

soliciting or canvassing custom of any person. Bay was sold to Albano Health Care Limited and then in December 2010 to Amplifon.

[2] Amplifon told the Authority it is a world leader in the field of hearing loss. It purchased Bay and National Hearing Care New Zealand Limited (NHC) in December 2010 and it has been trading in New Zealand under both names since. Bay and NHC operate clinics nationwide. The core business of both trading entities is around developing hearing solutions which include the sale and fitting of hearing devices along with after care services following purchase of a hearing care device.

[3] Amplifon decided to restructure the Bay and NHC clinics in mid 2012. This resulted in Ms Horsburg being given notice of termination on the grounds of redundancy on 31 May 2012. During her notice period she was offered a position by NHC as an Audiological Clinician. She accepted the offer and started the new position on 06 August 2012.

[4] The employment agreement with NHC that Ms Horsburg signed was not as favourable as the terms of her Bay employment agreement. NHC's redundancy provisions allowed for one month's redundancy compensation compared to the three months she had with Bay. The NHC agreement also included a different restrictive covenant which was twice as long as her Bay agreement and which also included a further period of 12 months non-solicitation of Amplifon's employees, clients/customers and potential clients/customers. NHC offered Ms Horsburg the same remuneration she had at Bay and her request for a pay rise was declined.

[5] Ms Horsburg raised these issues with Amplifon who agreed to amend the redundancy provisions but insisted there would be no negotiation on the restraint. Ms Horsburgh says she was anxious to remain in employment so felt she had no option but to sign the new NHC agreement. She says she felt vulnerable because she had been given notice of termination, with her employment due to end on 09 August 2012.

[6] The NHC restrictive covenant is set out in clause 22 of Ms Horsburg's agreement which states:

22.1 Non competition: For a period of six months following the expiry of the notice period or the termination of the employee's employment for any reason, and within a 10km radius of the Base Clinic, the employee shall not, without the

company's prior written consent, directly or indirectly, and whether on the employee's own account or as a shareholder, director, agent, adviser, employee, contractor or consultant for any persons or organisation be engaged in any trade or business which competes with any trade or business being carried on by the company at the date of termination of the employee's employment.

22.2 *Non-Solicitation: The employee shall not at any time during the period of employment or for a period of one year after termination of employment, for what ever reason, either on the employee's own account or for any other person, firm, organisation or company, solicit, endeavour to entice away from or discourage from being employed by the employer, any other employee or actual client/customer or prospective client/customer of the employer.*

[7] Ms Horsburg's new position was based at NHC's Victoria Street clinic. Amplifon closed the Victoria Street clinic in June 2013 when the landlord terminated the lease. Staff were either offered employment with Bay or were made redundant. Ms Horsburg was made redundant and her employment ended on 01 June 2013.

[8] When Ms Horsburg was told about the clinic closure she queried her restraint with Mr Daniel Hempstead, Amplifon's Operations Manager, who told her they would consider either removing it or reducing the duration of the restraint. Ms Horsburgh emailed Mr Hempstead on 15 May asking if he had come to any conclusion about her restraint. Mr Hempstead responded on 17 May recommending that she take advice and come back to Amplifon with a proposal.

[9] Ms Horsburgh says she took a holiday then decided to open her own business trading as The Ear Room in Queenwood Village Hamilton. Her clinic opened on 16 September 2013. Amplifon now currently operates two Bay clinics in Hamilton which are based at Tristam Avenue and in Flagstaff. Ms Horsburg's new business is 6.3km from the closed Victoria Street clinic and 6.8 km from the Bay Tristam Avenue clinic. Amplifon opened its Flagstaff clinic after Ms Horsburg opened her own Ear Room clinic in Flagstaff following her redundancy.

[10] The Ear Room is a modest enterprise with Ms Horsburgh being the only person who works there. She believes The Ear Room is likely to have minimal, if any effect on Amplifon's financial position. She says that she did not go back to Amplifon with a proposal about her restraint because she simply did not think about

it. She says the two clinics where she had previously worked had closed down so she did not see her new business as presenting a problem for Amplifon.

[11] Amplifon found out about Ms Horsburgh's new business and applied to the Authority for a declaration that the restraint of trade provision in her employment agreement is enforceable. If it is held not to be then in the alternative Amplifon seeks that the existing restraint be modified by the Authority under s.8 of the Illegal Contracts Act 1970 (ICA).

