IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 229
3135080

	BETWEEN	DU VAL MANAGEMENT LIMITED Applicant
	AND	HARRY BEST First Respondent
		WILLIAM CORPORATION LIMITED Second Respondent

Member of Authority:	Vicki Campbell
Representatives:	Madeleine Lister and William Buckley, counsel for Applicant John Farrow and James Cowan, counsel for First Respondent Gwen Drewitt, counsel for Second Respondent
Investigation Meeting:	On the papers
Submissions Received:	23 April, 12 and 21 May 2021 from Applicant 7 and 21 May 2021 from First and Second Respondents
Determination:	27 May 2021

DETERMINATION OF THE AUTHORITY

A. The application for interim orders is declined.

B. Costs are reserved.

C. The parties are directed to mediation.

Employment relationship problem

[1] Du Val Management Limited (DVML) claims a former employee, Harry Best, is breaching a restraint of trade provision in his employment agreement by working for William Corporation Limited (WCL), which DVML says is a competitor. DVML claims WCL has aided and abetted Mr Best's breaches. DVML has lodged a claim in the Authority seeking various orders and remedies for the alleged breaches and seeks an interim injunction preventing Mr Best from working for WCL pending the determination of its substantive claims.

[2] In support of its application DVML has lodged an affidavit and an undertaking as to damages.

[3] Mr Best opposes the interim injunction sought on the basis that the restraint of trade is unreasonable and unenforceable.

[4] This determination deals with the application for an interim injunction which the parties agreed to the Authority determining on the papers. These papers included the contents of the statements of problem and reply, documents, affidavits and submissions made by the parties.

[5] The Authority has received affidavits from Ms Merissa Gibson (Sales Manager for DVML), Mr Best and Mr Stephen Pike (Sales Manager for WCL).

[6] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence received I have carefully considered all relevant material lodged with the Authority.

Background

[7] DVML is a real estate development company based in Auckland. It specialises in residential-led regeneration projects, delivering and managing new residential homes and apartments for both owner-occupiers and investors. Based on the affidavit evidence I have concluded that DVML's focus is large apartment developments located in the South Auckland area. Properties are sold off the plans with completion dates sometimes more than 12 months in the future.

[8] WCL is a property development company based in Auckland, Wellington and Christchurch. It mainly develops terraced housing in the Auckland areas of West Auckland and Mount Albert.

[9] Mr Best is an English citizen and is 27 years old. On 15 September 2020 while he was resident in England Mr Best received a copy of a draft employment agreement together with a letter of offer of employment from DVML. In the attached email Mr Best is advised (verbatim):

> I have attached a draft agreement and letter of offer for your review. If you are happy to accept the offer please sign the letter and send back by email. We can print off the contract and sign once you start.
> We have a start date of 12 October if this changes could you please let us know as possible..

[10] Mr Best indicated via email that he was happy with the agreement and was happy to sign it once he started work. Despite being asked to sign and return the letter of offer he did not do so and DVML did not follow up with him about this. In his email Mr Best asked if the starting date could be moved from 12 to 19 October 2020. This was to accommodate Mr Best's obligation to complete isolation at a Managed Isolation Quarantine facility on his entry into New Zealand due to the Covid-19 situation.

[11] The copy of the draft employment agreement provided to the Authority has not been amended to reflect the agreement that Mr Best would start on 19 October 2020 instead of 12 October 2020.

[12] Mr Best started work on 19 October 2020 but did not sign the intended employment agreement and it has remained unsigned.

[13] While initially employed as a Property Advisor, within three weeks of starting work for DVML Mr Best was moved into the role of Investor Relations. There is a dispute about whether this was an agreed move or something that was imposed on Mr Best. I do not need to address that dispute in this determination. Mr Best was not offered an updated employment agreement at the time of the change of role despite the commission schedule being different to the commission paid to a Property Advisor.

[14] The draft employment agreement provided to Mr Best on 15 September 2020 contains restraining covenants in the following terms:

> **Non-Competition**

34.1 For a period of 12 months after the Employee's employment ends the Employee must not directly or indirectly engage in, be connected with (as an Employee or in any other capacity) or have an interest in any business that competes directly with the Employer within New Zealand.

