PLEASE NOTE PARAGRAPH 42 OF THIS DETERMINATION CONTAINS A NON-PUBLICATION ORDER

Determination Number: AA 95/05
File Number: AEA 33/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	David Jansen (Applicant)
AND	New Zealand Funds Management Limited (Respondent)
REPRESENTATIVES	Gretchen Stone, counsel for Applicant Philip Skelton, counsel for Respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
INVESTIGATION MEETING	7 March 2005
DATE OF DETERMINATION	21 March 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In December 2004 the applicant Mr David Jansen gave notice to the respondent New Zealand Funds Management Limited (referred to as "NZ Funds"), that he wished to terminate his employment with that company. As required under the terms of his employment, Mr Jansen gave notice of three months.

[2] During that period, which ended on 20 March 2005, NZ Funds required Mr Jansen to continue attending the office and carry out work for it.

[3] In giving notice Mr Jansen also advised that he was going to work for a competitor of NZ Funds called ING (NZ) Limited (referred to as "ING"). NZ Funds drew Mr Jansen's attention to restraint of trade provisions contained in his terms of employment and made it clear that Mr Jansen was expected to comply with those provisions upon expiry of his notice.

[4] The employment relationship problem is that Mr Jansen is leaving NZ Funds because he has accepted employment with ING offering significantly better remuneration and prospects. However he is uncertain as to whether the restraint provisions are valid and can be enforced to prevent him from starting with ING for three months, that is until 20 June 2005.

[5] To resolve his problem Mr Jansen has asked the Authority to declare that the restraint is void and unenforceable at law and to declare that he is released from it. He has asked for his problem to be resolved with urgency by the Authority because his notice period ended on 20 March.

[6] As a secondary matter Mr Jansen complains about his treatment by NZ Funds during the notice period which began on 22 December 2004. He seeks a declaration that by its conduct his employer seriously breached the employment agreement and that consequently he is entitled to

cancel the subsisting terms of the agreement and to recover damages. He also complains that NZ Funds acted unjustifiably and to his disadvantage by unilaterally changing his employment during the notice period. He seeks to have this personal grievance claim resolved by an order from the Authority requiring NZ Funds to pay him compensation for hurt feelings and humiliation he claims to have suffered.

[7] NZ Funds contends that the restraint provisions are enforceable and it seeks an order under s.137 of the Employment Relations Act 2000 requiring Mr Jansen to comply with them. The employer denies that it has breached the employment agreement or in any other way acted unjustifiably towards Mr Jansen while he has been working out his notice.

Nature of the employment

[8] Upon appointment to NZ Funds in June 2003, Mr Jansen worked in the position of Portfolio Manager of investment funds. His responsibilities were increased in October 2004 when he took on the role of Senior Investment Manager for income funds. At ING he will also be employed in managing investment funds of that company. ING and NZ Funds have funds which directly compete.

The restraint provisions

[9] The restraint provisions are among the written terms of employment signed by Mr Jansen on 23 June 2003 shortly before he commenced employment with NZ Funds. They are stated to cover all of New Zealand and to apply for three months from the date of termination. The provisions generally cover businesses competing with NZ Funds in providing financial planning, funds management or investment administration services.

[10] The terms of employment included non-solicitation provisions, but there is no issue between NZ Funds and Mr Jansen about those.

Applicable legal principles

[11] The law relating to restraints of trade is regarded as being well settled. It may be found restated and applied in cases such as *Brown v Brown* [1981] NZLR 484 at 491, a decision of the Court of Appeal, *Bates v Gates* (1986) 1 NZELC 95,269 at 95,273, a decision of the High Court, and more recently *Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 ERNZ 46, another Court of Appeal decision.

[12] The general rule is that restraints of trade are contrary to public policy and therefore are void. As an exception to this a restraint will be enforced if it is no wider than the circumstances of the case reasonably requires. Reasonableness is to be assessed in the circumstances of each case according to the legitimate interests of the parties to the restraint and also the wider public interest. Subsidiary legal principles are;

- A restraint will only be enforceable to the extent that it is required to protect a proprietary interest.

