

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2013] NZERA Auckland 201  
5404053**

BETWEEN

ALLIED WORKFORCE  
LIMITED T/A TRADEFORCE  
RECRUITMENT  
Applicant

A N D

DEANNE TE AO  
Respondent

Member of Authority: T G Tetitaha  
Representatives: D J G Cox, Counsel for Applicant  
S J Neville, Counsel for Respondent  
Investigation Meeting: 7 and 8 February 2013 at Auckland  
Submissions Received: 4 February 2013 from Respondent  
Date of Determination: 24 May 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. A determination clause 15.2 of the parties employment agreement is unreasonable and unenforceable. The application for injunction is declined.**
- B. Costs submissions are to be filed within 21 days of the date of this determination.**

**Employment relationship problem**

[1] Allied Workforce Limited (AWF) employed Deanne Te Ao as a recruitment consultant from 2 July until 28 November 2012. The parties entered into an employment agreement dated 25 June 2012. The employment agreement prevented Ms Te Ao, for a period of six months following termination, being employed by a

competitor without the prior written approval of AWF, soliciting in the coverage area AWF clients and persuading AWF clients to discontinue using AWF services.<sup>1</sup> This employment relationship problem arises from Ms Te Ao terminating her employment contract to work for a competitor and allegations of solicitation of an AWF client.

[2] Ms Te Ao originally took the job following a redundancy. At the time of her employment, she had no previous experience in the recruitment industry. Her experience was in general office administration, call centres and freight forwarding.

[3] During her employment, Ms Te Ao organised an appointment with Foodstuffs Fresh through an existing relationship with the manager of their warehouse. She attended the Foodstuffs appointment together with her general manager, Fleur Board. AWF secured Foodstuffs business including the provision of up to thirty temporary workers. Ms Te Ao and another staff member were allocated the Foodstuffs account to service.

[4] In October 2012 Ms Te Ao was telephoned by Coverstaff Recruitment Limited, an AWF competitor, inquiring if she wished to meet about a job opportunity. She had a short conversation with a co-worker about the job opportunity on 19 October 2012.

[5] She met with Roana Carran from Coverstaff in Wellington on 29 October 2012 and received an offer of employment. Ms Te Ao resigned from AWF on 31 October 2012 advising that she was going to work for Coverstaff. Ms Board reminded Ms Te Ao of restraint of trade provisions. Ms Board asked her to refrain from telling the staff about her resignation.

[6] On 1 November 2012 Foodstuffs emailed AWF seeking information on temporary workers. Ms Te Ao emailed her team and copied in Foodstuffs, setting out the information required for the six affected temporary workers. Foodstuffs emailed in reply to Ms Te Ao on 5 November 2012 advising “*[n]o issues De-Anne they have already transitioned to another agency.*” Ms Te Ao deleted the email.

[7] On 8 November 2012 Ms Te Ao’s resignation was announced to AWF staff. The same day Ms Board was told Foodstuffs had decided to transition thirty

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<sup>1</sup> Clause 15.2 Employment agreement, Exhibit B to Affidavit F Board sworn 4 December 2012

temporary staff to Coverstaff. When questioned, Ms Te Ao denied any knowledge. Ms Board subsequently discovered Foodstuffs email dated 5 November 2012 above.

[8] On 9 November Ms Board learnt Ms Te Ao had told a client she could not see them that day. She took her to task about this.

[9] On 14 November 2012 Ms Te Ao was advised she would not be required to work out her notice period. Her employment terminated on 28 November 2012.

[10] AWF seeks an injunction due to an alleged breach of clause 15 of the employment agreement. This relates to Ms Te Ao's commencement of employment with a direct competitor of AWF in the Auckland area and alleged solicitation of an AWF client.

### Issues

[11] The following issues arise:

- (a) Is the restraint of trade contained in clause 15.2 enforceable?
- (b) If so, what remedies should be granted?

