

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 75
5379417

BETWEEN

CRAIG McKINNON
Applicant

AND

ELDERS RURAL HOLDINGS
LIMITED
Respondent

Member of Authority: Michele Ryan

Representatives: Daniel Erickson, Counsel for the Applicant
Jo Douglas, Counsel for the Respondent

Investigation Meeting: 5 June 2012 at Napier

Determination: 4 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Craig McKinnon seeks declarations from the Authority concerning a number of restrictive covenants contained in the employment agreement with his former employer, Elders Rural Holdings Limited (Elders).

[2] Mr McKinnon's last day of work with Elders was on 4 May 2012. While waiting for a determination of his application for declarations, on 29 May 2012 he commenced working for a competitor of Elders, albeit in a branch outside the prohibited geographical area purported in the covenant of restraint.

[3] Mr McKinnon wishes to work for his new employer unimpeded and seeks orders that the restraint of trade provisions are unreasonable and unenforceable. Alternatively, he requests the Authority to modify the scope, geography and duration of those provisions.

[4] In contrast, Elders seeks declarations that the covenants of restraint of trade are reasonable and enforceable.

The investigation

[5] The Authority received Mr McKinnon's application under urgency on 15 May 2012. In circumstances where the Authority has the power under s 162 of the Employment Relations Act to cancel or vary any term of an employment agreement, a telephone conference between the parties was conducted on 17 May 2012. Having identified the problem pursuant to s 164, an inquiry was made as to whether the parties had attempted in good faith to resolve the employment relationship problem relating to the employment agreement by using mediation. The parties confirmed they had attended mediation but were unable to resolve the problem. It now falls to the Authority to determine the matter.

Background information

[6] Mr McKinnon was employed by Elders pursuant to an individual employment agreement dated 27 May 2010.

[7] Mr McKinnon had previously been employed by Elders between 2006 and May 2010 as Merchandise Manager of its Hastings branch store. In 2010 Mr McKinnon left Elders to work for another company however he rejoined Elders approximately two weeks later on an increased salary as Merchandise Sales Representative based at Elders' Hastings branch office, although this work comprised largely of travelling to farming properties in the Hawkes Bay region.

[8] The employment agreement between Mr McKinnon and Elders contains the following relevant provisions:

8. Restraint of trade after employment ends

Competing business

8.1 You agree that after your employment ends you will not for the period stated in schedule 2 and within the geographical area specified in schedule 2, as an employee or in any other capacity, directly or indirectly engage in, be connected with or have an interest in any business which competes with us.

Soliciting clients, accepting work

8.2 You agree that for 6 months after your employment ends you will not, as an employee or in any other capacity, in connection with a business which competes with us:

8.2.1 Canvas or solicit any client of ours who has been a client at any time in the two years prior to finishing date.

8.2.2 Accept business or work from/or carry out any work for any such client of ours.

...

Recognition by employee

8.3 You recognise that these restraints are reasonable for the protection of our business. You also recognise that you have provided reasonable consideration for these restraints and the remuneration we provide.

[9] Schedule 2 states, inter alia:

Item 3 Restraints

Area: 250 kilometres from your allocated geographical area.

Period of restraint of trade

Six months following termination of your employment.

[10] Clause 8 contains further restraint provisions which relate to non-solicitation of employees, agents, officers and consultants of Elders however these have not been recorded in this determination as neither Mr McKinnon nor Elders take issue with those provisions in the circumstances.

[11] The employment agreement also lists information Elders regards as confidential and records a requirement that Mr McKinnon maintain the confidentiality of that information.

[12] At the time Mr McKinnon signed the employment agreement he says he considered the six month duration of the restraint as excessive. However he acknowledges that he did not raise his concerns with Elders at that time and by signing the employment agreement he agreed to the covenants of restraint.