- The reasonableness of a restraint is to be measured at the time it was entered into, although future developments reasonably within the contemplation of the parties at that time may also be taken into account.

- The scope of the restraint in time and location is relevant in determining reasonableness.

- The relative bargaining power of employer and employee is also relevant.

- The nature of the employer's business and of the relationship between the employee and the customers or clients of that business, are both important when considering whether a restraint is reasonably necessary.

- A restraint is generally unreasonable if its injurious effect on the employee is greater than its benefit to the employer.

- For a restraint to be valid and enforceable the employer must give valuable consideration to the employee in return for it.

The challenge to the restraint

[13] Mr Jansen attacks the lawfulness of the restraint provisions for several reasons, as follows;

- the provisions are too broad and general in scope.

- to the extent NZ Funds has proprietary interests to legitimately protect with the provisions, that protection is adequately given by non-solicitation, confidentiality and intellectual property provisions which are included in the employment agreement.

- the provisions are contrary to the public interest in that they restrict the career development of an intermediate level employee, and also in that they were the product of an unequal bargaining situation.

- no consideration was given to Mr Jansen by NZ Funds in return for them.

[14] The above grounds of challenge are available to Mr Jansen as matters of well established legal principle which is amplified in the case law referred to by counsel Ms Stone and Mr Skelton.

Proprietary interest

[15] I find that NZ Funds does have a proprietary interest to protect by the restraint provisions. That interest is in respect of its investment designs and funds structures, including its Income Advantage Trust and its Multi Income Trust both of which funds were put on the market in October 2004. NZ Funds also has an interest to legitimately protect in relation to its development projects, fee structures and strategies.

[16] In this regard I accept the evidence of Mr Richard James, Chief Operating Officer of NZ Funds. I find that Mr Jansen in the course of his employment was closely involved in these areas of information and ideas which belong to NZ Funds. His involvement was sufficient for his employment by a competitor to be reasonably perceived as a threat to the protection of NZ Funds interest.

[17] Further I find that other express and implied provisions in the employment agreement prohibiting solicitation and requiring confidentiality to be maintained, are not adequate to protect the employer's interest. The threat to that interest will arise if Mr Jansen is present in the work environment of a competitor ING. It is reasonable I find for NZ Funds to have a short period to protect or maintain the position it holds in the market because of the features of its products or services in respect of which it has a proprietary interest.

Scope of restraint

[18] I do not consider that the scope of the restraint is too wide in respect of either time or place. Three months is reasonable in the circumstances. The restraint does not prevent Mr Jansen from working for a competitor outside of New Zealand in a country such as the United States where he had worked successfully in his career for some years before accepting the position with NZ Funds. I agree with the submission by Mr Skelton that the nature of NZ Funds business means that it does not have an identifiable locality within New Zealand and in which it sells its investment products or services. It is therefore meaningless to confine the restraint to a particular city or provincial area.

[19] It is at least implicit from the wording of the restraint provisions that they only apply to Mr Jansen's employment by a competitor in the same or similar position to that he held at NZ Funds, being the management of investment funds. That is the work he has been employed to do for ING. Within the next three months he can I find commence working for a bank or similar institution so long as he is not managing investment funds during that period. I do not consider that modification of the restraint provisions under s.8 of the Illegal Contracts Act 1970 is necessary to make expressly clear this limitation with regard to the type of work Mr Jansen is restrained from performing for a competitor.

Public interest

[20] I find that Mr Jansen was employed in the financial and commercial sector at a senior level requiring him to use a high degree of professional skill and knowledge. In return he was able to earn up to $300,000 in total remuneration, depending on how well he performed. Inevitably there will be greater exposure through work in this occupation and at this level to information and ideas that his employer is entitled to protect. The public interest is concerned with balancing the employer's reasonable interests with those of the employee. I consider that a restraint of no longer than three months achieves that balance.