Non-Solicitation of Clients

34.2 For a period of 12 months after the Employee's employment ends, the Employee must not either personally, or as an employee, consultant or agent for any other entity or employer:

a. Canvass or solicit any of the Employer's former or current clients;

b. Accept business or work from any of the Employer's former or current clients;

c. Directly or indirectly discuss, advise, on or transact business for any of the Employer's former or current clients; and

d. Procure or assist anyone else to do any of these things or be directly or indirectly financially involved with any person, firm, company or other body doing any of these things.

Non-Solicitation of Employees

34.3 For a period of 12 months after the Employee's employment ends, the Employee will not, either personally, or as an employee, consultant or agent for any other entity or employer:

a. Induce or attempt to induce any of the Employer's Employees, agents, officers or consultants to end their employment, appointment or engagement or to become employed, appointed or engaged in a competing business.

b. Procure or assist anyone else to do any of these things.

[15] Under the terms of the intended employment agreement and in his role as a Property Advisor the draft employment agreement provided for Mr Best to be paid a guaranteed retainer of $41,184 per annum, paid fortnightly, which was to be offset against future commissions. Mr Best was to receive payment of a $10,000 commission per sale to be paid on the basis of 80% of the total commission upon the sale going unconditional and the balance of 20% on completion of settlement between the developer and the purchaser.

[16] No documents have been provided to the Authority clarifying the commission structure applicable to Mr Best's new role of Investor Relations. Ms Gibson deposed that the terms and conditions applying to the Investor Relations role were identical to those applying to the Property Advisor role except for the commission scheme. On the change of role Mr Best was to receive an updated commission schedule, but this did not happen.

[17] Mr Best resigned from his position on 21 January 2021 with immediate effect. Because he had not signed the employment agreement Mr Best was of the view that he was not required to provide any notice. The draft employment agreement provided for a four week notice period. DVML did not attempt to enforce the notice provision contained in the draft employment agreement.

[18] Mr Best had a conversation with Ms Gibson on 21 January 2021 where he explained he was leaving because he did not like working there. The discussion took about 45 minutes during which Mr Best told Ms Gibson he had considered applying for a role with JLL in New Zealand (a company he had worked for in the UK) but that had not eventuated.

[19] Mr Best left that same day after returning all company property including his laptop and mobile phone.

[20] On 5 February 2021 Ms Gibson became aware Mr Best was working for WCL. Ms Gibson was concerned he was in breach of the terms of the employment agreement and on 15 February DVML wrote to Mr Best raising its concerns and reminding Mr Best of the post-employment restraining covenants contained in his employment agreement.

[21] On that same day DVML wrote to WCL pointing out the terms of Mr Best's employment agreement and requesting undertakings from WCL that it would not request or require Mr Best to commit further breaches of his post-employment restraints.

[22] Mr Best advised DVML he was not employed by WCL but was an independent contractor operating his own property consultancy and that he had no intention of soliciting DVML's clients or employees.

[23] On 4 March 2021 WCL confirmed to DVML that Mr Best had been engaged by it as an independent contractor in the role of Property Sales Consultant based in Auckland. WCL agreed it would not aid or abet Mr Best to solicit any clients or employees of DVML for the 12 month restraint period.

Interim application

[24] An application for interim injunction involves the exercise of discretion. The basis on which applications for interim orders are to be decided can be summarised as follows:[1]

(a) DVML must establish there is a serious question to be tried. This will require an assessment of the following:

i. Whether the restraining covenants are enforceable;

ii. Whether Mr Best breached the terms of his employment agreement; and

iii. Whether DVML has an arguable case for the substantive relief sought.

(b) Consideration must then be given to the balance of convenience, and the impact on the parties of granting, or the refusal to grant, an order;

(c) Finally, the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

[25] The merits of this case, in so far as they can be ascertained at the interim stage, are relevant in the assessment of the balance of convenience and the overall justice of the case. The assessment relies on the as-yet-untested evidence in the affidavits and what can be discerned from the pleadings and documents provided by the parties.

[26] Any findings of fact made by the Authority in this determination are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses have been examined about their evidence where necessary.

