

a) Liquidated damages

b) Penalty clause

c) Restraint of trade

- There was repudiation by de Lautours which invalidated the applicability of the clause
- There was a waiver of the clause by de Lautours
- What remedies should be awarded to de Lautours?

Background facts

[3] De Lautours is an accountancy firm based in Te Awamutu. Mr Craig Yarndley is the sole director and joint shareholder. It has approximately 15 employees, principally accountants and some administrative employees.

[4] It is agreed by the parties that Ms Hunter was employed by de Lautours in 1993 and provided with an individual employment agreement at that time; however a copy of that employment agreement was not made available to the Authority.

[5] Mr Craig Yarndley (Mr Yarndley) said that he commenced employment with de Lautours in 1998. During the period in which Ms Hunter was employed, there were a number of changes in both the partners and ownership of de Lautours which traded as either de Lautour Partners or de Lautours.co.

[6] The changes in the partnership were reflected in the parties to the individual employment agreements between it and Ms Hunter.

[7] Mr Yarndley said that employment agreements prior to 2000 had included a full restraint of trade clause although no copies of those agreements were provided to the Authority. The partners at the time had not considered this to have been a fair clause and employment agreements which were re-issued in 2000 contained an amended clause headed 'Other Employment and Conflicts of Interest'. This clause was amended slightly and included in subsequent employment agreements as clause 50.1.

[8] Mr Yarndley said that all employees at de Lautours had regular contact with de Lautours clients rather than only the de Lautours partners interfacing with clients, and the purpose of the amended clause was to allow departing employees to benefit from the client relationships they had developed whilst employed at de Lautours. In return, the employee

would pay a fee to de Lautours in respect of their first year's business with that client, and thereafter have full ownership and sole benefit of ongoing client fees.

[9] He explained that the 18 month period specified in the amended clause was due to the nature of work undertaken by accountants in which the work is usually spread out over a 12 month period. The 18 month term was to allow for clients who were late in providing information and would capture only one accounting period.

[10] Mr Yarnley said employees were given the new version of the employment agreement on or about 2000 and there was an opportunity provided for them to ask questions on the contents or to take legal advice before signing and returning the agreement. Two copies of the employment agreement were made, one for the employer and one for the employee. This practice was that adopted whenever an amended employment agreement was issued.

[11] Ms Hunter confirmed that she had an opportunity to take away the proposed employment agreements and consider them, but said that her usual practice was to place an amended employment agreement in her desk drawer and sign it after a few days, and then return it to de Lautours.

[12] There were copies of four employment agreements provided to the Authority dated 2000, 2004, 2007 and 2011. Each employment agreement had been signed by Ms Hunter. The first three employment agreements had been signed by Mr Yarnley, Partner, and the fourth by Mr Stuart Yarnley, Business Manager.

1. The 2000 Employment Agreement

[13] An employment agreement was signed on 27 and 28 March 2000 (the 2000 Employment Agreement) and the parties were stated to be de Lautour Partners (presently consisting of Allan L Oliver CA Ltd, Robin J Morriss CA Ltd, Eric M Scott CA Ltd and Craig R Yarnley CA Ltd and their successors) and Carol Hunter.

[14] The 2000 Employment Agreement contained the following clause:

OTHER EMPLOYMENT and CONFLICTS of INTEREST

You shall not within the terms and conditions of your employment set yourself up or engage in private business or undertake other employment in direct competition with the employer or clients using knowledge or materials gained in your employment with the employer.

If within 18 months of ceasing employment with de Lautour Partners the employee or any enterprise associated with the employee undertakes accounting work for someone who was a client of de Lautour Partners during their period of employment then the employee will pay to De Lautour Partners an amount equal to 60% of the retail value of any work performed within the first year of commencing work for that client. This payment will be due at the earlier of the time the invoices are issued or 12 months after commencing work for the client.

[15] Beneath the clause entitled “*Completeness*”, it was stated:

The terms and conditions set out in this contract replace any previous agreements and understandings. The employee acknowledges that they have received a copy of the Employee’s Team Manual that sets out the objectives and various policies of the firm.

2. The 2004 Employment Agreement

[16] The parties to the 2004 Employment Agreement were stated to be a partnership of companies (presently consisting of Robin J Morriss CA Limited, Eric M Scott CA Limited, Craig R Yandley CA Limited and Grant A Boyles Limited and their successors) carrying on the business of Chartered Accountants and Business Coaches at Te Awamatu.

[17] The 2004 Employment Agreement contained clause 50.1 which was virtually identical in wording to that of the clause headed ‘Other Employment and Conflicts of Interest’ in the 2000 Employment Agreement.