[13] On 4 April 2012 Mr McKinnon advised his manager Mr Haliburton, that he had accepted employment with Farmlands Trading Society Limited (Farmlands) and provided Elders with four weeks' notice of his resignation as required by his employment agreement. He advised that his last day of work would be 4 May 2012.

[14] There is no dispute that Farmlands is a competitor of Elders. Both Farmlands and Elders are in the business of selling farm supplies to farmers and each have a significant presence in the Hawkes Bay region.

[15] On 17 April 2012 Elders wrote to Mr McKinnon to remind him of his post-employment obligations, including the restraint of trade and confidentiality requirements. Elders advised that it was prepared to reduce the duration of the non-competition provision to two months in exchange for signed undertakings that Mr McKinnon abide by the remaining contractual provisions.

[16] On 21 April 2012 Mr McKinnon replied to Elders' proposal. He made an alternative offer. He proposed to commence work with Farmlands at their Waipukurau branch office, approximately 45-50km away from Elders' office in Hastings and advised that for a period of two months he would (a) not perform work in the Napier/Hastings area and (b) comply with the non-solicitation provisions of his agreement.

[17] Elders did not accept Mr McKinnon's counter-offer. It responded on 27 April 2012 reiterating the terms of its proposal of 17 April 2012 and further advised it was prepared to pay Mr McKinnon an additional month's salary for each month that the non-competition clause applied.

[18] The parties attended mediation but did not resolve the matter.

[19] Mr McKinnon commenced work with Farmlands on 29 May 2012 at its Paeroa branch, outside the prohibited area of 250kms. At the time of the Authority's investigation, there was no suggestion that Mr McKinnon was soliciting work from or dealing with Elders' clients.

Main contentions of the parties

Mr McKinnon's position

[20] Mr McKinnon accepts that Elders may have a legitimate interest in trade connections with its clients. However he says that the provisions contained within the employment agreement go beyond what is necessary to protect those interests.

[21] Mr McKinnon asks that the non-competition and non-dealing clauses be deleted on the basis that each provision is unreasonable and contrary to public

policy. Alternatively, he submits those provisions may be appropriate pursuant to s 8 Illegal Contracts Act 1970 for modification as to geography and duration. In these circumstances he says both clauses should have the geographical coverage reduced to 50kms and the duration of the restraint modified to two months. In relation to the non-dealing clause Mr McKinnon says that if enforced, the scope of the clause should also be modified to apply only to customers whom he had direct dealings with during the two years prior to his resignation.

[22] As regards the non-solicitation clause, Mr McKinnon does not challenge the enforceability of the provision but seeks modification to the scope of it. As with the modifications requested with regards to the non-competition and non-dealing provisions, he asks for the non-solicitation clause to be similarly modified as to geographical range and duration.

[23] In his evidence Mr McKinnon confirmed that he is bound by the confidentiality clauses contained in the employment agreement to not disclose confidential information to anyone outside of Elders. He says he has no intention of using this information for Farmlands' benefit.

Elders' position

[24] Elders submits that in circumstances where Farmlands and Elders are the major suppliers of farm products in the Hastings area, if the covenants of restraint of trade are set aside the effect will limit competition and may allow Farmlands an unfair advantage.

[25] Elders says it is not looking to limit Mr McKinnon's right to work but it is seeking to uphold the provisions relating to confidentiality and restraint of trade to enable it to continue its business in the Hastings area. It says Mr McKinnon has commenced his employment with Farmlands in a way which complies with the restraint provisions previously agreed with Elders. Elders says this arrangement is evidence that the restraint provisions are not anti-competitive and says the status quo should not be interfered with.

[26] Elders states that it principally seeks to protect its client base and the goodwill associated with those clients. It says client information and contacts are its confidential information as are its supplier lists, products, pricing information and business strategies. Elders says Mr McKinnon had access to all of this information.