[12] Amplifon is also pursuing a breach of contract claim against Ms Horsburgh for breaching the restraint provisions in her employment agreement. It asks that damages be quantified following a determination on liability.

[13] On the morning of the Authority's investigation meeting Amplifon advised that it recognised that the one year duration of clause 22.2 was unreasonable which would make it unenforceable. Amplifon told the Authority it does not intend to enforce clause 22.1 and seeks modification of clause 22.2 only to reduce the duration of the restraint from one year to six months. It does not accept that the non-compete restraint in clause 21.1 is unreasonable or unenforceable.

[14] Amplifon is pursuing Ms Horsburg for a breach of contract claim. On the day of the investigation meeting Mr Harrison advised the breach related solely to Ms Horsburg advertising her new business which it claims amounts to solicitation of its clients in breach of clause 22.2 of her employment agreement. It advised that it no longer took issue with her running her business within a 10km radius of an Amplifon clinic.

[15] Ms Horsburgh admits that her daughter assisted her (without her knowledge) by setting up a Facebook page for The Ear Room and posting a message which announced the intention to open The Ear Room from 9 September 2013¹. The Facebook posting states that Ms Horsburgh was looking forward to seeing all her *lovely loyal faces and welcome all new clients to The Ear Room*.

[16] Amplifon claims that the reference to Ms Horsburgh's *loyal clients* on Facebook is to its clients/customers. The Facebook announcement occurred on 25 August. Ms Horsburgh says that only family and friends had 'liked' The Ear Room

¹ It opened a week later on 16 September 2013.

Facebook page so they would have been the only people to have access to this announcement. No evidence to contradict that was presented by Amplifon.

[17] Ms Horsburgh says she put advertisements in the Hamilton Press on 18 and 25 September which included a photograph of her. Amplifon says the photo amounts to solicitation of its clients. Ms Horsburg also distributed flyers which were printed at the beginning of September and which she delivered around 25 September by hand to residents in the Rototuna/Flagstaff, Queenswood residential area.

[18] The flyers had a photograph of Ms Horsburgh and said *We welcome all new and existing clients*. Amplifon says the reference to “existing clients” breaches clause 22.2 because it is solicitation of its clients. After Amplifon raised an issue via counsel with Ms Horsburg about her activities breaching her restraint she manually blacked out the reference to *existing* on the flyer so it just read *We welcome all new clients*.

[19] Ms Horsburgh has been approached by seven clients whom she previously worked for at Amplifon and she has disclosed information as to how those clients came to find her and the fees she has charged in respect of those individuals.

[20] On the day of the investigation meeting Ms Horsburgh conceded that Amplifon had a legitimate proprietary interest in the customers/clients she had previously dealt with when employed by it. Ms Horsburgh denies that she has breached the restraint and opposes any modification to it.

Issues

[21] The following issues are to be determined:

- a. Should the restraints in Ms Horsburg’s employment agreement be modified?
- b. If so, has she breached the modified restraint?

Should the restraints in Ms Horsburg’s employment agreement be modified?

[22] Section 8 of the Illegal Contracts Act 1970 provides:

8. *Restraints of Trade*

- (1) *Where any provision of any contract constitutes an unreasonable restraint of trade the Court may –*

- (a) *Delete the provision and give effect to the contract as so amended; or*
 - (b) *So modify the provision that at the time the contract was entered into the provision as modified would have been reasonable, and give effect to the contract as so modified; or*
 - (c) *Where the deletion of modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand, to try to enforce the contract.*
- (2) *The Court may modify a provision under para.(b) in sub-section (1), notwithstanding that the modification cannot be effected by the deletion of words within the provision.*

[23] The ability of the Authority to modify a restraint under s.8 of the Illegal Contracts Act 1970 (ICA) is constrained by s.164 of the Employment Relations Act 2000 (the Act) which allows modification only if four conditions have been met;

- a. The Authority must have identified the problem in relation to the agreement and directed the parties to mediation.
- b. The parties must have attempted to resolve the problem in good faith by using mediation.
- c. The problem must remain unresolved by mediation.
- d. The Authority must be satisfied that any remedy other than an order varying the agreement would be inappropriate or inadequate.

[24] I am satisfied the first three prerequisite conditions have been met. At the investigation meeting on 19 November the Authority identified that there was a problem with the restraint because it was void and unenforceable. The parties were directed to mediation to attempt to resolve that problem in good faith. Mediation on that problem occurred on 19 November and was unsuccessful. The Authority resumed its investigation meeting that same day after being advised meditation was unsuccessful.