[18] It also contained clause 51 headed ‘Completeness’ which was identical to the ‘Completeness’ clause in the 2000 Employment Agreement.

3. The 2007 Employment Agreement

[19] Ms Hunter was issued with a replacement employment agreement on 1 February 2007 (the 2007 Employment Agreement). The parties were identical to those stated in the 2004 Employment Agreement

[20] The 2007 Employment Agreement contained some additional clauses including clause 54.1 ‘Good Faith’ which stated:

The parties to this agreement shall deal with each other in good faith. They shall be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive, communicative, supportive, cooperative, transparent and honest. This is an obligation which binds both the Employee and the Employer.

4. The 2011 Employment Agreement

[21] The individual employment agreement issued to Ms Hunter on 26 May 2011 (the 2011 Employment Agreement) was the employment agreement operative at the date her employment terminated.

[22] The employer was defined as Craig R Yarndley CA Limited and de Lautours.co trust.

[23] The 2011 Employment Agreement contained identical clauses 50.1, 51.1 and 54.1 as in the 2007 Employment Agreement. Clause 50.1 of the 2011 Employment Agreement (Clause 50.1) stated:

You shall not within the terms and conditions of your employment set yourself up or engage in private business or undertake other employment in direct competition with the employer or clients using knowledge or materials gained in your employment with the employer. If within 18 months of ceasing employment with de Lautour Partners the employee or any enterprise associated with the employee undertakes accounting work for someone who was a client of the firm during their period of employment then the employee will pay the firm an amount equal to 60% of the retail value of any work performed within the first year of commencing work for that client. This payment will be due at the earlier of the time the invoices are issued or 12 months after commencing work for the client.

[24] Ms Hunter had signed the 2011 Employment Agreement beneath the statement: “I, Carol Hunter understand the conditions of employment set out above and accept those terms and conditions.”

5. The alleged 2012 Employment Agreement

[25] Ms Hunter said that she had been provided with an individual employment agreement during 2012. She claimed that this employment agreement did not contain clause 50.1. and

that she had initialled the employment agreement on all pages and returned a signed copy to Mr Stuart Yarnley by placing it on his desk.

[26] On her way to Mr Yarnley's office to return the signed employment agreement, she claimed to have commented to Mr James Gibson, at that time Manager of the Accounting Team, that clause 50.1 was not in this latest version of the employment agreement.

[27] Mr Gibson confirmed that Ms Hunter had spoken to him about an employment agreement and that the page containing Clause 50.1 had been omitted, however he could not confirm the date of the discussion. He had been issued with an employment agreement in 2011, and believed the one Ms Hunter showed him was some time after he received his. He said she had expressed her surprise at the omission.

[28] The employment agreement allegedly provided to Ms Hunter in 2012 has not been provided to the Authority. Ms Hunter said she had not kept a copy of it and she had shredded all the documentation in her desk when she had left de Lautours employment. Ms Hunter confirmed that she had not mentioned the Clause 50.1 omission to either Mr Stuart Yarnley or Mr Yarnley.

[29] Mr Gibson said he had been familiar with Clause 50.1 and after he had left his employment at de Lautours and started working in his own accounting business, he had received a bill for payment in accordance with Clause 50.1 which he had paid to de Lautours after some negotiation.

[30] Ms Cathy Coughlin, Executive Assistant to Mr Yarnley, said that the meaning of Clause 50.1 of the employment agreements provided to all de Lautours employees was well-known within the firm. She specifically recalled a team discussion prior to 2010 in which Mr Yarnley stated that an employee who wished to leave and set up in business of their own accord was free to do so, however they would be required to pay de Lautours a fee pursuant to clause 50.1 of the employment agreement.

The 2014 restructuring Process

[31] Following a restructuring process undertaken in 2014, Ms Hunter's employment with De Lautours ended on 25 July 2014 by way of redundancy.

[32] Mr Craig Yarnley, Partner, said that the world of accountancy had been changing for a period of time. On 7 July 2014, the Partners had notified the employees that despite their best efforts at efficiency measures, de Lautours could not continue to financially sustain the level of staff employed which was based around an old accountancy model.

[33] Ms Lara Hellier, Director of People Passion, a Human Resources consultancy, had been engaged by de Lautours to advise and assist with the restructuring. Ms Hellier said that the restructuring process had been a standard one which People Passion had used on previous occasions.