### Legal Framework

[12] Restraints on economic activity after the end of employment are unlawful, except to the extent that they may be reasonably necessary to protect the employee's legitimate proprietary interests.<sup>2</sup> The reasonableness of a restraint clause is to be determined at the time the contract was entered into.<sup>3</sup>

[13] The restraint is a mechanism to prevent unfair competition by an ex-employee in the period immediately following termination of that relationship. It is necessary to examine whether the evidence discloses that "*there is likely to be or will be unfair competition with the employer by the employee's intended employment with [its competitor] ...*"<sup>4</sup>

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<sup>2</sup> *Jerram v. Franklin Veterinarian Services (1977) Ltd* [2001] ERNZ 157, 171 at [46]; *Gallagher Group Ltd v. Walley* (1999) 5 NZELC 95,936, 95,941 at [20] to [21] referring to *Mason v. Provident Clothing and Supply Co Ltd* [1913] AC 724 at p.733.

<sup>3</sup> *Gallagher Group Ltd v. Walley* (1999) 5 NZELC 95,936, 95,941 at [23]

<sup>4</sup> *DB Breweries Ltd v Marshall* [1994] 1 ERNZ 98 (EmpC) at 104

[14] Relevant factors in considering whether a restraint was reasonable in all the circumstances are the history of the employment, the nature of the employer's interest to be protected, the likely effect of it on the former employee taking up a position with a competitor of the employer, the likely effect on the employee of the covenant being enforced, and any relevant considerations of public interest that suggest themselves.<sup>5</sup>

[15] The actual responsibilities and opportunities an employee had during employment are relevant. Reasonableness is to be judged in the light of all the circumstances, both at the time the contract was entered into, and during the course of the employment.<sup>6</sup>

[16] Case law on claims against sales employees generally have proof of the development and maintenance of close personal associations with their employer's customers or suppliers.<sup>7</sup> A restraint for six months when the term of employment contract was only for one year was held to be unreasonable.<sup>8</sup> A three-month restraint was reasonable for a senior sales representative.<sup>9</sup>

[17] An employer can only protect confidential information or trade connection by restraint, where it has been established that the employee bound by the restraint was of such seniority that he or she had access to that material.<sup>10</sup>

[18] Where there is no evidence of a deliberate breach of the restrictions upon confidentiality, the Authority should not give effect to a restraint on employment merely to ensure that there is no possibility of the confidentiality clause being intentionally breached.<sup>11</sup>

### **Is the restraint of trade contained in clause 15.2 enforceable?**

[19] AWF submits clause 15 is reasonable and necessary to protect AWF's proprietary interest. The period of six months is reasonable because of the level of responsibility held by Ms Te Ao and time to hire and train a new employee. The coverage area sought is Greater Auckland from Orewa to the Bombay Hills.

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<sup>5</sup> *Radio Horowhenua Ltd v Bradley* [1993] 2 ERNZ 1085, 1094

<sup>6</sup> *Broadcasting Corporation of New Zealand v Nielsen* (1988) 2 NZELC 96,040 at p.96,048

<sup>7</sup> *Kiwis Stat Limited v Nichols* [2010] NZEmpC 151

<sup>8</sup> *Radio Horowhenua Ltd v Bradley* [1993] 2 ERNZ 1085

<sup>9</sup> *DB Breweries Ltd v Marshall* [1994] 1 ERNZ 98 (EmpC)

<sup>10</sup> *Debtor Management (NZ) Ltd v Quail* [1993] 2 ERNZ 498 (EmpC)

<sup>11</sup> *DB Breweries Ltd v Marshall* [1994] 1 ERNZ 98 (EmpC) at 104

[20] At the time the contract was entered into, AWF submits Ms Te Ao was fully aware of the restraint clause and its effects because the General Manager, Ms Fleur Board, explained the employer required a restraint, pointed out the clause and went through the provisions prior to Ms Te Ao signing the agreement. During her employment, another employee left whom was the subject of legal action for breach of restraint of trade. It submits Ms Te Ao should have been aware of the consequences of breaching the restraint of trade.