[21] I find that there was no significant imbalance of power between NZ Funds and Mr Jansen when the restraint was stipulated for by the employer as a term of employment. The pressure for Mr Jansen to accept employment with NZ Funds was present largely because he had left long term employment in the United States to achieve a desire he and his family had to live again in New Zealand. It was possible for him to remain working overseas and he contemplated doing that. The employment was not accepted out of desperation to have the job itself. That he had chosen to return to New Zealand was not the doing of NZ Funds.

[22] Mr Jansen was given a real opportunity to take legal advice about the terms offered by NZ Funds before he accepted them. He was able to successfully negotiate for higher remuneration than initially offered by NZ Funds. He also tried but failed to negotiate terms that did not include the restraint provisions or that were less onerous in scope.

Consideration

[23] There was no express term of employment to show that consideration was present in relation to the restraint provisions. However as has been confirmed by the High Court in *M A Watson Electrical Ltd v Kelling* [1993] 1 ERNZ 9 at 23, consideration if not shown on the face of the agreement may be reasonably inferred from it.

[24] Like any other contract, an employment agreement is a collection of mutual promises made between the parties. I find it can reasonably be inferred that Mr Jansen received valuable and legal consideration for promising to be bound by the restraint. He offered to be the subject of the

restraint provisions in return for NZ Funds offer of the employment itself and the particular terms of it including the substantial remuneration package.

[25] Mr Jansen was aware of the restraint provisions before he accepted the offer of employment. He had an opportunity to take advice about them. He was dissatisfied with the provisions but when he asked about them he learned that they were not a negotiable term. Mr Jansen did not ask, as he could have done, what the consideration for the provisions was. He did not ask to have the consideration referred to expressly in the agreement. In those circumstances it is reasonable to infer that there was consideration but that the parties did not feel it necessary to spell that out in the terms of employment.

Disadvantage grievance – breach of employment agreement

[26] I find no foundation for the claim that there was a fundamental breach of the employment agreement by NZ Funds in the way it behaved towards Mr Jansen during the notice period. Neither is there any basis, I find, for the claim of unjustified disadvantage raised with regard to the kind of work he was given during some of that period.

[27] Mr Jansen gave notice of termination exactly according to the letter of his terms of employment. He did not consult NZ Funds in advance about his plans and he gave no forewarning of his intention to resign. NZ Funds was understandably disappointed to be losing him because he worked in a key position in which he had performed well. The employer's disappointment was naturally compounded by the fact that he was leaving to work for a competing business.

[28] Inevitably the abrupt resignation by Mr Jansen had a chilling effect on the employment relationship from that point on. Mr Jansen cannot complain if NZ Funds too chose to act according to the letter of the employment agreement. It invoked clause 10(d) which expressly permitted the employer to continue to employ Mr Jansen but not require him to carry out "normal duties under your agreement".

[29] Mr Jansen's complaints arise I find from having his hopes dashed that he would be put on garden leave for three months. That was an alternative available to NZ Funds under clause 10(d) but because Mr Jansen did not consult with his employer or discuss his intention to resign, he had no reasonable basis for expecting to be put on garden leave. It may be that if he had talked to his employer before announcing his resignation he may have been offered more agreeable arrangements for the period of notice.

[30] I consider the complaints made by Mr Jansen about the so-called closet he was banished to work in are trivial and even comical. Many an office worker would be envious of the features of this accommodation including its 18th floor views.

Effective commencement date of the restraint

[31] I find that NZ Funds invoked an agreed term of employment to take Mr Jansen out of the operational environment in the office. The work he was given did not require him to sit in the open plan office with the fund management team viewing information as it was received on various computer screens. However the consequence of this was that for some of the notice period Mr Jansen did not practice his profession or keep up to date with outside developments that were important to that practice.