[34] Ms Hellier and Mr Victor Calitz, met with Ms Hunter and other Account Managers on 10 July 2014 to discuss the proposed restructure. The restructure proposal was set out in a PowerPoint presentation which had been prepared by Ms Hellier, and which was provided to the Account Managers in electronic form.

[35] The proposal involved the selection of two Account Managers from the existing three, and advised that this would involve selection criteria to be used to assess their ability to meet the needs of the business. The selection criteria were set out in the proposal. It was proposed that de Lautours management team would complete the selection criteria ratings and the Account Managers were also invited to rate themselves with further supporting information if so wished.

[36] The employees had been asked for feedback on the proposal which Ms Hunter provided on 17 July 2014.

[37] The decision was made by de Lautours to proceed with the restructure and this was communicated to the Account Managers in a collective meeting on 18 July 2014. During that day, a copy of the selection criteria to be completed was provided to the affected Account Managers. The completed copies were to be returned to People Passion by 23 July 2014.

[38] Ms Hunter submitted her selection criteria to People Passion.

[39] Mr Yarnley said that Ms Hunter had been selected for redundancy because she was the lowest ranked employee based on the selection criteria. Ms Hunter was notified of the decision verbally in a meeting with Ms Hellier and Mr Calitz on 25 July 2014. The decision was confirmed in a letter dated that same day which stated:

In regard to our meeting today: as discussed after serious consideration and discussion with Craig in regard to all the suggestions and those you raised during our consultation process we have come to the decision that your position will be disestablished and you will be made redundant.

As you are aware over more than 12 months de Lautours.co have implemented various cost saving initiatives however unfortunately long term this has not assisted us in the ability to move forward to

improve our bottom line and still retain the full complement of our team.. It has now reached a stage where we need to look at larger ongoing costs in the business. ...

Carol, please be aware that is purely a cost saving business decision and at no point does this reflect your performance in your role.

Implementation of clause 50.1

[40] Following the termination of Ms Hunter's employment with de Lautours, she became self-employed commencing an accountancy practice known as Encompass Accounting Services.

[41] Ms Hunter said that after she had left de Lautours, a number of clients whom she knew from de Lautours and who had been informed that she had left de Lautours employment approached her to undertake their accounting work. As she had a farming background, and many of them were farmers, she had understood the nature of their business.

[42] During July 2015 to October 2015 Ms Hunter wrote to Mr Stuart Yardley requesting documents in respect of approximately 18 entities who had been clients of de Lautours during her period of employment (the Transferred Clients).

[43] Ms Hunter had prefaced the majority of her letters by stating:

I have been approached by [name of potential client] to act as accountant and therefore I am writing to confirm whether or not there are any professional reasons why I should not accept the appointment.

Assuming there are none, I would appreciate you providing the following documents:-

[44] The requested documentation was primarily:

The latest set of accounts and tax returns prepared and filed with IRD (2014 Financial Year)

Trial balances at the last balance date – detailed showing asset codes separately

All Workpapers

Banklink Files

And any other relevant information which may be helpful in my taking over these entities.

[45] In each case Mr Stuart Yarnley replied enclosing most of the requested information apart from the Banklink files which were emailed to Ms Hunter. He had raised no objection to supplying the requested documentation and stated in a letter dated 4 August 2015 that: “*I advise that there are no professional or ethical objections to your appointment*”.

[46] Ms Hunter said that at no stage did de Lautours inform her that she would be receiving an invoice in connection with her having undertaken work for these clients. Mr Stuart Yarnley said that he had considered there was no need to mention the fee as Clause 50.1 of the de Lautours employment agreements which referred to the fee was well-known to all de Lautours employees.

[47] Mr Yarnley said he had reviewed the files of the clients who had transferred to Ms Hunter following the termination of her employment with de Lautours. Based on his view that he had no reason for believing that any of the work undertaken by de Lautours would not have needed to be undertaken by Ms Hunter in the 12 months following the transfer of their files, he prepared a spreadsheet.

[48] The spreadsheet set the retail value, which was based upon what de Lautours would have charged if the client had not transferred to Ms Hunter for annual and GST work, for the twelve months preceding the clients transferring to Ms Hunter.

[49] The spreadsheet prepared by Mr Yarnley had been reviewed by Mr Dale McGuire, an accounting expert.

[50] Mr McGuire said that it was usual for accountancy firms to state that they ‘owned’ their clients as an accountancy practices assets are based on client relationships. When accountancy practices are bought, sold or merged, it was common practice to agree a fee to be payable in respect of acquired clients.