Serious question to be tried

[27] The onus is on DVML to establish there is a serious question to be tried in respect of the enforceability of the restraining covenants. The threshold for a serious question is that the claim is not frivolous or vexatious. A decision on this aspect is not

[1] See, *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36 at [7] referring to the Court of Appeal in *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

an exercise of discretion rather it must be based on a judicial assessment of the evidence, albeit untested, and the submissions advanced.[2]

Is the restraint of trade valid and enforceable?

[28] Restraints of trade are prima facie unenforceable and invalid. DVML must establish the restraints are enforceable and reasonable at the time the agreement was entered into, in the interests of the parties and the public interest.[3] In order to override the prima facie position rendering a restraint of trade unenforceable DVML needs to show that it has a legitimate proprietary interest and that the restraint is no wider than is reasonably necessary to protect that interest.[4]

[29] Impacting on the question of whether the restraints are enforceable is that the employment agreement has not been signed by either party.

What is the status of the employment agreement?

[30] DVML seeks to enforce restraining covenants set out in an unsigned employment agreement.

[31] It is common ground that neither Mr Best nor DVML signed the draft employment agreement emailed to Mr Best on 15 September 2020. For that reason, Mr Best says DVML is unable to rely on the restraining covenants contained in the intended employment agreement.

[32] Section 64 of the Act requires all employers to retain a copy of an intended employment agreement if one has been provided to an employee even if the employee has not signed the agreement.

[33] Section 64(6) of the Act states:

> To avoid doubt, an intended agreement must not be treated as the employee's employment agreement if the employee has not-
>
> (a) Signed the intended agreement; or
>
> (b) Agreed to any of the terms and conditions specified in the intended agreement.

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[2] *Western Bay of Plenty District Council* and *Brooks Homes* above n.1.
[3] *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97 [37]-[41].
[4] *Air New Zealand Ltd v Kerr* [2013] NZEmpC 153 at [23].

[34] Section 64(6) of the Act came into force on 1 July 2011 as a result of an amendment to the Act.[5] No previous legislation contained a similar provision.

[35] Mr Best had indicated in his email on 15 September 2020 that he was happy with the intended employment agreement. It is apparent that both parties agreed that the draft employment agreement would be printed and signed on Mr Best's first day of employment. In the meantime he was asked to sign the letter of offer, confirming his acceptance of the position. Neither of these actions were completed or followed up by DVML.

[36] At my invitation the parties have provided additional submissions on the effect of s 64(6) of the Act. Submissions from DVML include reference to a number of cases which I have carefully considered. In particular DMVL relies on *Sensi Merivale Ltd t/as Mod's Hair v Casey* (which I have referred to as *Mod's Hair*) in which the Authority upheld restraining covenants set out in an unsigned employment agreement.[6]

[37] That case can be distinguished from the present case on the basis that the restraining covenants were for a limited period of 18 weeks and limited to a 2 km radius of the employer's business. By comparison the non-compete clause in this case is for 12 months and New Zealand wide.

[38] Ms Casey challenged the decision from the Authority and while no substantive hearing was held, the Court issued a decision setting out orders sought by Ms Casey and which had not been opposed by *Mod's Hair*. The Court ordered the determination of the Authority be set aside and declared that Ms Casey was not bound by the restraining covenant of an unsigned employment agreement.[7]

[39] In the subsequent costs decision from the Court, Chief Judge Colgan, as he was then, stated:[8]

> The plaintiff's assertion that the defendant could not have relied in law, as it did in practice, on the terms of a draft or proposed employment agreement but which was unsigned, is problematic. I conclude that it was not clear that the company could be said confidently to have been pursuing a hopeless cause. There were cases, albeit decided under a previous legislative regime affecting these matters, which may have given the defendant some confidence in pursuing the course of action in litigation that it did. Indeed, the defendant was able to persuade the

[5] Employment Relations Amendment Act 2010 (2010 No 125), s 11.
[6] *Sensi Merivale Ltd v Casey* [2014] NZERA Christchurch 31.
[7] *Casey v Sensi Merivale Ltd* [2014] NZEmpC 47 at [1].
[8] *Casey v Sensi Merivale Ltd* [2014] NZEmpC 62 at [29].

> Authority that it had a seriously arguable case on this question. Had it gone to trial, the case would have turned in large part on the meaning of s 64(6) of the Act which has not been determined judicially and authoritatively. The meaning of this provision is not clearly apparent by a reading of the section.