[27] Elders states that Mr McKinnon was a senior and experienced sales representative who freely entered into contractual arrangements with Elders having had an opportunity to negotiate terms of agreement and to obtain independent advice as to those terms. It considers the covenants of restraint recorded in Mr McKinnon's employment agreement are reasonable. It further submits that Mr McKinnon is prima facie bound by the terms of that agreement including the restraint provisions and Mr McKinnon cannot set aside or ignore those arrangements simply because they are inconvenient to him and/or his new employer.

Restraints of trade

Proprietary interest

[28] Elders submits that any assessment as to the enforceability of a covenant of restraint should start with a presumption that the restraint, if freely entered into, should be upheld.

[29] I do not agree with this proposition.

[30] Restraint of trade covenants are different to that of other contractual obligations. Covenants of restraint are generally considered unenforceable if the purpose of the restraint is to prevent an employee from his or her entitlement to work in their area of expertise and skill and compete in the free-market. However a restraint of trade may be enforceable if it can be shown that the restraint of trade is reasonably necessary to protect some proprietary interest(s) and is reasonable between the parties and in the public interest. A restraint cannot be imposed simply to limit competition¹.

[31] The starting point in assessing the enforceability of a restraint of trade provision is to ascertain whether there is a proprietary interest which should be protected.

[32] The Employment Court in *Bryant*² commented on what information may be accepted as attracting a proprietary interest as follows:

¹ *Gallagher Groups Ltd v Walley* [1999] 1 ERNZ 490

² *Airgas Compressor Specialists v Bryant* [1998] 2 ERNZ 42

An employer may possess a proprietary interest in trade secrets, confidential information, and its business or trade connections. The employer is permitted to protect its business connection – that is, to prevent the departing employee from enticing its clients or customers. These are the most obvious but not the only examples of legitimate proprietary interest.

[33] The confidentiality provisions contained in Mr McKinnon’s employment agreement states, amongst other things, that Elders regards “*information about us, our employees, clients and suppliers*” as confidential. Mr McKinnon acknowledges also that Elders may have a legitimate interest in its trade connections.

[34] I accept that Elders has a proprietary interest in its confidential information including information about its clients which is capable of lawful protection.

Reasonableness of the Restraint

[35] Once an employer has established a legitimate proprietary interest, it needs to demonstrate that the restraint is reasonable and does not go beyond protecting that interest any more than is necessary.³ A restraint may be enforced but only to the extent necessary for the former employer to make preparations to meet the competition of its former employee.

[36] The Court noted in its recent decision of *Warmington, O’Neill v Affco New Zealand Limited*⁴

A number of factors are to be considered in determining the reasonableness or otherwise of a restraint of trade provision. Restraints by employers are enforced only to the extent required to protect a proprietary interest of the employer. The nature of the employee’s role and the employer’s business, the geographical scope of the restraint, and its nature and duration are relevant factors in assessing whether a restraint is reasonably necessary.

[37] If a restraint is stipulated in such a way as to go beyond the protection sought, the Authority may modify the restraint pursuant to s8 of the Illegal

³ *Fletcher Aluminium Ltd v O’Sullivan* [2001] 2 NZLR 731; [2001]ERNZ 46 (CA) and referred to recently in *Warmington, O’Neill v Affco New Zealand Limited* [2012] NZEmpC 19

⁴ [2012] NZEmpC 19

Contracts Act 1970, so as to give effect to the protection required but not to an extent that it would alter the agreement between the parties.

Assessment of clause 8.1 – the non competition clause

[38] Mr McKinnon says that the non-competition clause is uncertain and unreasonable and therefore unenforceable. He also asserts that to the extent that Elders may have a legitimate interest in trade connections with clients these should be protected by the non-solicitation clause.

Uncertainty

[39] The scope of the purported geographic coverage clause is contained in Schedule Two as: “250 kilometres from your allocated geographical area”

[40] In his written evidence Mr McKinnon reports that although 80% of his clients were located within approximately 50kms of Hastings he was never allocated a geographical area and says he does not understand the meaning of this clause in terms of the area it is meant to cover. I understand Mr McKinnon to say he is uncertain as to which exact geographical point or points the ambit of restraint begins.