[51] The usual fee represented the good will acquired as a percentage of the annual fees generated each year, and was either 50c or 60c per \$1.00. In his expert opinion 50c would be too low to be a reasonable amount, and 60c per \$1.00 was a reasonable fee. Accordingly it was Mr McGuire’s opinion that the 60% of the retail value performed set out in clause 50.1 to be reasonable.

[52] Mr McGuire said that although he worked on a 3 year period when buying selling or merging accountancy practices, he considered the 18 months term to be reasonable in that it would cover one year of client fees for a particular client as was usual accounting practice.

[53] On 28 August 2014, De Lautours requested payment in respect of the Transferred Clients from Ms Hunter in accordance with clause 50.1 of in the sum of \$38,820.78 (including GST) which represented 60% of a retail value calculated to be \$56,262.00, in a tax invoice which stated:

In respect of your employment contract with de Lautours.co we are invoking Clause 50.1 that stipulates:

.If within 18 months of ceasing employment with de Lautour Partners the employee or any enterprise associated with the employee undertakes accounting work for someone who was a client of de Lautour Partners during their period of employment then the employee will pay to De Lautour Partners an amount equal to 60% of the retail value of any work performed within the first year of commencing work for that client. This payment will be due at the earlier of the time the invoices are issued or 12 months after commencing work for the client.

[54] The Transferred Clients were named in the tax invoice which also stated: “*Attached is a spreadsheet detailing the calculations to come to this figure*”.

[55] Mr Stuart Yarnley sent letters to Ms Hunter reminding her that payment was due on 7 and 20 October and 5 November 2015.

[56] Ms Hunter did not reply until 12 November 2015, the date when she said she had received the letter dated 7 October 2015 attaching the tax invoice seeking payment. In response in her letter dated 12 November 2015 she disputed the amount of \$38,820.78 or that she owed any other monies to de Lautours in respect of the Transferred Clients. She also pointed out that there had been no spreadsheet attached to the email as stated.

[57] Edmunds Judd, Barristers, Solicitors & Notaries, contacted Ms Hunter on behalf of de Lautours on 1 December 2015 advising her that unless de Lautours received the payment as requested, proceedings would be commenced to recover it.

[58] Ms Hunter subsequently contacted de Lautours and provided evidence of the work she had undertaken for the Transferred Clients. She had set out the clients and the work she had performed for them in her brief of evidence and an attached spreadsheet.

[59] Mr McGuire reviewed the evidence provided by Ms Hunter and as a result provided an amended spreadsheet.

[60] In accordance with the amended spreadsheet prepared by Mr McGuire, the retail value of work performed by Ms Hunter within the first year of commencing work for the Transferred Client is \$45,100.00 and the amount claimed by de Lautours as owed by Ms Hunter is \$27,060,00 (60% of \$45,100.00).

Determination

Was there an obligation contained in the individual employment agreement issued to Ms Hunter?

(i) *The Applicable Employment Agreement*

[61] Ms Hunter had been issued with a number of employment agreements during her employment. The 2011 Employment Agreement clearly indicated that it replaced the previous employment agreements in the inclusion of Clause 51 which read:

The terms and conditions set out in this contract replace any previous agreements and understandings. The employee acknowledges that they have received a copy of the Employee's Team Manual that sets out the objectives and various policies of the firm.

[62] It had been signed by Ms Hunter below her signature stating that she had understood: *“the conditions of employment set out above and accept those terms and conditions “.*

[63] Ms Hunter claimed that she had been issued with a further employment agreement in 2012 following a small increase in her salary.

[64] Mr Yardley said that employment agreements were reissued when there was change in the ownership of the partnership, and that a change in an employee's salary level did not engender an amended employment agreement.

[65] Ms Hunter has not provided evidence of amended employment agreements following increases in her level of remuneration in the interim periods between the dates of the employment agreements reissued as a result of ownership changes.

[66] Mr Gibson states in his written evidence: *“I was presented along with other staff, multiple iterations of an individual employment agreement due to the fact that ownership of the business would change regularly ...”.* Mr Gibson makes no reference to the reissuing of employment agreements due to changes in remuneration.

[67] I observe that there was no change in the ownership of the partnership between the issuing of the 2004 and 2007 Employment Agreements; however additional clauses were present in the 2007 Employment Agreement which explains the amended employment agreement at that time.

[68] I do not accept that there was an amended employment agreement issued whenever an employee had a change in remuneration because (i) none have been provided to me to support that argument, (ii) de Lautours deny that was the case, and (iii) all the employment agreements have a clause making provision within the Remuneration section for an annual review of salaries without the necessity of reissuing the whole employment agreement.