[40] In *Smith v Stoke's Valley Pharmacy (2009) Ltd* the Court stated:[9]

> ...the employer's form of draft agreement contemplated its execution by signature. Once parties sign an employment agreement, they regard themselves and are regarded by others as being bound to the obligations and benefits contained in that agreement. Conversely, until that symbolic, but important act of signing, the form of agreement remains as a draft and, potentially, subject to further negotiation and alteration.
>
> As with most contracts, and employment contracts or agreements in particular, I conclude that the parties did not intend that they would each be bound by the draft written agreement unless and until that was executed by the writing of their signatures. ... The application of signatures, in this case and generally, signifies both mutual agreement to the written provisions and a solemn intention to be bound by them. Therefore, these legal consequences do not apply beforehand, at least not if, as in this case, there is an express exclusion of retrospectivity or even if there is an absence of reference to retrospectivity ...
>
> For these reasons I do not accept that the employer's draft form of employment agreement established the agreed terms and conditions of Ms Smith's employment as from 29 November when she received it, or as from 1 October when she began work for the defendant.

[41] It is arguable that the draft employment agreement did not establish all of the terms and conditions of Mr Best's employment from 15 September 2020 when he received it or from 19 October 2020 when he began work. The copy of the intended employment agreement provided by DVML remains unchanged from the draft employment agreement provided to Mr Best on 15 September 2020. The date of 12 October 2020 remains as the start date of the employment relationship, despite the agreement that the start date be changed to 19 October 2020.

[42] Clause 37 of the draft employment agreement requires variations to be completed by written agreement between the parties. Despite this requirement DVML did not amend the agreed start date nor did it provide written confirmation of the new commission structure when Mr Best moved into the role of Investor Relations.

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[9] *Smith V Stokes Valley Pharmacy* (2009) Ltd [2010] NZEmpC 111; (2010) 9 NZELC 93,594; [2010] ERNZ 253; (2010) 7 NZELR 444 at [100] – [103].

[43] After carefully considering the additional submissions of the parties I have concluded that the draft employment agreement has never been executed to the stage where all of the terms and conditions could be enforceable against the parties.

[44] The terms that were clearly agreed include the start date, Mr Best's rate of pay and the commission payable to him.

[45] The parties did not enforce the notice provisions, Mr Best maintaining that in the absence of a signed agreement he was not required to provide notice, and DVML taking no steps to enforce the four week notice period. At the time of giving notice Mr Best explained to Ms Gibson his view that the unsigned employment agreement was not enforceable and Ms Gibson took no steps to persuade him otherwise.

[46] There is an arguable case, although by no means certain that the employment agreement is not enforceable against Mr Best as a result of it never being fully executed. When Mr Best resigned DVML took no steps to enforce the provision relating to notice giving the appearance that it accepted Mr Best's view that because he had not signed the agreement the notice provisions did not apply.

Proprietary interest

[47] The proprietary interests DVML seeks to protect are its confidential information and intellectual property including client contact information, customer preferences and interests as well as its sales and marketing strategies and template contracts.

[48] The Courts have recognised that confidential information is a proprietary interest and have expressly stated that a restrictive covenant may be necessary, in addition to any confidentiality obligations, to protect the inadvertent disclosure of confidential information in the course of further employment.[10]

[49] The protection sought by enforcing the restraint of trade covenants relates to protecting DVML's former and current customer base from unfair competition, where competition might arise because Mr Best has knowledge about DVML's customers that would not otherwise be readily available to a competitor. DVML seeks to protect the relationship Mr Best developed with its former and current clients and prevent Mr Best from gaining an unfair advantage, by exploiting the intimate knowledge of preferences

[10] *Credit Consultants Debt Services NZ Ltd v Wilson* [2007] ERNZ 252; *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97.

and financial goals he would have gained over time with the clients he had had contact with while working for DVML.

[50] Leads were generated for DVML by people clicking on a link in an advertisement published on social media platforms. The information is captured into DVML's salesforce customer relationship management system (CRM).