[25] I am not satisfied that s.164(d) of the Act is met. I do not consider that anything other than an order varying the agreement would be inappropriate or

inadequate. Rather I consider it would be inappropriate to give Amplifon the relief it seeks.

[26] Mr Harrison submits that because Ms Horsburg concedes Amplifon has a legitimate proprietary interest in protecting its client relationships then the Authority must modify the restraint. I do not accept that submission. The use of the word “*may*” in s.8(1) of the ICA makes it clear that any relief provided is discretionary. That is recognised by the High Court in *C E Elley Ltd v Burgess*² which held there was no presumption in favour of modification and that each case must be considered in relation to the relevant circumstances.

[27] Amplifon says that if the non-solicitation provision is to be held unenforceable then despite clinicians agreeing to restrain these post-employment activities they would be able to leave and set up in competition and straight away solicit clients without any time impediment. Amplifon claims that could have a significant adverse effect on the viability of some its clinics, particularly those outside of Auckland/Wellington.

[28] Even if that is the case, I consider that if restraints were important to it then Amplifon should have ensured they were reasonable and enforceable. An employer who relies on restraints that are held to be void and unenforceable takes a risk that the restraint may not be modified.

[29] Ms Horsburgh raised concerns about the restraint at the time she was presented with the employment agreement and again after being given notice of redundancy. Despite her concerns Amplifon failed to take either of these opportunities to renegotiate a restraint with her that would have been reasonable and therefore enforceable. It also did not at that point apply to the Authority for a declaration if agreement could not be reached between the parties on what if any restraint would be reasonable and enforceable.

[30] Ms Horsburg’s redundancy should have caused Amplifon to carefully review the nature of her restraints to ensure they did no more than adequately protect its legitimate proprietary interest. It is not an adequate answer for Amplifon to say that it put the onus back on Ms Horsburg to take advice and revert to it with a proposal.

² Gallen J, 9 May 1997, AP101/96 (see 7 TCLR 582).

Amplifon would have known about and understood its business needs in a way in which Ms Horsburg as a non-management employee could not.

[31] Ms Horsburg had just lost her job and the employment she had been doing for nine years. She was stressed and distressed. Her main concern was about her financial security to the extent that she sold her house because of her worry that she could not cover the mortgage without any income. She actively sought new work but did not find anything. It was only after she did not find new employment that she decided to start her own business in order to generate an income for herself.

[32] I am also satisfied that Ms Horsburg never deliberately intended to solicit Amplifon's clients. She did nothing to target them and the issues that Amplifon rely on arose out of normal and relatively low key attempts by her to publicise her new business. It is interesting that Amplifon elected to set up a clinic in the exact same area as Ms Horsburg's new business.

[33] Further the problem with clause 22.2 is not just the length of the restraint (as Amplifon concedes) but also includes the scope of the non-solicitation clause being too wide. I consider it is anti-competitive because it seeks to restrict Ms Horsburg from soliciting a "*prospective client*" of Amplifon's. There is no definition of how a "*potential client*" can be identified so Ms Horsburg has no way of establishing who may fall within that category.

[34] Amplifon says Ms Horsburg saw around 2,650 clients over the course of her employment. It seeks to enforce the restraint in respect of all these clients. I consider that unreasonable because given this number of clients and the length of Ms Horsburg's service she cannot reasonably be expected to know who the "*actual clients*" are who are covered by clause 22.2. This opens her up to inadvertently breaching that provision if it is modified. That significantly weights against modifying the restraint.

[35] The non-solicitation also relates to all of Amplifon's clients including those whom Ms Horsburg had no knowledge of or involvement with. It is not confined to clients Ms Horsburg worked with during a reasonable period before her employment ended. That is obviously unreasonable. There is no good reason for it to be so wide so it is clearly more than adequate to protect any legitimate proprietary interest Amplifon has.

[36] The non-solicitation is not restricted to a geographical area so covers all of New Zealand. That is also too wide particularly when Ms Horsburg only ever worked from Hamilton clinics. I consider that more substantial modifying would be required to make clause 22.2 reasonable than merely exchanging the reference to “*one year*” to “*six months*” as Mr Harrison urges me to do.

[37] Under clause 18.6 of Ms Horsburgh’s employment agreement Amplifon could require her to take garden leave (which involves staying away from work and not performing any duties), to work from home or to perform alternative duties. This means that if Amplifon had exercised that right and required Ms Horsburgh to work out her three month notice period (required in the event of resignation/redundancy) then it would have had the benefit of effectively a nine month restraint because Ms Horsburgh would not be having any contact with customers/clients whilst on garden leave and then three months following. That is too long.