[69] I have considered whether or not the 2011 Employment Agreement was succeeded by one issued in 2012, however I am not persuaded that was the case based upon the fact that:

- (i) de Lautours deny that there was an employment agreement issued in 2012 as there were no changes in the partnership which would have triggered it, and Ms Hunter was unable to produce a copy claiming she would have shredded the copy she had been given;
- (ii) Mr Gibson's evidence confirmed that employment agreements were reissued whenever the ownership of the partnership changed, but made no reference to the reissuing of employment agreements when remuneration changed. Mr Gibson's evidence was also inconclusive in that although he stated at the Investigation Meeting that he had seen an employment agreement which Ms Hunter showed to him and the page with clause 50.1 on it was missing, he could not confirm that this occurred in 2012, stating that the employment agreement last issued to him had been in 2011; and
- (iii) Given that Ms Hunter was surprised that the alleged 2012 Employment Agreement had not contained clause 50.1, it could be expected that she would have retained her copy, and not shredded it as she claimed. This is especially as in her written evidence Ms Hunter stated that she had in the last couple of years of her employment at de Lautours taken to initialling each page of the employment agreement because of her '*growing distrust of my employer.*' I note that although the 2011 Employment Agreement was signed in May 2011, and Ms Hunter claims that she received a reissued Employment Agreement in March or April 2012, only some 10 months later, the 2011 Employment

Agreement was signed but no pages were initialled as she claimed they would have been.

[70] I therefore consider it more likely than not that no employment agreement was issued to Ms Hunter in 2012 and I find that the 2011 Employment Agreement is the relevant one for the purposes of this case.

(ii) *Nature of clause 50.1 of the 2011 Employment Agreement*

[71] The Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*¹ comprehensively examined the principles of contractual interpretation. In *Silver Fern Farms Ltd v New Zealand Meat Workers and Related Trades Union Inc*² the Court of Appeal applied that analysis to employment agreements. The Employment Court subsequently summarised the principles of contractual interpretation in *New Zealand Professional Firefighters Union v The New Zealand Fire Service Commission*³ which stated in clause [17]:

[17] In summary, it would appear from Vector that the starting point for any contractual interpretation exercise is the natural and ordinary meaning of the language used by the parties. If the language used is not on its face ambiguous then the Court should not readily accept that there is any error in the contractual text ... It is, nevertheless, a valid part of the interpretation exercise for the Court to “cross-check” its provisional view of what the words mean against the contractual context because a meaning which appears plain and unambiguous on its face is always susceptible to being altered by context, albeit that outcome will usually be difficult to achieve ... If the language used is, on its face, ambiguous or flouts business commonsense or raises issues of estoppel then the Court should go beyond the contract so as to ascertain the meaning which the relevant provision would convey to a reasonable person with all the background knowledge available to the parties ... Extrinsic evidence is admissible in identifying contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear ... Evidence is not relevant if it does no more than tend to prove what individual parties subjectively intended or understood their words to mean, or what their negotiating stance was at any particular time ...

[72] The starting point in analysing clause 50.1 is to examine the words to see whether they are clear and unambiguous. Clause 50.1 of the 2011 Employment Agreement comprised has two sections. The first sub-clause consists of a full restriction on the employee undertaking in private business or taking part in any business in competition with the

¹ [2010] 2 NZLR 444

² [2010] NZCA 317

³ [2011] NZEmpC 149

employer or clients using knowledge or materials gained during employment with the employer. The second sub-clause ameliorates this prohibition to allow the employee to undertake accounting work after the termination of their employment for clients who were clients of the company during the period of their employment which would incur a fee.

[73] Taken together I find the natural and ordinary meaning of the language used is clearly understood as meaning that ex-employees who undertake work for previous clients of de Lautours will be liable for a fee.

[74] I find in performing a cross-check against the contractual background that there is no ambiguity or flouting of business common sense, and the clause was, from the evidence provided by Mr Gibson, Ms Coughlin and indeed by Ms Hunter herself, to have been well known and understood within de Lautours.

[75] On that basis I determine that the meaning of Clause 50.1 is that if an employee ceases employment with de Lautours and within an eighteen month period they undertake work for a previous client of de Lautours they will be liable to a fee equivalent to the retail value of that work within the first year of commencing the clients work.

[76] In addition, although not specified in the clause, but confirmed in practice, de Lautours supply the employee with copies of the relevant documents of the client in question, in order to facilitate the ex-employees carrying out the work.

(a) *Is it a liquidated damages clause?*

[77] Mr McBride submits that Clause 50.1 is a liquidated damages clause. A liquidated damages clause in a contract stipulates an agreed sum to be paid upon breach of the contract.

[78] A breach of Clause 50.1 has been claimed by de Lautours because Ms Hunter has not paid the relevant fee pursuant to Clause 50.1.

[79] A liquidated damages clause is only enforceable if the sum stipulated was a genuine pre-estimate by the parties at the time of contracting of the loss likely to flow from the breach.⁴

[80] I observe that there is no pre-estimate and no agreed sum stipulated in Clause 50.1 of the 2011 Employment Agreement, rather the clause contains an obligation to pay a fee in the event that the employee undertakes accounting work for someone who was a client of the

⁴ *Dunlop Pneumatic Tyre Co Limited v New Garage Motor Company Limited* [1915] AC 79 at 86-87 (HL)

employer during their period of employment, and a formula purchasing the client contact at an agreed price.

[81] I do not find Clause 50.1 to be a liquidated damages clause.

(b) *Is it a penalty clause?*

[82] Mr Mc Bride submits that Clause 50.1 is a penalty clause.

[83] A penalty clause in a contract is designed to punish the party in breach and/or otherwise induce performance of the contract. Such a clause is unenforceable, although a finding that the clause is an unenforceable penalty clause does not preclude the party in breach being liable for actual loss flowing from breach of contract in the normal way.⁵

[84] Having considered Clause 50.1 I do not find the clause to be in the nature of punishment or a threat to induce performance. Nor is the sum to be paid extravagant in comparison to the greatest loss that could be proved on breach.

[85] In accordance with Clause 50.1 there is no punishment to prevent Ms Hunter undertaking work for clients who were previously clients of de Lautours, nor is there any threat to prevent her from so doing. On the contrary the clause permits her to benefit from work undertaken for previous de Lautours clients at a 40% rate during the first year of commencing work for them, thereafter entirely for the duration of the relationship.

[86] I do not find that Clause 50.1 to be a penalty clause.

(c) *Is it a restraint of trade clause?*

[87] Mr McBride submits that Clause 50.1 is a restraint of trade clause, and as such invalid on the basis that it does not purport to protect any proprietary interest, and is unreasonable in terms of duration and scope.

[88] The first part of the Clause 50.1 is, as I have observed, a restraint of trade clause in that it prohibits Ms Hunter undertaking work for previous de Lautours clients using knowledge or materials gained during her employment with de Lautours. This first part of the clause however is followed by a sub-clause which ameliorates this prohibition to an

⁵ *Workers trust & Merchant Bank limited v Dojay Investments Ltd* [1993] AC 573 at 583 (PC)

obligation for Ms Hunter to pay a fee should she undertake accounting work for someone who was a client of the employer during her period of employment.

[89] I have considered whether or not the clause is a restraint of trade and binding on Ms Hunter on that basis.

Proprietary Interest

[90] Mr McBride submits that Clause 50.1 does not protect any proprietary right; it merely seeks to profit when an employee does work.

[91] Mr Brant submits, and I accept, that the single biggest asset of an accounting firm is its clients. Mr Yarnrdley's evidence was that de Lautours preferred its employees to be able to deal with its clients on a level of some familiarity rather than partners interfacing with their individual client contacts.

[92] As a consequence during the course of her employment Ms Hunter was able to develop a close relationship with the clients with whom she dealt, including access to their client information, and an informed knowledge of their business needs.

[93] In *Broadcasting Corporation of New Zealand Ltd v Nielson Hardie Boys J* stated:

*The employer's interest in maintaining his trade connection does not entitle him to obtain protection against every employee who deals with his customers, but only against those who because of the nature of their employment are likely to have personal knowledge of or influence over [the] customers and hence over where they place their custom to such an extent that it is within their power to entice them away*⁶

[94] As observed, Clause 50.1 was a well-known clause within de Lautours, and there is no evidence that Ms Hunter queried the nature of the proprietary interests referred to at any time during the 11 year period from March 2000 to May 2011. Ms Hunter signed the employment agreements presented to her for consideration on four occasions and in the 2011 Employment Agreement she had signed it beneath the statement: "*I, Carol Hunter understand the conditions of employment set out above and accept those terms and conditions.*".

[95] I find that de Lautours had a proprietary interest in its clients which it sought to protect via Clause 50.1.

⁶ (1988) 2 NZELC 96,040 at page 19

Consideration

[96] A principle relating to restrictive covenants referred to in *Gallagher Group Ltd v Walley*⁷ is that consideration is necessary, but may be satisfied by the mutual promises intrinsic in the offer and acceptance of employment.