[51] Mr Best was assigned leads from the CRM on a round robin lead assignment. Each team member was assigned one lead at a time and Mr Best was able to access only those leads that had been assigned to him. The CRM system had controls preventing him from accessing any other leads.

[52] The information provided to Mr Best on assignment of a lead was the name of the individual, their contact telephone number and which advertisement the individual had clicked onto to generate the lead. Once a lead was assigned to him, Mr Best called the individual, qualified them and attempted to get them to invest in a DVML investment fund.

[53] The affidavit evidence discloses that Mr Best could not access the full database. DVML acknowledges the database could not be downloaded, but says the information can be easily recorded externally by taking screen shots or photographs or by retaining the information in the minds of those who access it. There are no allegations that Mr Best has taken screenshots or photographs of the customer information contained in the database.

[54] DVML says Mr Best had access to information relating to over 50,000 individuals and their contact details. Mr Best disputes this. He deposed that he was assigned a limited number of people to call and the CRM system had strict controls in place to protect the database and he had no access to other information contained in the database.

[55] Mr Best deposed that he did not sell any properties so did not earn any commissions during his time as a Property Advisor. During his time in the Investor Relations team Mr Best successfully signed up only one client and was paid a $1,000 commission as a result.

[56] DVML has not defined in the employment agreement, when a lead becomes a client. DVML submits that current clients include those leads with whom Mr Best had material dealings or personal contact on behalf of DVML. This includes those leads who had undergone significant "nurturing" but were yet to complete a transaction.

[57] Where a lead is placed on the "nurture" list it is arguable they are not in fact a client at that stage but simply a potential client. Mr Best argues that such leads are not covered by the restraining covenants which refer to "...former or current clients".

[58] Not every potential business contact constitutes a dealing with a client. In *CBS Engineering Ltd v Strand* the Court held:[11]

> ....the practical way of identifying whether any person has been a customer of the plaintiff is to ascertain whether the commercial relationship has resulted in the generation of an invoice or a tax invoice by the plaintiff in respect of commercial transactions during the relevant period.

[59] Clarity about what constitutes a client in this case will be a matter for the substantive determination but for the purposes of this determination I am satisfied there is an arguable case that not all leads quality as former or current clients.

[60] DVML says Mr Best had significant exposure to its sales and marketing strategies and that these were discussed during twice daily sales meetings. Mr Best disputes this and deposed that he did not have access to any information that was highly confidential.

Are the restraints are wider than necessary?

[61] In *Air New Zealand v Kerr* the Court confirmed that the answer to this question requires consideration of the duration of the restraint, its scope and geographical limits.[12]

Duration

[62] Each of the restraining provisions including the non-compete clause are said to apply for a period of 12 months after the employment ends. Ms Gibson deposed that this is necessary because it can take up to 12 months for a lead to crystallise into a confirmed client.

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[11] *CBS Engineering Ltd v Strand*, unreported, Auckland Employment Court, 31 March 1995, AEC22/95.
[12] *Air New Zealand* above n 3.

[63] Mr Best has signed a contract for services with WCL. That contract does not provide for a non-compete clause but does prohibit the solicitation of clients, contractors or suppliers for a period of six months. Mr Pike deposed this is because non-compete provisions are not standard within the industry.

[64] DVML submitted that pursuant to s 162 of the Act, if I form a view that the duration of the restraint is unreasonable, the restraining covenants may be modified by the Authority from 12 months to six months exercising its discretion under s 83 of the Contract and Commercial Law Act 2017.

[65] The Court has previously held that 12 months is at the upper end of a restraint period, taking into account the seniority of the position held by the employee.[13] In a judgment of the Court dealing with restraining covenants of an employee in a sales supervisor role (as opposed to here where Mr Best was in an entry level role), the Court held that a three month restraint of trade was at the outer limit of a reasonable restraint.[14]

[66] I am of the view that even at six months, given the low level position held by Mr Best, the non-compete restraint will be too long in duration to be reasonable. Accordingly I have declined the invitation by DVML to exercise my discretion to modify the clause to six months.

[67] Before making any orders under s 162 of the Act I am required under s 164 to identify the problem in relation to the agreement and direct the parties to attempt in good faith to resolve that problem. Having identified the problem with the duration of the restraining provisions the parties will be directed to attend mediation and attempt in good faith to resolve this problem.