[21] AWF submits the proprietary interest to be protected is their confidential information and non-solicitation of AWF clients. Ms Te Ao had seniority and a close and personal relationship with the clients.

### ***History of Employment***

[22] The duration of Ms Te Ao's employment was 5 months. She had no previous recruitment experience. She did not recall what was discussed at the time she signed the employment agreement, but accepts Ms Board went through it with her. She did not seek legal advice prior to signing. There is no record of the advice Ms Board gave about the restraint clauses other than pointing them out and reading through them.

[23] Having regard to the evidence at hearing, Ms Te Ao's job description<sup>12</sup> does not accurately describe what she did for AWF during her employment.

[24] She was allocated eleven existing AWF clients. However, some of these clients had existing relationships with other consultants and preferred to deal with them, rather than Ms Te Ao. When clients contacted AWF, any of the consultants took the call. She would take client job orders by telephone and email, interview candidates for placement with client's including drug testing and general consultant duties. She did no pricing or quotes for clients, although she had access to a proposal of Ms Board's which was retyped for another client, but did not secure that client's work. Any client sales calls were attended with and led by Ms Board.<sup>13</sup>

### ***Nature of the employer's interest to be protected***

[25] The confidential information requiring protection is submitted to be AWF pricing, quotes and client lists.

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<sup>12</sup> Schedule 1, Employment agreement, Exhibit B to Affidavit F Board sworn 4 December 2012  
<sup>13</sup> Affidavit D Te Ao sworn 19 December 2012 at paragraphs 8 to 17.

[26] Ms Te Ao had access to invoices showing final pricing given to clients and pricing lists.

[27] Ms Board deposed at hearing the pricing lists remain current for four months. The pricing lists and the dates they were current to are not part of the evidence. Ms Te Ao stopped attending the AWF workplace on 14 November 2012. Any proprietary interest to be protected in the pricing lists expired on 14 March 2013 at the latest or even earlier. Any proprietary interest protected by the pricing is now non-existent and may have been so prior to hearing.

[28] Invoices, pricing lists and quotes would have been of little value if Ms Te Ao did not prepare the pricing or quotes. The final price given to a client could be obtained from the client themselves in any event if they were seeking competitive quotes. Ms Board admitted obtaining a competitors quote from Foodstuffs at hearing. Ms Board's quote was not cheaper, but contained a range of pricing at various service levels. This indicated skills beyond knowledge of the pricing were required to obtain client business. These were skills Ms Te Ao did not have as she did not do pricing or quotes.

[29] There is no evidence she physically removed confidential information from AWF. It is inferred she may have and the injunction is sought to protect AWF from possible breach.

[30] Ms Te Ao's client's were nonexclusive to AWF, including Foodstuffs. Clients often utilised several agencies including AWF to provide staff. This was happening with Foodstuffs.

[31] Ms Te Ao did not appear to have achieved a close and personal relationship with her clients during her five months with AWF. Many continued to call the previous consultant or dealt with whoever answered the phone.

[32] There is an allegation Ms Te Ao was involved in the loss of Foodstuffs' business to Coverstaff due to her close and personal relationship. This is based upon an email dated 5 November 2012 from Foodstuffs (see above paragraph [6]) and a disputed conversation with a co-worker alleging a Foodstuffs person had recommended her to Coverstaff who were opening a branch in Airport Oaks area.

[33] There was no direct evidence from Foodstuffs confirming Ms Te Ao was responsible for the loss of business. The only direct evidence is Ms Carran's which must be preferred. She states Coverstaff obtained Foodstuffs business prior to Ms Te Ao's offer of employment and due to Ms Carran's relationship with Foodstuffs. The transitioning of temporary staff between agencies such as Coverstaff and AWF was common in this industry for reasons such as better pay rates.<sup>14</sup>

[34] The email dated 5 November 2012 is equivocal. It negates the need to follow up information on six staff as they had transitioned to another agency. It does not confirm why or to whom they are transitioning. It does not confirm 30 staff are to be transitioned. Transitioning of staff was common and may not have warranted specific attention by Ms Te Ao.