[32] In investment fund management change can occur suddenly and frequently. This may happen in the international financial markets, the regulatory environment, the economy of New Zealand,

and in other critical and sensitive areas. In the way Mr Jansen worked, in an information sharing environment, the changes when they occurred would be received and discussed immediately by a team with expertise in several different areas. The discussions were strategic and therefore not something NZ Funds wanted Mr Jansen to hear once he resigned.

[33] I put the date at which Mr Jansen ceased useful fund management work as 4 February 2005. Shortly after resigning he went on holiday for three weeks over Christmas and New Year. When he returned he continued to have some involvement in this work, although as part of a hand-over of work phase which ended on about 4 February. I consider that from then and until the end of the notice period, the objective of the restraint provisions was achieved. I find it is reasonable to take this period of about 6 weeks into account in determining how much longer the overall restraint period of three months should be enforceable for.

[34] In my finding it would be inequitable for the restraint provisions, although they are reasonable in scope and otherwise valid, to be enforced beyond 4 May 2005. NZ Funds has already received the benefit of the provisions for six weeks of their three month term, since 4 February 2005.

Determination

[35] I declare that the restraint provisions were reasonable at the time they were entered into. NZ Funds had a proprietary interest to properly protect with the provisions which in scope were no greater than required to give that protection. I find that in his new role with ING there is some risk that Mr Jansen might disclose, even inadvertently or indirectly, information that NZ Funds is entitled to protect for a limited period.

[36] I further find that NZ Funds has not acted unjustifiably towards Mr Jansen during the notice period and neither has it breached the employment agreement, certainly not to any extent that would allow him to cancel the subsisting terms of the agreement and claim damages.

[37] At this stage I decline to order Mr Jansen to comply with the restraint provisions, as he has neither breached the provisions nor threatened to do so. I am satisfied that he has acted in good faith by bringing this matter to the Authority, at some expense, to find out where he stands before taking up the new job with ING. There is no reason to think that he will not comply with the restraint now that it has been declared valid.

[38] However if Mr Jansen should commence with ING straightaway now that the notice period has ended, then NZ Funds may apply with urgency for a compliance order to prevent him from continuing that employment, for some of the restraint period at least.

[39] Such an order is likely to be limited to a period ending on 4 May 2005. That date is three months from 4 February 2005. I accept that it was from then that the restraint effectively commenced, as Mr Jansen could not work for ING but at the same time was not asked to work for NZ Funds in any way that has posed a threat to the protection of its proprietary interests. Although he was required to be present at the office he was withdrawn from fund management work and isolated from the team he previously worked in. Although what NZ Funds did in this regard was not unjustified or unlawful, in the result the objective of the restraint is already being achieved and has been since 4 February.

[40] As compliance is a discretionary remedy the Authority is not obliged to make an order in every case, even where the provision of an employment agreement that has not been observed is a valid and enforceable one. The discretion of the Authority in this regard may be exercised where for any reason it would be unjust to make an order. In my view the circumstances of this case point

to some injustice in having the restraint enforced beyond the period of three months from 4 February 2005.

[41] In summary, the effect of this determination is that the restraint provisions are valid and enforceable without modification, and Mr Jansen has no basis for cancelling them. However, it would be unjust for them to be enforced beyond 4 May 2005, should NZ Funds find it necessary in future to seek an order to that effect. Mr Jansen has not been treated unjustifiably in his employment and has suffered no compensateable loss or harm in that regard.

Non-publication order

[42] A 15 page document headed "Income Assets Strategy" was produced in evidence to the Authority by NZ Funds during the investigation meeting held on 7 March 2005. In the interests of justice I now make permanent the order given by me earlier which prohibited publication of the document or any of its contents. No one apart from NZ Funds management may disclose to any person that document or anything in it.

Costs

[43] Costs are reserved to allow the parties an opportunity to try and resolve any question themselves.

A Dumbleton
Member of Employment Relations Authority