[97] The Court of Appeal considered the issue of adequacy of consideration for a restraint in *Fuel Espresso Ltd v Hsieh*⁸. The Court observed⁹:

What we are dealing with here is the initial (and only) agreement of the parties. The traditional definition of consideration requires that there be something of value which must be given, and that consideration is either some detriment to the promisee or some other benefit to the promisor. But the law does not inquire into the adequacy of the consideration, nor, as the Judge seems to have thought, does it require an extra “premium” for a restraint of trade clause. It is also a very well settled principle of contract law that even mutual promises can be consideration for each other. As Treitel G.H, Law of Contracts (9th Ed), London, Sweet & Maxwell, 21995, at p 66 puts it:

“A person who makes a commercial promise expects to have to perform it ... correspondingly, one who receives such a promise expects it to be kept. These expectations can properly be called a detriment and a benefit and they satisfy the requirement of consideration in the case of mutual promises.”

[98] Whilst mutual promises intrinsic in the offer and acceptance of employment may constitute consideration, and whilst Ms Hunter does not dispute that she was provided with an employment agreement when she commenced employment at de Lautours or that it contained a restraint of trade clause, no copy has been provided.

[99] More significantly the 2011 Employment Agreement contained an acknowledgement by the parties that it replaced previous arrangements and understandings.

⁷ [1999] 1 ERNZ 490 (CA)

⁸ [2007] 60

⁹ *Ibid* at para 18

[100] On that basis, I therefore proceed to consider whether or not there is an inherent consideration in the application of Clause 50.1 in that there was a benefit to both parties because the clause provided a mechanism for ascribing value to the relationship that de Lautours permitted Ms Hunter to gain over what would ultimately become her own clients.

[101] Ms Hunter's evidence was that the Transferred Clients had approached her of their own volition; there was no solicitation on her part involved. The majority of the Transferred Clients had a farming background which had no doubt helped to foster a good business relationship with Ms Hunter during her employment at de Lautours.

[102] There is no legal ownership in a client. However I also take into account the fact that the Transferred Clients were known to Ms Hunter because of the nature of her employment at de Lautours which allowed her to have regular contact with the Transferred Clients and to develop an understanding of their business needs. I consider this enabled a familiarity in the relationship to develop which facilitated an approach to Ms Hunter for accounting services subsequently.

[103] Following the approach by the Transferred Clients Ms Hunter was able to freely accept their business, and after the first year of providing accountancy services, to unrestrictedly benefit fully from the Transferred Clients fees. Even during the first year she would have a benefit represented by the retention of 40% of the fees charged to the Transferred Clients.

[104] I find there was a benefit to Ms Hunter in the application of Clause 50.1, especially in view of the fact that de Lautours provided all relevant client documents to Ms Hunter upon her request.

[105] There was also a benefit to de Lautours in that having the security of Clause 50.1 it could allow employees during their employment full access to its clients knowing that if the clients transferred their accounting business to a departing employee, it would have some financial recompense for the business thereby lost.

[106] I find there is consideration in Clause 50.1.

Reasonableness of the Restraint

[107] The restraint is for a period of eighteen months of ceasing employment and the payment: “*was due at the earlier of the time fee invoices are issued or 12 months after commencing work for the client*”.

[108] Mr McGuire’s expert evidence which was not challenged by opposing expert evidence was that an eighteen month period was reasonable within the context of an accountancy practice because it would cover one year of client fees for a particular client.

[109] Mr McGuire also gave evidence that the fee of 60c per \$1.00 was reasonable in accountancy terms.

[110] I have considered the reasonableness of the clause in light of the fact that Ms Hunter was not a highly remunerated employee. Clause 50.1 is not a full restriction on her undertaking any business which competes with that of de Lautours, but rather addresses the situation in which an ex-employee purchases an asset in exchange for a payment of a fee.

[111] I accept Mr McGuire’s evidence that the terms of the ‘restraint’ viewed as the purchase of an asset is reasonable.

[112] Viewed as a restraint of trade clause I do not find Clause 50.1 to be unreasonable. However I do not find that the clause is a restraint of trade but rather is in the nature of a sale and purchase arrangement.

[113] As such I find it to be binding on Ms Hunter on that basis.

Was there repudiation by de Lautours which invalidated the applicability of the clause?

[114] Mr McBride submits that the restructuring process undertaken by de Lautours in 2014 repudiated the employment agreement and consequently Clause 50.1 as a result of Ms Hunter’s termination by way of redundancy.