[35] There alleged conversation between Ms Te Ao and her co-worker is contained in a transcript prepared by the co-worker one month later. The transcript is surprisingly detailed given the lack of any contemporaneous note and the lapse in time before it was prepared. The transcript gives the impression the conversation was short. Ms Te Ao's evidence contradicts the majority of this transcript and is corroborated by Ms Carran. Ms Te Ao's evidence is preferred.

[36] Evidence of possible breaches may give rise to a basis for enforcement of a restraint clause. Although the circumstances may appear suspicious, there is insufficient proof on the balance of probabilities to show Ms Te Ao breached clause 15 by soliciting Foodstuffs business for Coverstaff.

***Likely effect of it on the former employee taking up a position with a competitor of the employer***

[37] Other than the loss of the Foodstuffs account (which is dealt with above), there is nothing to indicate AWF's relationship with its customers was affected at all by Ms Te Ao's departure. The client relationship was and remains with AWF (primarily Ms Board) not Ms Te Ao.

[38] There is no evidence she has removed any confidential information of AWF.

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<sup>14</sup> Affidavit R Carran 19 December 2012 paragraphs 6 and 14; BoE R Carran dated 29 January 2013 paragraphs 17 to 24.

[39] If the restraint was not upheld, the confidential information and clients would remain within AWF.

***Likely effect on the employee of the covenant being enforced***

[40] If the restraint was upheld, Ms Te Ao would be prevented from obtaining work within the recruitment industry. It would mean immediate loss of her employment with Coverstaff. The likelihood of her obtaining another job is unknown. It is inferred it would not be immediate and there may be some period of time where she is not working. If she was unable to immediately find work, as the principal earner, it is likely to create financial hardship for her family.

***Any relevant considerations of public interest that suggest themselves***

[41] No further considerations of public interest have been raised by either party.

**Determination**

[42] A restraint cannot be necessary and reasonable for the purposes of enabling AWF to hire a replacement. That is what the requirement to give notice of termination of employment is intended to protect. The parties have chosen to provide for one month's notice. AWF cannot seek to extend *defacto* the notice period by a further 5 months for those purposes. If Ms Te Ao had gone to a non-competing business, the obligations upon AWF to hire and train would remain.

[43] Ms Te Ao had no recruitment experience and no seniority. She was a junior employee, requiring upskilling in most if not all aspects of recruitment. The information she could access was not particularly confidential and required knowledge and skills beyond her abilities to be useful. There is no evidence she removed any of this information. The way the recruitment consultants operated and her short term of employment, it is unlikely she developed a close and personal relationship with AWF clients.

[44] The impact upon AWF of Ms Te Ao's departure is minimal. It remains in the same position it was in at the time of Ms Te Ao's arrival and departure. The loss of the Foodstuffs business is due to the nature of the industry AWF competes within. There would be financial hardship for Ms Te Ao if the restraint was enforced.

[45] Given the above finding regarding the loss of the Foodstuffs business, there is no evidence of a deliberate breach of the restrictions upon solicitation. There is no evidence of a deliberate breach of the restrictions upon confidentiality. The Authority declines to give effect to a restraint on employment merely to ensure that there is no possibility of the confidentiality or non-solicitation clause being intentionally breached in future.

[46] Weighing the above evidence, the Authority determines the restraint of trade is unreasonable and unenforceable. It declines to grant the injunction. Given this finding no consideration of the issue of remedies is required.

### **Costs**

[47] Costs submissions are to be filed within 21 days of the date of this determination.

**T G Tetitaha**  
**Member of the Employment Relations Authority**