality and inventions inherently more secure for a period". Yet being "bound by contractual covenants concerning misuse of confidential information" may be a factor against the reasonableness of the restraint: *Walley v Gallagher Group Ltd* [1998] 3 ERNZ 1153, 1188.

[51] The respondent has suggested that he give an undertaking to the Authority not to use or disclose the applicant's confidential information and that such an undertaking should be sufficient protection of any proprietary interest in the information. While there might be circumstances where such an undertaking would assist parties, it could be no wider than the respondent's existing obligations to the applicant which could only be enforced at its suit in any event. In short, it does not change the rights and duties of the parties or resolve the real issue.

[52] Mr Campbell clearly had access to commercially sensitive information of the applicant. This included its pricing, terms and conditions with suppliers, sales reports, strategies and plans. Pricing information, I was told, is sensitive and does not ‘date’ quickly because prices for the ‘speciality products’ distributed by the applicant are relatively stable. Specialty products result from some technical processing or formulation for a specific need, such as food colourings and flavour concentrates, unless more simple or raw ‘commodity products’ such as flour or starch. Commodity product prices are significantly more volatile.

[53] The applicant’s concern is also with information about the ‘packages’ of various products at various prices it puts together for its customers. There was evidence that, shortly before leaving the applicant’s offices, the respondent sent himself an email containing a form with information he had prepared for a project for one of the specifically identified customers.

[54] Whether such commercially sensitive information amounts to trade secrets and has the necessary quality of confidentiality does not need to be decided in this determination. Publicly available pricing information and “information he could not help acquiring” is not likely to be so confidential as to amount to a trade secret. However specialised information in relation to current and on-going transactions between employer and customer is more likely to be truly confidential: *SSC & B Lintas New Zealand Ltd v Murphy* [1986] 2 NZLR 436, 456-8. A restraint provides a method of enforcing that confidentiality: *Space Industries 919790 Ltd v McKavanagh* [2000] 1 ERNZ 490.

[55] However it is not only the applicant’s proprietary interest in its confidential information, to the extent there is any, that is enforced by the restraint on the respondent. It also protects its proprietary interest in its trade connections or commercial relationships. On this point, the Court stated in *Cain v Turners and Growers Fresh Ltd* [1998] 3 ERNZ 314, at 330, that:

Such relationships did not amount to trade secrets or other confidential information, and it is precisely in that situation that employers are told by the courts that if they wish to protect their position they should obtain a covenant in restraint of trade because they cannot rely on their notion of what seems to them confidential always being upheld.

[56] The applicant took steps in its employment agreement with the respondent to protect those relationships. I do not find, in the circumstances of this case, that the existence of confidentiality provisions in that agreement makes the restraint provisions unreasonable or less reasonable.

Public interest

[57] If the employer possesses the requisite proprietary interest and the restraint is not too broad as to time, space and scope of activities covered, and merely prohibits solicitation of the former employer’s clients or customers, the restraint is likely to be reasonable between the parties and enforceable so long as the public interest is not prejudiced: *Airgas Compressor Specialists Ltd v Bryant* [1998] 2 ERNZ 42 (EC, Goddard CJ) at 54.

[58] The public interest includes fostering competition and allowing individuals to use their skill and knowledge without restriction. There is also a public interest in upholding agreements on the terms on which they are made (certainty). The public interest in competition does not extend to sanctioning unfair competition which would allow a former employee and his or her new employer to unfairly take for their own benefit ‘property’ (such as business connections) developed on a former employer’s time and money.

[59] In this particular case I find there is no public interest which would render unreasonable a suitably modified restraint on the respondent.

[60] I am satisfied that a restraint in respect of the five identified suppliers would not enable monopolistic domination by the applicant. Mr Campbell told me in the investigation meeting that it was “100% correct” that the products carried by the applicant could be substituted with other products to supply the needs of potential customers. The applicant distributes specialty food ingredients, and some are the premium products of their type. However, none are so essential that Mr Campbell could not suggest and source suitable alternatives or equivalent products to meet the needs of customers of his new employer. Mrs Thomas confirmed the availability of what she called “me too” alternative products to those the applicant distributes.

[61] I am also satisfied that for the period of a customer solicitation restraint Mr Campbell is not prevented from using his skills and experience. He complains that his portfolio of customers with the applicant covered around 60 per cent of the New Zealand market. There is then at least 40 per cent of the national market open for him to apply his skill and experience to win sales during a limited restraint period. He is also able to use his baking skills and recipe development experience in other roles in the industry.

Determination

[62] The Authority may declare a restraint of trade void and unenforceable. Alternatively, it may use powers under s8 of the Illegal Contracts Act 1970 (through s162 of the Employment Relations Act 2000) to delete or modify provisions of the restraint. In making such an order, the Authority must also meet certain requirements under s164. In the investigation meeting the parties confirmed that they accept that those requirements have been met in this case and the Authority may make an order to delete or modify the restraint provision, should it consider that is the appropriate remedy.

[63] Accordingly, for the reasons set out in this determination, I declare the restraint of trade provision in the applicant’s employment agreement with the respondent to be reasonable and enforceable only to the following extent:

- 12 months in respect of the five identified suppliers (referred to in paragraph [25]);
- 3 months in respect of those customers for which the respondent managed the applicant’s accounts (as identified in document “H”);
- 6 months in respect of the three identified customers (referred to in paragraph [27])

[64] The restraint provision is modified accordingly.

Next steps

[65] Because this declaration is made some seven and a half months after the respondent left the applicant’s employment, some of its application is historical only. However the parties asked that the issue be determined and now it has been.

[66] If the parties wish to proceed with an investigation meeting in respect of the allegations of breach of the restraint, as now modified, and the superannuation issue, they should notify the Authority no later than **10am, Friday, 16 December 2005**. This will enable time to arrange a telephone conference before the Christmas break to confirm the date of the further investigation meeting and to set a timetable for the filing and exchange of any further witness statements and documents that may be necessary.

[67] Meanwhile, in accordance with s159(1)(b) of the Act and as discussed at the investigation

meeting, I direct the parties to arrange and attend mediation on any remaining issues between them in this matter. Leave is reserved for either party to apply on 48 hours notice for any other directions necessary to assist with further mediation.

Robin Arthur

Member of Employment Relations Authority