[115] In the case of *General Billposting Company Ltd v Atkinson*¹⁰ the House of Lords held that because the employer had repudiated the contract, the employee involved was entitled to accept the repudiation, sue for damages, and was no longer bound by the restraint of trade.

[116] In *Pottinger v Kelly Services (New Zealand) Ltd*¹¹ Judge Inglis stated:

¹⁰ [1909] AC 118

¹¹ [2012] NZEmpC 101

[39] In Rock Refrigeration Ltd v Jones Philips LJ doubted the continued general application of General Billposting. He expressed the view that General Billposting accorded “neither with current legal principle nor with the requirements of business efficacy.” He also emphasised the special statutory context of employment law, which provides the opportunity for employees to gain compensation for unfair dismissal, and observed that it did not seem reasonable to also prevent the employer from protecting its confidential information or goodwill in such circumstances. In my respectful view there is considerable force in these observations.

[40] I conclude that while it is arguable that an established repudiation would result in a finding that the restraints contained within the plaintiffs’ employment agreements were void following General Billposting, that argument is weak.

[117] The restructuring occurred in 2014 and Ms Hunter’s employment was terminated by reason for redundancy by letter dated 25 July 2014. Ms Hunter took no steps within the statutory time period to challenge the redundancy decision as being unfair or in breach of good faith and the employment agreement.

[118] I find no established repudiation which invalidated the applicability of Clause 50.1.

Was there a waiver of Clause 50.1 by de Lautours?

[119] During July to October 2015 Ms Hunter wrote to de Lautours asking if there was any professional reason why she should not accept the appointment of a previous client of de Lautours as a future client and providing that was the case, requesting that de Lautours send her documents in its possession pertaining to that client. On each occasion de Lautours provided the requested information.

[120] Mr McBride submits that by not alerting Ms Hunter to the fee liability of Clause 50.1 de Lautours failed to act in good faith and that it waived any right in terms of Clause 50.1. I note that the duty of good faith ceases following the termination of the employment agreement.

[121] I observe that Clause 50.1 did not prohibit Ms Hunter acting for previous clients of de Lautours; on the contrary it expressly allowed her to do so in return for the payment of a fee during the first year of that particular client’s accountancy services.

[122] I note that Clause 50.1 was a familiar clause to Ms Hunter, it had been in the four employment agreements with which she had been issued by de Lautours since 2000, and in

her evidence she stated that she had noted its omission in the alleged 2012 Employment Agreement (which I do not find to have been the applicable employment agreement).

[123] I find no words or conduct in the response of Mr Stuart Yarndley to the letters sent by Ms Hunter during July and October 2015 expressly waiving the payment of the fee in Clause 50.1.

[124] I find that that there was no waiver of Clause 50.1 by de Lautours.

[125] I determine that by not paying the agreed fee Ms Hunter has not complied with Clause 50.1 of the 2011 Employment Agreement.

Remedies to be awarded to de Lautours

[126] I have found that Ms Hunter has not complied with Clause 50.1 which sets out the basis of the fee to be paid, namely 60% of the retail value of any work performed within the first year of commencing work for the relevant clients.

[127] Mr McGuire has recalculated the fee to be paid in light of the detailed information provided of the work Ms Hunter has actually carried out for the Transferred Clients. The retail value as assessed by Mr McGuire is \$45,100.00 and the calculated fee is \$27,060.00. The calculations have not been challenged by Ms Hunter.

[128] I accept Mr McGuire's expert evidence and make an order for payment in accordance with that sum.

[129] Pursuant to s137.1(a)(i) of the Employment Relations Act 2000 (the Act) Ms Hunter is ordered to pay de Lautours the sum of \$27,060.00 (excluding GST) in accordance with Clause 50.1 of the 2011 Employment Agreement.

[130] This sum is to be paid 28 days following the date of this determination pursuant to s 137.3 of the Act.

Interest

[131] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908, which is currently 5% per annum¹².

¹² Judicature (Prescribed Rate of Interest) Order 2011 (SR2011/177)

[132] I consider that it is appropriate that Ms Hunter is ordered to pay interest on the outstanding sums owed to de Lautours.

[133] Ms Hunter is to pay interest of 5% on the sum of \$27,060.00 due to de Lautours from 20 September 2015 until the amounts owed are paid in full.

Penalty

[134] A penalty is sought by de Lautours in respect of the contractual breach.

[135] I consider that this case has presented as a dispute over the interpretation and application of a contractual clause, and has required the Authority to apply analysis to each aspect of the disputed interpretation.

[136] On that basis I do not find a penalty to be appropriate.

Costs

[137] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[138] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson

Member of the Employment Relations Authority