[41] However Mr McKinnon’s uncertainty was not apparent in his oral evidence. Before the Authority Mr McKinnon acknowledged that his employment agreement stipulated he would “usually work at [Elders] premises at 103A Stoneycroft Street, Hastings” and that he understood the point of the geographical restraint would commence from those premises. The evidence of behalf of Elders confirmed that the geographical restraint commenced from its office in Hastings.

[42] I accept that the wording contained in the employment agreement had the potential to create uncertainty as to the area of restraint in circumstances where no geographical area was allocated. However Mr McKinnon had been in a previous employment relationship with Elders which was also subject to covenants of restraint. As a senior and experienced employee he was aware also of Elders’ terms of employment as applied by the company at the time he entered into the 2010 employment agreement containing the covenants of restraint at issue. The evidence of Mr McKinnon and Elders at the Authority’s investigation meeting confirmed both parties had the same understanding as to geographical range at the time the

restraint was agreed. In these circumstances I conclude there was no uncertainty by either Mr McKinnon or Elders that the area of restraint was for a radius of 250km from the Hastings premises in Stoneycroft Street.

Scope

[43] Mr McKinnon submits that the scope of non-competition clause is simply an attempt to prevent competition and is therefore unreasonable and unenforceable.

[44] Mr McKinnon compares the non-competition clause to that examined by the Court in *Green v Transpacific Industries Group (NZ) Limited*⁵ and submits that, as with *Green*, the non-competition clause contained in his employment agreement sets out to prohibit competition “*even if there is no existing relationship between the customers or potential customers in question*”. The inference of this submission is that, in the absence of an express reference to a proprietary interest the non-competition clause is anti-competitive and should be declared unenforceable.

[45] The non-competition clause in *Green* did not refer to an interest that the employer was entitled to protect. Rather, the provision sought to claim an interest in the knowledge and skills obtained by employees during their employment and restrain them on that basis. The Court, in *Green*, was disparaging in its comments as regards to the effects of the particular clause. It said, “*all the company is required to establish is the fact of competition in business*”. The Court assessed the clause as “*arguably void in contravention of the public policies of competition in commerce and freedom to work*”.

[46] There is no reference contained within Mr McKinnon’s non-competition clause to the proprietary interest the restraint seeks to protect. However I do not consider the comments made by the Court in *Green* as authority for the proposition that a proprietary interest must be expressly referenced within the contractual provision drafted to protect the interest, or that a failure to do so will render the restraint as unreasonable

[47] Mr McKinnon’s employment agreement contained terms relating to his duty to preserve confidential information (including after the agreement ends) and described in detail what was regarded as confidential information. I regard the

⁵ [2011] NZEmpC 6

confidentiality clauses contained in the employment agreement and read alongside the covenants of restraint, together with the evidence before the Authority, are sufficient to establish Elders' legitimate proprietary interest in its customers. I note that interest has been acknowledged also by Mr McKinnon.

[48] I do not accept that the non-competition clause contained in the employment agreement between Mr McKinnon and Elders prohibits competition *per se* and is therefore unreasonable. I reject this aspect of Mr McKinnon's claims.

Geographical coverage

[49] Mr McKinnon says the geographical restraint of 250kms from Hastings contained in the non-competition clause is unreasonable and seeks a declaration that it is unenforceable. He says the area of restraint is larger than is necessary to enable Elders to protect its proprietary interests as against him. To this end I was provided with a map which demonstrated that a restraint of 250km from Hastings would stretch to Upper Hutt in the south, beyond Hamilton in the north and to Taranaki in the west. Alternatively Mr McKinnon says the geographical restraint should be modified and reduced to 50kms from Hastings.

[50] Mr McKinnon's evidence is that he serviced clients from Kotemaori in the north and Takapau in the south of the Hawkes Bay region.