[38] Although Amplifon does not concede that clause 22.1 is unreasonable I find that it is. I am not satisfied that it is reasonable for Amplifon to prevent Ms Horsburg from competing with it within a 10 km radius of the “*base clinic*” when both clinics she worked at had closed. The base clinic in clause 22.2 must refer to her last place of work which was the NHC Victoria Street clinic which closed on 01 June 2013.

[39] It also seeks to prevent Ms Horsburg from engaging in “*any trade or business which competes*” with Amplifon. It is not restricted to the position Ms Horsburg held when her employment ended. Again too wide.

[40] The notice provisions in clause 18.2 specifically address redundancy but redundancy is not addressed in respect of the restraint clause. I consider that in this particular case (based on the evidence I heard) that makes the restraint unfair to Ms Horsburg.

[41] Ms Horsburg was issued notice of redundancy twice in one year. She is a single mother who had to sell her house immediately after being made redundant because of the financial pressures she was facing. It has been a big undertaking for her to start her own business and one of the drivers for that was her fear that if she was an employee then her employer could always terminate her employment. She set up her own business to avoid that continuing to happen to her in future.

[42] I also consider there was inequality of bargaining power when Ms Horsburg entered into the restraint. She accepted the less favourable terms offered by NHC because she had to work to support herself. The bargain she accepted was far more favourable to Amplifon and her attempts to redress that by way of a pay rise were rejected. This inequality weights against modification.

[43] I also find that the adverse impact on Ms Horsburg of modifying the restraint would be greater on her than the potential impact on Amplifon of not modifying it.

[44] Notwithstanding that I have held the restraint void and unenforceable Ms Horsburgh has already been adversely impacted by it because she has been unable to publicise and promote her new business freely.

[45] Ms Horsburg has been prevented from advertising her new business in the way in which she would have liked to due to concerns about Amplifon's breach of contract claim. As a new business in which she is the only person who provides services that has operated as a real constraint on her. It has also had a serious impact on her personally because she relies entirely on her new business for income and Amplifon's proceedings have adversely impacted on her ability to attract clients.

[46] I consider the fact that Ms Horsburg's post-employment business activities have already in effect been restrained for a period of time weighs against exercising the discretion to modify the existing restraints.

[47] Because clause 18.6 allows Amplifon to place Ms Horsburg on garden leave during her notice period it therefore has in effect additional protection (in event of redundancy/resignation) for longer than has been recognised in clause 22.

[48] I am also concerned that Amplifon seeks to pursue a breach of employment agreement claim against Ms Horsburgh. If the restraint is modified as sought by Amplifon then Ms Horsburgh will have to answer those proceedings in circumstances when the restraint was void as at the date of termination of her employment. I consider that weighs against the discretion to modify the restraint.

[49] I consider that when determining whether to exercise the Authority's discretion to modify the restraint I should look at the entire restraint provisions instead of merely focusing on the duration of the non-solicitation part of clause 22.2 as Mr Harrison invited me to do. Standing back and looking at the entire restraints in clause

22 I find they are clearly more than is adequate to protect Amplifon's legitimate interest in securing its client relationships subsequent to Ms Horsburg's employment ending.

[50] The Employment Court in *ASIACITI Trust New Zealand Limited v. Harris*³ recognised that the law of jealousy guards the right of employees to pursue their chosen occupations and to earn a living and the right will not be lightly interrupted by the Courts.

[51] Even if I made the modification Amplifon seeks I consider the restraints in clause 22 would still be unreasonable and therefore void. The amount of redrafting required to make the restraints in clause 22 reasonable and enforceable weighs against modifying it.

[52] I therefore decline to exercise my discretion to modify the restraint. I find that the restraints in clause 22 of Ms Horsburg's employment are void and unenforceable.

Did Ms Horsburg breach her employment agreement?

[53] Amplifon claims that Ms Horsburg breached her employment agreement by soliciting its clients. I have found that the restraint is void and unenforceable so Amplifon's breach claim does not succeed.

Costs

[54] The parties are encouraged to resolve costs by agreement. If that is not possible then Ms Horsburg has 14 days within which to file costs submissions, Amplifon has 14 days to file its costs submissions with Ms Horsburg having a further 7 days to reply.

Rachel Larmer
Member of the Employment Relations Authority

³ [2013] NZEmpC 178.