Scope

[68] The restraining provisions apply to former and current clients of DVML. I have already raised an issue about what constitutes a client. In particular the lack of certainty over when a lead becomes a former or current client. According to Mr Best he dealt with only one client during his employment and that was the client who took up the investment opportunity for which he received a commission payment.

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[13] *Hally Labels v Powell* [2011] NZEmpC 63 at [99], *Grey Advertising (New Zealand) Ltd v Marinkovich* [199] 2 ERNZ 844.
[14] *Cain v Turners and Growers Fresh Ltd* [1998] ERNZ 314 at p 331 line 14.

Geographical arear

[69] The non-compete provision extends to cover the geographical region of the whole of New Zealand. While the affidavit evidence indicates that DVML operates to sell new housing in the South Auckland region and not elsewhere in New Zealand currently, I accept that leads for potential clients may reside anywhere within New Zealand and possibly overseas. This applies particularly for investors who do not intend to reside in a property or those taking up an investment opportunity.

Is Mr Best in breach of the restraining covenants?

[70] Mr Best is engaged in or has a business interest in a business that may compete with DVML and he has been so engaged within the 12 month non-compete period. Mr Best submits that he is not in "...direct competition..." with DVML because he is selling properties in a different geographic area, a different type of property at a higher price point that DVML and because of the nature of the properties built by WCL they are built more quickly that DVML's properties.

[71] Mr Pike deposed that WCL is not in direct competition with DVML because of their relative size, their building products, and geographical region:

(a) WCL is the seventh largest residential property builder in New Zealand (based on consents issued) and its developments are smaller in size ranging from 10 – 15 homes per site. In contrast DVML develops fewer properties on a larger scale of mainly apartments managed by a Body Corporate.

(b) WCL has 78 developments ongoing within New Zealand whereas, DVML has 8 projects on the go;

(c) WCL has built a total of 617 residential properties (including apartments and up to three bedroomed homes) whereas DVML has built 1134 apartments.

[72] Mr Best's affidavit discloses evidence that he contacted a lead from DVML after he started working for WCL. When he made the contact he understood the lead had not committed to DVML and was neither a former nor current client of DVML. This contact did not result in the person entering into a sales and purchase agreement with WCL.

[73] DVML submits that this contact is an example of the proprietary interest it is seeking to protect. Mr Best was only aware of the financial goals and interests of the prospective client because he had contacted the lead while working as an employee for DVML.

[74] Mr Best deposed that since working for WCL he has not contacted any DVML clients and has no motivation to do so as WCL's lead generation provides him with sufficient leads to contact.

Conclusion

[75] I have concluded there is a serious question to be tried as to the enforceability of the restraining covenants in the employment agreement and whether Mr Best has breached any enforceable provisions. The issues are arguable and exceed the frivolous or vexatious threshold.[15]

Balance of convenience

[76] The balance of convenience weighs the potential effect on Mr Best if the interim orders were granted against the potential effect on DVML if the interim orders are not granted. This also involves a consideration of the merits of the application and an assessment of the impact on the parties of granting or not granting the interim order, having regard to whether damages would be an adequate remedy if the interim position is reversed after the substantive investigation.

[77] If the order is granted there will be significant hardship to Mr Best as he will not be able to provide services to WCL for a period of 12 months, or earlier if the substantive claim is able to be heard and determined before 26 January 2022, which is unlikely.

[78] I accept that if Mr Best is unable to provide services to WCL until January 2022 his capacity to earn income will be significantly reduced. Mr Best is a young man whose work for DVML was at an entry level where he earned slightly more than the minimum wage. He is subject to a Partner of a New Zealander Work Visa which expires in August 2021. He is concerned that he may not be able to find alternative work in the short term because of the limited time left on his visa.

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[15] *Western Bay of Plenty District Council* and *Brooks Homes* above n 2.

[79] The non-compete clause states that Mr Best is prohibited from being engaged in or involved in "...any business that competes directly...". DVML submits that there are five companies in New Zealand it considers to be in direct competition to it and that it is open for Mr Best to find alternative work within the property industry beyond the five companies. There is no evidence that this was discussed or disclosed to Mr Best during his employment or at the time the draft employment agreement was provided to him.

[80] Mr Best worked for DVML for a limited period of three months. His retainer was equivalent to 90 cents per hour more than the minimum wage. The draft employment agreement provided for the payment of commissions for his Property Advisor role being subject to DVML receiving a deposit for an unconditional sale. Ms Gibson deposed that this could take anywhere between six months to a year. The evidence suggests the commissions paid for investment clients are realised much more quickly.

[81] There is no evidence that DVML has lost any customers as a result of Mr Best providing services to WCL. In his affidavit Mr Best has made it clear that other than the one lead he contacted he has not and does not intend to contact any of DVML clients or take any other steps in breach of the non-solicitation provisions.

[82] I have considered whether damages would be an adequate remedy. DVML submits there is no evidence that Mr Best would be able to meet a substantial award of damages. Mr Best owns properties in the United Kingdom which although subject to mortgages, are assets that may be liquidated in the event that DVML is successful in its claim for damages.

[83] Mr Best's evidence referred to by DVML to support its submission related to the financial hardship he would suffer if he was unable to continue working for WCL. I am satisfied that if he continues to earn an income he will be in a much stronger position to meet any damages award than if he is restrained from working for WCL.

[84] If I decline to make the orders sought, and Mr Best is not restrained from providing services to WCL then damages will be an adequate remedy. Having weighed the various factors discussed, I find the balance of convenience does not favour granting the interim orders DVML sought.

The overall justice

[85] The overall justice is essentially a check on the position that has been reached after my analysis of the serious question to be tried and the balance of convenience.[16]

[86] DVML has an arguable case, however there is a question about the enforceability of the unsigned draft employment agreement pursuant to s 64(6) of the Act and there are elements of the restraining covenants that are potentially unreasonable making them unenforceable or subject to significant modification.

[87] DVML submits the overall justice lies in its favour for the following reasons:

(a) Mr Best actively misled and deceived DVML as to the reason for his resignation, when he advised Ms Gibson that he was considering returning to work for a previous employer despite having already received an offer to contract for WCL;

(b) Mr Best resigned without providing any notice, depriving DVML of a realistic opportunity to shore up its client relations, prior to his termination; and

(c) Actively attempted to solicit a lead he had engaged with while employed by DVML.

[88] Mr Best submits the overall justice lies with him because:

(a) He has already provided DVML with undertakings which protect it;

(b) DVML is attempting to enforce an unlawful restraint of trade provision which purports to prohibit competition;

(c) The restraints are significantly wider then is reasonable; and

(d) DVML will not suffer any detriment if he continues working until the substantive matter can be determined.

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[16] *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

[89] There are no allegations that previous or current clients have left DVML. Apart from Mr Best's acknowledgement that he contacted one lead from his contact list, there are no allegations by DVML that Mr Best has breached the non-solicitation provisions of the employment agreement.

[90] Unlike other cases where restraining covenants have been investigated, there are no allegations that Mr Best has taken or is using confidential information belonging to DVML. I am satisfied Mr Best has provided reasonable undertakings to abide by the confidentiality provisions of his employment agreement to not solicit DVML clients or employees.

[91] It is apparent that Mr Best may have misled DVML at the time he proffered his resignation. That could be considered a breach of good faith for which remedies are available. In relation to DVML's submission of the consequence on it as a result of Mr Best seeking a reduced notice period, it was always open to DVML to enforce the contractual notice period. It chose not to do that.

[92] The overall justice of this case favours declining DVML's application for interim orders.

Application for penalties

[93] In submissions Mr Best has invited the Authority to impose penalties on DVML for an alleged breach of s 63A(2) of the Act. There is no claim by Mr Best properly before the Authority seeking an investigation and determination for an alleged breach of s 63A(2) of the Act. It is not appropriate to raise new claims in submissions and accordingly this issue will be taken no further.

Costs

[94] Costs are reserved and will be dealt with when the substantive matters have been determined.

Further mediation

[95] Section 159(1)(c) of the Act requires the Authority to consider from time to time whether to direct the parties to use mediation. Given my findings I consider it appropriate to direct the parties to attend further mediation and in good faith attempt to resolve the employment relationship problem between them.

Vicki Campbell
Member of the Employment Relations Authority