[51] Elders submits that the agreed 250km geographical restraint is reasonable in circumstances where Mr McKinnon is a senior member of its sales team. Elders states that Mr McKinnon had access to information about clients outside the Hastings area as a consequence of information exchanged across Elders' sales teams, although the Authority was not provided with detail as to the type or extent of information available to him.

[52] In addition to clients for whom Mr McKinnon had direct responsibility, Elders' evidence is that Mr McKinnon assisted and mentored less experienced staff throughout the greater Hawkes Bay region which allowed Mr McKinnon to develop relationships with farmers from Dannevirke through to Wairoa. Elders also say that from time to time Mr McKinnon assisted staff in other regions including as far away as Wairarapa which further provided contact with additional clients.

[53] In contrast, Mr McKinnon's unchallenged evidence is that he did not commence mentoring until eight months prior to his resignation. He says during those eight months he came into contact with five clients outside the geographical area in which he usually worked. He says his contact with those clients consisted of no more than a single meeting or phone call, and with the exception of one client he cannot remember their names.

[54] The Authority is required to assess the reasonableness of the geographical restraint at the time the restraint was agreed to⁶.

[55] Elders provided evidence in support of its contention that the geographical restraint is reasonable as a consequence of Mr McKinnon's increased client contacts via his mentoring role. However I am unable to consider this evidence in my appraisal as to reasonableness unless it can be shown that the increased duties and resulting contact with additional clients was reasonably foreseeable by the parties at the time agreement to the restraint was made. No evidence of this sort was supplied.

[56] Having assessed the evidence, I find that the breadth of the geographical area referred to by the non-competition provision goes beyond what is required to protect Elders' trade connections. I make this conclusion on the basis that whilst Elders may be correct in assuming that Mr McKinnon is aware of the identity of some of Elders' clients situated beyond his geographical area of work, there was insufficient evidence to establish who these clients were, where they were located, or if Mr McKinnon had developed relationships of influence with those clients such that he should fairly be restrained.

[57] I regard the extent of the geographical restraint as recorded in the employment agreement is unreasonable. However I do consider it reasonable to restrain Mr McKinnon from working in the geographical region he was primarily responsible as a representative of Elders. I find that the scope of the geographical restraint should be modified.

[58] My conclusion is made with regard to the circumstances at the time the parties agreed to the restraint. There is no suggestion of unequal bargaining power and Mr McKinnon was aware there was a prospect that when he left Elders he may

⁶ Ibid at [28]

be restrained from working in the area in which he serviced their clients. As noted 80% of Mr McKinnon's clients were located within 50km of Hastings. He submits that if restrained, the restraint should be confined to 50km from Hastings. However Mr McKinnon acknowledges he dealt with clients from Kotemaori to Takapau. As the crow fly's Kotemaori is approximately 75-85km away from Hastings and Takapau is between 60-70km from Hastings. I note I was not provided with information from either Mr McKinnon or Elders as to the exact distances Mr McKinnon's clients ranged from Elders' Hasting office.

[59] Through s 162 of the Employment Relations Act 2000 I exercise the Authority's power under s 8 of the Illegal Contracts Act 1970 to modify the restraint of trade provisions as regards to geographical coverage. The modification is that the geographical scope of restraint set out in Schedule Two, Item 3, is reduced to 85kms.

Duration

[60] Mr McKinnon says the duration of the non-competition clause is unreasonable.

[61] Mr McKinnon says that Elders implicitly acknowledged that the duration of the restraint is unnecessary when it made conditional offers on 17 and 27 May 2012 to reduce the duration of the non-competition clause. I do not agree with this submission. There is no admission contained in Elders' correspondence that the non-competition clause is unwarranted. I regard the offers made by Elders to Mr McKinnon in May 2012 reflect genuine attempts by Elders to resolve the employment relationship problem.

[62] The Employment Relations Act actively encourages parties to resolve matters without the requirement for adjudication. As a matter of public policy I am unwilling to treat Elders' offers to compromise, made with a view to resolving the differences between the parties and so as to avoid legal proceedings, as evidence that its restraint is unreasonable.

[63] In support of enforcement of a six month restraint, Elders' National Sales Manager, Mike Carroll advised the Authority that the farming industry is seasonal. At the time of the Authority's investigation Elders is yet to find a suitably experienced sales person to replace Mr McKinnon. Mr Carroll says that Elders

requires a restraint of six months in duration so that a replacement sales representative can be found. He says the new incumbent will need time during the winter months to establish relationships with clients so as to be ready to start selling in spring (September/October) when sales of farm supplies traditionally increase substantially.

[64] Against the enforcement of the restraint's duration, Mr McKinnon says a significant proportion of his clients at Elders also belong to Farmlands as members of its co-operative and that clients tend to frequently move between the differing suppliers of farming products according to need. The inference is that brand loyalty is not a significant feature of customers purchasing farm supplies.

[65] In opposition, Mr Carroll says "*it is common for farmers to retain a relationship with an individual over many years, and if the sales representatives move, then the farmers will still retain that relationship with them*".

[66] Having assessed the evidence I conclude that the timing of Mr McKinnon's departure from Elders four months' prior to the farming sectors' busy period should not be a factor so as to find a six month restraint reasonable. I make this conclusion on the basis that there is no reference in the employment agreement that the duration of restraint is dependent on seasonal fluctuations. As noted the Authority is required to consider the reasonableness of the restraint at the time it was entered into not the time it is sought to be enforced⁷. I consider that both Elders and Mr McKinnon would have been aware of the changes in the nature of business transactions over the course of year, however those changes were not recorded as a feature affecting the duration of the restraint.

[67] However I accept the evidence on behalf of Elders that Mr McKinnon was one of its top sales persons and that he has minimised the value of loyalty Elders' clients have for him. During the Authority's investigation Mr McKinnon conceded there was a likelihood that "*a certain number*" of Elders' clients would follow him to Farmlands and acknowledged that it was for this very reason that Elders had sought to protect itself when both it and Mr McKinnon agreed to the restraint.

[68] In these circumstances I recognise that Elders does require a period of time in which to find a suitably experienced candidate to cement relationships with its

⁷ Ibid at [28]

customers so as to meet the potential commercial advantage Mr McKinnon presents when he commences his sales position in Hastings with Farmlands. In *Century Yuasa Batteries (NZ) v Johnson*⁸ the Court stated:

The ability to replace a departed employee or agent who is to compete with the former employer is a common and arguably reasonable justification for a restraint.

[69] As a consequence, pursuant to s 8 of the Illegal Contracts Act 1970, I consider it appropriate for the Authority to apply its discretion and modify Schedule 2 as it applies to the duration of the period of restraint to three months following termination of Mr McKinnon's employment.

[70] I have considered Mr McKinnon's submission that the non-competition clause be struck out on the ground that the non-solicitation clause is sufficient to protect Elders' proprietary interest in its trade connections. However I have found that Mr McKinnon was a highly effective senior sales person and a primary representative for Elders in the Hastings/Hawkes Bay region. In these circumstances I think it is reasonable to enforce the non-competition clause and restrain Mr McKinnon from working in the Hawkes Bay area for a period of three months so that the risk of inadvertent disclosure of Elders' confidential information does not occur. I consider a period of isolation from Farmlands premises in Hastings is appropriate⁹ and I decline to strike out the non-competition clause.

Assessment of clause 8.2, 8.2.1: the non-solicitation provisions

Scope and geography

[71] Mr McKinnon does not challenge the enforceability of the non-solicitation clause but says it should be limited in respect of the conduct it covers, its duration and its geographical coverage.

[72] In particular Mr McKinnon takes issue with the scope of both the non-solicitation and non-dealing clauses. He says that these provisions prevent him from engaging with any person or entity that has been a client of Elders within two years prior to Mr McKinnon's resignation. He describes his concerns as follows:

⁸ EMC Auckland AC65/04, 11 November 2004

⁹ *Allright v Canon New Zealand Ltd* (2009) 9 NZELC 93,141; (2008) 6 NZELR 367 (EMC)

The main issue I have with the non-solicitation and non-dealing clauses is that they both apply to a wider group of customers than just the ones that I dealt with. They apply to anyone who has been a customer of Elders with the two years leading up to me leaving the company. Elders is a nationwide company. Hypothetically, say a customer brought a bag of fertiliser from an Elders branch in Canterbury sometime in the last two years. The non-solicitation clause means I could not approach that person to solicit work. The non-dealing clause means I could not deal with them at all, even though I may never have dealt with them or even know about their relationship with Elders, and even though they have only ever made one purchase from Elders.

[73] In response to Mr McKinnon's statement, Mr Carroll says the intention of the non-solicitation clause is to prevent Mr McKinnon from soliciting clients whom he knows are customers of Elders'. Mr Carroll agrees that it would be unreasonable of Elders to prevent Mr McKinnon working for a client if Mr McKinnon had no knowledge of that client. He says it's a matter of being fair and reasonable.

[74] While I accept Mr Carroll's best intentions to act fairly and reasonably, the words contained in the provision are contractually binding and in these proceedings Elders seeks to have the provision enforced.

[75] I regard the provisions of the non-solicitation clause are so broad that compliance would be difficult and inadvertent breach more than a mere possibility. I agree with Mr McKinnon's submission that he cannot be expected to know the names of every client of Elders and he cannot know who he can and can't approach to solicit work.

[76] I regard the non-solicitation clause goes beyond what is necessary to protect the proprietary interest Elders says it requires. I hold that the non-solicitation clause is unreasonable and unenforceable.

[77] However I am the view that the non-competition clause as now modified adequately protects the proprietary interest which has been established by Elders. I also consider that there is a significant gulf between Mr McKinnon's apparent consent to have the non-solicitation clause modified so as to restrain him from soliciting work from clients he worked with directly, and Elders request to have the clause enforced. In these circumstances I decline to exercise the Authority's discretion to modify the non-solicitation clause.

Assessment of clause 8.2, 8.2.2: the non-dealing provisions

[78] As regards the non-dealing clause, Mr McKinnon raises identical concerns as to those previously mounted against the non-solicitation clause. He says that the clause as recorded applies to any client of Elders, anywhere in the country and regardless of the nature of that clients' relationship with Elders.

[79] I regard the non-dealing clause as broader still than the non-solicitation clause. The non-dealing clause seeks to prevent Mr McKinnon not only from canvassing or soliciting customers of Elders but prevents him from dealing with any of Elders' clients even if it is a client who initiates contact with him and/or if a client chooses to conduct business with him.

[80] For the same reasons I found that the non-solicitation clause to be unreasonable I find the non-dealing clause to be unreasonable also. The provision goes well beyond protecting Elders' proprietary interest in maintaining its client base against the loyalty and influence Mr McKinnon may have built with Elders' clients. The effect of the provision if enforced would require Mr McKinnon in any engagement with a client to first ask if s/he has purchased any products with Elders in the previous two years and if so he would be required to walk away. I regard the clause as simply a means to prevent competition and I find it is unenforceable.

Determination

[81] For the reasons given above I find that:

- (i) Clause 8.1 of the employment agreement is reasonable and enforceable only for the period of three months from the termination of Mr McKinnon's employment and only for a geographical distance of 85kms from Elders' office on Stoneycroft Street, Hasting.
- (ii) Clause 8.2 of the employment agreement (including sub-clauses 8.21 and 8.2.2) is not reasonable and not enforceable.

[82] Under s 8 Illegal Contracts act 1970 Mr McKinnon's employment agreement with Elders Rural Holdings Limited is modified to the extent found reasonable in this determination and remains enforceable to that extent.

Costs

[83] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority