IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 15
3158861

	BETWEEN	TOVA O'BRIEN Applicant
	AND	DISCOVERY NZ LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Charlotte Parkhill and Rachel Dunlop, counsel for the Applicant Peter Kiely and Anthony Kamphorst, counsel for the Respondent
Investigation Meeting:	18 – 20 January 2022
Submissions received:	At the investigation meeting, from the Applicant At the investigation meeting, from the Respondent
Determination:	24 January 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 21 October 2021 Tova O'Brien resigned from her position as political editor with Discovery NZ Limited (Discovery) to take up a position with MediaWorks Radio Limited (MWR) as host on a to be launched morning radio show. Ms O'Brien's employment ended on Friday 21 January 2022, following completion of her three month notice period, and she wishes to commence her new employment with MWR on Tuesday 25 January 2022.[1] Discovery says Ms O'Brien cannot start because under the

[1] To accommodate the determination of this employment relationship problem, Ms O'Brien moved her intended start work date at MWR from Monday 24 January 2022 to Tuesday 25 January.

terms of the parties' employment agreement (the employment agreement) she is restrained from working for a competitor for three months and this restraint as well as restraints of non-dealing and non-solicitation (the restraints) contained in the employment agreement are reasonable and enforceable. Ms O'Brien does not agree. She seeks a determination that the restraint of trade is unenforceable and the restraints of non-dealing and non-solicitation are unenforceable to the extent that they seek to restrain her from dealing with or soliciting clients and suppliers. In the alternative, she seeks modification of the restraints.

[2] In addition to saying the restraints are reasonable and enforceable Discovery says, by way of counter-claim, that Ms O'Brien's conduct during her notice period breached the conflict of interest clause of the employment agreement and the implied duty of fidelity. It seeks a finding of breach and award of a penalty.

The Authority's investigation

[3] On 10 December 2021 Ms O'Brien lodged an application in the Authority for the determination sought along with an application for the matter to be dealt with urgently. On 13 December a case management conference was held with the parties' representatives to progress the matter. The application was granted urgency and directions for timetabling made including the filing of Discovery's counter-claim. The parties have complied with all timetabling directions. The parties have attempted to find a resolution of this employment relationship problem themselves including attending mediation.

[4] During the investigation meeting the Authority heard evidence from the following witnesses:

- Ms O'Brien;
- Dallas Gurney, the Director of News and Talk at MWR;
- Sarah Bristow, Director of News at Newshub, Discovery;
- Kylie Elsom, Discovery's Senior Director-People & Culture;
- Henry Crawford, former Chief News Officer at Discovery;
- Dr Gavin Ellis, an expert on New Zealand news media; and
- Thomas Turton, Director-Legal at Discovery.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

The terms of employment

[6] Ms O'Brien has worked for Discovery, and its predecessor MediaWorks TV Limited, from 2007.[2] Since February 2018 she has held the position of political editor. When she accepted the political editor role she signed a new employment agreement the terms of which are set out in a letter of offer dated 15 February 2018 and a document titled 'Terms of Employment'.

[7] Attached to the offer letter was the political editor job description which includes:

> **Position purpose**
> To lead the Newshub political unit, ensuring comprehensive coverage of political events across all our platforms and programmes.
>
> **Key responsibilities**
> Provision of high quality editorial content, including original stories
> Develop and maintain strong political contacts
> Filing for digital, radio and television
> Providing political commentary across all Newshub programmes and platforms
> Perform in a live capacity on radio and TV
> Mentoring and developing other Newshub Press Gallery staff
> …

[8] The letter of offer includes:

> Your terms of employment comprise the provisions of the MediaWorks Terms of Employment (V1.1 March 2017) a copy of which is enclosed, subject to the additional terms set out below. If there are any inconsistencies between the terms in this letter, and the Terms of Employment document, the terms of this letter apply.
> …
>
> **9. Post Employment Obligations**

[2] Discovery became Ms O'Brien's employer from 1 December 2020 when it purchased MediaWorks TV Limited. At this time no changes were made to Ms O'Brien's terms and conditions of employment.

You agree that you occupy a key role. Therefore in the event your employment terminates you will be subject to restraints on the terms set out in the Employment Policies. In your case the restraint periods and geographical area are:

Non-Competition: 3 months
Geographical area for Non-Competition: National Level
Non-Solicitation and Non-Dealing: 6 months

[9] The document titled 'Terms of Employment' provides:

Post-Employment Obligation

MediaWorks does not want to prevent you from obtaining alternative employment should you wish to leave. However, we naturally wish to protect our business relationships and our confidential information. For that reason certain restrictions on your activities following the termination of your employment with us may be set out in your appointment letter.

If in your employment letter it is agreed that you hold a key position, unless you first obtain the written consent of MediaWorks to waive or reduce any restraint, you agree that during your notice period and for the term specified in your appointment letter (however that occurs), you will not:

i. Be directly or indirectly involved in any capacity (whether as an employee, contractor, consultant, partner, trustee, principal, agent, shareholder, director, self-employed person or otherwise) in any business or activity in competition with MediaWorks in the Geographical Area specified in your appointment letter (Non-Competition), or

ii. Directly or indirectly solicit, canvass, procure or attempt to entice any person or entity which within the 12 month period prior to the termination of your employment, was a client, supplier to or employee of MediaWorks, to change the nature of their relationship with us or assist any person, form or corporate to do any of the same (Non-Solicitation), or

iii. Directly or indirectly deal with any person or entity which, within the 12 month period prior to the termination of your employment, was a client or supplier of MediaWorks or assist any person, form or corporate to do any of the same (Non-Dealing).

Note that obligations concerning protection of confidential information continue after the end of the restraint period.

[10] Clause 8 of the letter of offer required Ms O'Brien to give three months' notice of resignation. In addition, the 'Terms of Employment' includes under the heading 'Resignation' that the employer:

On receiving notice we may elect to pay you in lieu of notice and not require you to work put all or part of the notice period. We may also require you to remain at home on full pay during the notice period, or direct you to undertake an alternative role or duties on the same terms and conditions of employment while working out the notice period.

[11] In addition to the implied duty of fidelity contained in every employment agreement the 'Terms of Employment' document includes:

> **Conflict of Interest**
>
> During the course of your employment you should be careful to avoid situations, which might compromise your integrity or otherwise lead to conflicts of interest.
>
> You must avoid anything that could directly or indirectly compromise the standing of MediaWorks and its relationships with customers or suppliers and/or the general public. Care must be taken if you accept hospitality from either customers or suppliers over and above that required for the normal conduct of business.
>
> While employed by MediaWorks you must not own, operate or otherwise be involved in any business that is in competition with MediaWorks. If you believe a conflict may exist you are encouraged to discuss this with your manager, preferably before any such arrangement is entered into.

February 2018 - entering the restraints

[12] In emails dated 13, 14 and 15 February 2018 Ms O'Brien raised various issues with the offer details including in the email 15 February:

> …
> <u>Post-employment obligations</u>
> She [Ms O'Brien's lawyer] raised concerns about these being overreaching and at risk of being viewed as a punishment of the employee as opposed to the protection of MediaWorks.
> - Are these obligations negotiable at the time of notice and can I get an assurance they won't be employed in a punitive way?

[13] Ms O'Brien and Mr Crawford had a discussion on 15 February and they both recall he told her in answer to her query about the non-compete restraint that it was not his intention to use it punitively. The discussion did not extend to defining what 'punitively' meant. Ms O'Brien said in evidence she understood it would mean the non-compete restraint would not be used to punish her for resigning and unfairly restrict her from continuing in her chosen career. In his evidence to the Authority Mr Crawford said it was not unusual in his experience for employees first faced with restraints of trade, as was the case with Ms O'Brien in February 2018, to have questions and he recalled telling her non-compete restraints were standard for senior editorial roles. He said he did not believe in long non-compete restraints and regarded Ms O'Brien's as reasonable in length.

[14] The chain of email correspondence concerning the offer and acceptance of the political editor role shows the parties were under pressure to conclude negotiations in order that an announcement of Ms O'Brien's appointment could be made. The correspondence also shows Ms O'Brien carefully set out her concerns, following receipt of legal advice and sought clarification from Mr Crawford which she received.

23 September - October 2021 - discussions with Ms Bristow about other opportunities

[15] From 23 September 2021 through to early October Ms O'Brien had several discussions with Ms Bristow about other opportunities within Discovery to progress her career. The discussions did not result in a new role within Discovery which met Ms O'Brien's career aspirations. She said she found this disappointing.

October 2021 - Ms O'Brien accepts offer with Media Works Radio

[16] In October 2021 Ms O'Brien began talking with Mr Gurney about an opportunity to move to radio. The role they discussed was hosting a new nationally broadcast morning talk back show that it was developing. Ms O'Brien saw this as an exciting, once in a life time opportunity. On 19 October Ms O'Brien accepted an offer with MediaWorks Radio. Before accepting she checked with MWR that the new show could not harm Discovery and in particular Discovery's morning breakfast television programme 'The AM Show'. Mr Gurney assured her this was the case because 'The AM Show' was not a radio show and in particular the breakfast radio audience is usually a commuter audience who are unable to watch television while they are driving, biking or walking to work. Mr Gurney said MWR's show would be competing with NewsTalk ZB and National Radio. Ms O'Brien felt confident the restraints with Discovery would not apply to the new role because Discovery, as a consequence of the sale to MWR did not have a radio station or any-radio-based activities – her new role as a radio host would not and could not compete with Discovery's television broadcasts.[3]

[17] Ms O'Brien did not seek a similar assurance from Discovery prior to accepting MWR's offer. She said she did not because she relied on the conversation with Mr Crawford in 2018 and never thought the restraints would apply because the roles are so different.

[3] The radio simulcast of 'The AM Show' ceased at the end of 2021.

21 October 2021 – Ms O'Brien resigns

[18] On 20 October Ms O'Brien rang Ms Bristow to advise she would be resigning. On 21 October she tendered her written resignation advising she had '…accepted a position at MediaWorks with a proposed start date of 23 January 2022.' The letter included an expression of disappointment that their discussions regarding new roles did not progress and ended:

> I hope Discovery can work with MediaWorks, and you can work with me, to agree on the next steps. You have my complete commitment to do everything, anything and whatever you think best to manage the transition in the gallery.

[19] The same day Ms Bristow and Mr Gurney had a discussion about the timing of announcements of Ms O'Brien's new role. Ms Bristow said she did not give permission to Mr Gurney or Ms O'Brien for Ms O'Brien to participate in promotional materials for MWR or for Ms O'Brien to provide a direct quote about MWR's business while she was an employee of Discovery. She said in her evidence if she had been asked she would not have given permission. Internal announcements were duly made.

26 October – the parties raise the restraints

[20] During a telephone conversation on 26 October Ms Bristow told Ms O'Brien by her calculations she would not be able to start with MWR until 21 April 2022 given her three month notice period plus three month non-competition restraint. Ms Bristow said she said this because it was her view the new role with MediaWorks would be in completion with Discovery. Later that day Ms O'Brien emailed Ms Bristow that she had taken legal advice on the employment agreement, that her view was Ms Bristow's interpretation was mistaken because "Non-compete clauses are not designed to be blanket bans. They must be reasonable and in the public interest". The letter included the following statements:

> I accept that this clause would prevent me working as a political reporter or political editor for any other broadcaster for the designated period. However, my new role is a significant departure from political reporting. I will not be in competition with my successor.
>
> Likewise, I am not leaving to work for another television station and therefore I will not be competing with the AM Show (in its new guise, which excludes radio simulcast).

[21] On 28 October Ms Bristow replied:

> The terms of your restraint apply to you taking employment or being involved with any competitor to Discovery NZ Ltd, and are not specifically related to your role. That said you are key on air talent and you are going to a role as key on air talent. MediaWorks is clearly a competitor to Discovery NZ Ltd.
>
> As we discussed earlier this week we intend to require you to comply with the terms of your restraint which you agreed to when you signed your contract.

[22] Attached to the email were documents for Ms O'Brien to sign - a letter titled 'Re: Acknowledgement of resignation and reminder of obligations' and undertakings which included compliance with obligations relating to the extant employment including good faith obligations and the post-employment restraints of non-competition, non-solicitation and non-dealing.

2 November – MWR media release announcing Ms O'Brien's appointment

[23] This media release announced MWR was launching a new talk radio brand in 2022 with the new breakfast host being 'Newshub political editor Tova O'Brien.' A quote from Mr Gurney included in the release says 'Tova is one of the finest journalists in the country. She's heavily plugged into the political scene, is a formidable interviewer and we know will be an awesome breakfast radio host.' Ms O'Brien is quoted:

> This is an incredible once in a lifetime opportunity to be part of something new, different and exciting. We're building something special here and I can't wait to get on-air."

[24] The media release ended by noting that MWR was establishing its own newsroom. Ms O'Brien confirmed to the Authority that she approved the quote attributed to her in the release. She said she understood from discussions with Mr Gurney and Discovery that they had agreed on an announcement being released and, that based on what she had seen in the industry including a quote from talent in such announcements was not unusual.

4 November

[25] On 4 November Ms O'Brien emailed Ms Bristow she had taken advice on her 28 October letter (the email misdates it as 21 October), Discovery would not be able to enforce the restraints and she would therefore not sign the undertakings because:

- the restraints inadequately set out the legitimate proprietary interest Discovery seeks to protect;
- the interests identified are unreasonably broad and not specific to her role;
- in the absence of legitimate proprietary interests any attempt to enforce the restraints would be for anti-competitive reasons;
- the terms of the restraints would prevent her working at any media outlet in New Zealand for three months in any capacity and this would be unreasonably restrictive and would unfairly prevent her earning a living; and
- the MWR role is significantly different to her political editor role with Discovery so, if there were adequately described proprietary interests in the restraints there is no risk of breach.

[26] By way of offer to remove her from the 'journalism scene' and 'end on a good note' Ms O'Brien offered to take annual leave, of which she had a significant amount due, for the remainder of her notice period if Discovery would not enforce the restraints. The email ended with an offer to assist with hand over to her successor during this period.

10 November

[27] On this date Discovery announced the breakfast show 'The AM Show' would be relaunched as 'AM' with a new co-host announced.

19 November – Ms O'Brien photographed for MWR promotional video and Discovery's lawyers write to Ms O'Brien

[28] Ms O'Brien attended a Wellington photography studio at which photographs were taken for a MWR promotional video. This attendance was on a day off from work with Discovery.

[29] By letter dated 19 November Discovery's lawyers wrote to Ms O'Brien with reference to the correspondence dated 28 October and 4 and 18 November. The letter included describing Ms O'Brien's post-employment obligations as including restraints on proprietary interests described as:

- confidential information she had access to which included editorial priorities and future plans, identities of confidential sources and team salaries;
- business relationships included key connections with sources, political contacts and other industry relationships developed as a result of her employment with Discovery; and
- goodwill in part attributable to Ms O'Brien's reputation in the market developed as a direct result of her employment with Discovery.

[30] The letter declined her proposal to take the balance of the notice period as annual leave and restated the request for the undertakings previously sought by 24 November. The letter ended by stating that if the undertakings were not provided a request for mediation would be made to urgently resolve this matter.

30 November – Discovery's lawyers write to Ms O'Brien's lawyers

[31] This letter expresses surprise and disappointment when Discovery became aware Ms O'Brien had featured in a MWR advertising campaign, that its view was she was advertising with a competitor while still an employee of Discovery and this was a clear breach of her employment obligations including the conflict of interest clause in the employment agreement and the duty of fidelity. The letter sought that she immediately cease involvement and/or appearances in such promotional activity and to confirm this by 2 December. A claim for penalties, damages and costs was reserved. Reference was made to arrangements for the parties to attend mediation.

2 December – Ms O'Brien's lawyers reply

[32] On 2 December Ms O'Brien's lawyers wrote to Discovery's lawyers:

- *Role fundamentally different*

  Ms O'Brien's new role was fundamentally different to the one she holds at Discovery – her current role is limited to investigating and reporting on political matters in usually, a 2 minute slot during the 6pm TV3 news, the new role covers all news and current events and involves hosting a whole breakfast radio show (2 ½ hours), the roles target different audiences, use different media platforms (radio and television) and have different subject matter;

If proprietary interests existed they would not be adversely affected by the new role; and

Attempting to prohibit Ms O'Brien from working in her chosen field is punitive and in bad faith.

- *Broadly worded and generic restraint clause*

No legitimate proprietary interest exists because the clause is too general and not tailored to Ms O'Brien's position, confidential information is defined as 'clients and customers' which does not apply to Ms O'Brien and 'business relationships' are only relevant to a limited part of her new role and its use would not be a detriment to Discovery;

Regarding goodwill – it is not possible to restrain on the basis of talent alone.

- *Non-solicitation and non-dealing*

The wording of these restraints is generic, there can be no cause of concern Ms O'Brien would solicit any client, supplier or employee of Discovery and the clause is 'something of a nonsense' as Ms O'Brien had no material dealings with clients or suppliers

- *Punitive enforcement*

Discovery was seeking to punitively enforce the clause in an anti-competitive manner.

- *Breach*

Any established breach is minor and Discovery had suffered no damage;

The media release and promotional video are preparatory steps only, such announcements are routine in the media market;

Any breach was not deliberate – Ms O'Brien understood the promotional steps taken had been approved and were normal practise; and

Discovery raising these issues indicates a punitive approach.

21 December – Discovery appoints new political editor

[33] After a competitive selection process Discovery's deputy political editor was appointed into the political editor role to replace Ms O'Brien.

22 December – Discovery announces new political editor

[34] The new political editor was publicly announced.

Issues

[35] The issues for investigation and determination are:

(i) Are the restraints in the employment agreement enforceable?
(ii) If so, would Ms O'Brien breach the restraints by starting work with MWR on 25 January 2022?
(iii) If so, should compliance orders be issued?
(iv) Has Ms O'Brien breached terms of the employment agreement including those relating to conflict of interest and the implied duty of fidelity?
(v) If so, should compliance orders be issued?
(vi) If Ms O'Brien has breached a term or terms of the employment agreement is she liable to a penalty?
(vii) Are either party entitled to a consideration of costs?

[36] The issues are discussed as follows.

Are the restraints enforceable?

[37] There are three restraints at issue – non-compete, non-solicitation and non-dealing.

Restraint of trade – non-compete

[38] Paragraph 9 of the letter of offer dated 15 February 2018 describes the non-compete restraint in bare terms – '…you will be subject to restraints on the terms set out in the Employment Policies. In your case…Non-competition: 3 months'. The 'Terms of Employment' document provides more detail at (i):

> …you will not:
>
> i. Be directly or indirectly involved in any capacity (whether as an employee, contractor, consultant, partner, trustee, principal, agent, shareholder, director, self-employed person or otherwise) in any business or activity in competition with MediaWorks in the Geographical Area specified in your appointment letter (Non-Competition)

[39] I am satisfied that when the parties entered the employment agreement on or about 15 February 2018 Ms O'Brien was aware the 'Terms of Employment' formed

part of the employment agreement and in particular the post-employment non-compete restraint. She confirms this in her written evidence dated 23 December 2021. The reference to 'Employment Policies' in the letter of offer, though untidy, is a reference to the 'Terms of Employment' document. This is apparent when the documents are read as a whole.

[40] The prima facie position is restraints of trade are contrary to public law and not enforceable. To overcome this Discovery must establish that it has a legitimate proprietary interest that the restraint protects and that the restraint is no wider than is reasonably necessary to protect that interest.[4]

Does Discovery have legitimate proprietary interests?

[41] The proprietary interests Discovery seek to protect are its confidential information, Discovery's business relationships and goodwill.

(i) Confidential information

[42] Confidential information has been recognised as a propriety interest and restrictive covenants may be necessary, in addition to confidentiality obligations, to protect the disclosure of confidential information in the course of further employment.[5] Ms O'Brien says she is unaware of any confidential information over which Discovery could reasonably assert a proprietary interest or that any such interest is so minor that it is protected by the general confidentiality protection obligation. She says it is unreasonable to restrain her from using her skill and knowledge as a journalist because any risk of breach of confidential information is non-existent or, at best, minor. She also says the lack of definition of this proprietary interest (or any other) in the restraints is unreasonable and weighs in favour of unenforceability.

[43] The confidential information over which Discovery seeks to impose a restraint are its editorial priorities and future plans, identities of confidential sources and team salaries:

---

[4] *Air New Zealand v Kerr* [2013] NZEmpC 153 at [23].
[5] *Credit Debt Services NZ Ltd v Wilson* [2007] ERNZ 252; and *Transpacific Industries Group (NZ) Ltd v Harris* [2013] NZEmpC 97.

- *editorial priorities and future plans*

[44] This asserted proprietary interest is about how Discovery puts its news programme together. In evidence to the Authority Dr Ellis said editorial priorities are "usually jealously guarded" and that every news organisation he had ever had anything to do with had editorial priorities that could not be transposed elsewhere. He said leaders (including editorial leaders) within the newsroom are responsible for the implementation and maintenance of the priorities and the newsroom, as a collective effort, guided by these priorities, puts the news programme together.

[45] Discovery has established a proprietary interest in its editorial priorities.

- *identities of confidential sources*

[46] The evidence establishes a category of confidential sources which may belong to the organisation.[6] I am satisfied that within Discovery's newsroom such a category of sources is known and used. Discovery has established a proprietary interest in the identities of such confidential sources.

- *team salaries*

[47] As political editor Ms O'Brien headed a team of journalists. She was privy to their salaries. This is confidential information and Discovery has established a proprietary interest in that confidential information.

(ii) Business relationships

[48] This is the second category of proprietary interest Discovery seeks to enforce. The key relationship over which Discovery seeks to assert a restraint is Reid Polling. Ms O'Brien 'owned' that relationship at Discovery – she commissioned the polls, including setting the questions, received the polls and editorialised on and presented the results. She described a close friendship with the owner of the business and, unprompted, during the course of her evidence to the Authority offered not to speak with her for three months. Notwithstanding, she says there is no proprietary interest sufficient to justify a restraint because the commissioning of polls and the results are

[6] Witness statement Dr Ellis dated 13 January 2022 at [29].

time bound – their relevance has passed – and MWR does not intend to commission polls and, further, a lot of information about polling, including the Reid polling, is publicly available. These issues Ms O'Brien raises sound in the assessment of whether it is reasonable for Discovery to seek to protect this and the other proprietary interests it asserts by way of restraint.

[49] I am satisfied Discovery has a proprietary interest in the business relationship with Reid Polling – it is its polling agency.

(iii) Goodwill

[50] This is the third category of proprietary interest under consideration. Ms O'Brien was employed in a 'key role' by Discovery. This position has contributed to her reputation in the New Zealand market. It is accepted that goodwill is in part attributable to Ms O'Brien's reputation. Discovery's goodwill is a legitimate proprietary interest.

Reasonableness

[51] This question requires Discovery to establish the non-compete restraint is no wider in scope, duration and geographical limit than is reasonably necessary to protect the proprietary interests it has established.[7]

Reasonableness of duration

[52] A factor relevant to reasonableness of duration is whether the total period of a restraint should include the notice period where the employer has the ability under the terms of the employment agreement to put an employee on garden leave.[8]

[53] Discovery had the ability under the terms of the employment agreement on receiving Ms O'Brien's notice of resignation to not require her to work all or part of her notice period.[9] Given this the potential period of restraint available to Discovery under the terms of the employment agreement was 6 months (3 months garden leave + 3 months restraint of trade). On Mr Crawford's evidence this was too long for the type

[7] *Air New Zealand v Kerr* [2013] NZEmpC 153 at [23].
[8] *Air New Zealand v Kerr* [2013] NZEmpC 153 at [71].
[9] 'Terms of Employment' document.

of role Ms O'Brien filled. How long then, in the circumstance so this matter is a reasonable duration for the restraint?

[54] The natural point in the timeframe appears to be after the adjournment of Parliament on 19 December – within days of this date the new political editor had been appointed and the day to day busyness of producing a daily news programme (and associated content for other media platforms) had passed for the Christmas/New Year programme shut down. Discovery says it could not put Ms O'Brien on garden leave at this point because she was still employed as the political editor and could be called in to work if a significant political event occurred. How likely Discovery would be to call Ms O'Brien in from annual leave to front a significant political event is debatable given the proximity to her intended start date with a competitor, the seriousness Discovery is expressed to have placed on Ms O'Brien's participation in MWR's media release of her appointment and promotional material and the appointment to the political editor role of an experienced journalist who had immediately prior held the role of deputy political editor.

[55] Given these factors it is appropriate to exercise my discretion and modify the duration of the three month non-compete restraint by five weeks to seven weeks.[10] For the sake of clarity the final day of the modified non-compete restraint is 14 March 2022.

Reasonableness of scope

[56] For the reasons set out at [39] above the scope of the non-compete restraint is clear and I find reasonable.

Reasonableness of geographical limit

[57] For completeness, Ms O'Brien worked at a national level and the role she is going to is national. The scope of the restraints is New Zealand wide which, given the nature of the subject roles and industry, is reasonable and enforceable.

Restraints – non-solicitation and non-dealing

[58] The non-solicitation restraint sets out that for six months after employment ends Ms O'Brien is not to 'directly or indirectly solicit, canvas, procure or attempt to entice

[10] Contract and Commercial Law Act 2017, s 83.

any person or entity which within the [6] month period…was a client, supplier to or employee of [Discovery] …'. Similarly, the non-dealing restraint restricts dealings with '…a client or supplier of [Discovery]…'

[59] Discovery's proprietary interests in how it operates its newsroom, its supplier Reid Polling and Ms O'Brien's team's salaries have been established. It is reasonable for it to seek to protect the relationships associated with those interests from solicitation or dealing given the evidence of the close working relationships between Ms O'Brien and the proprietary subjects and MWR's evidence it intends to set up a newsroom. However, the non-solicitation and non-dealing restraints are drawn wider than those relationships to include 'clients', the basis of which is unclear.

[60] The non-dealing and non-solicitation restraints can be modified without substantial redrafting by removal of the phrase 'a client' as contained in both the non-dealing and non-solicitation restraints and I exercise my discretion to do so.[11]

[61] Is the six-month duration of the non-dealing and non-solicitation restraints reasonable? It is not clear on the evidence before the Authority why these restraints are twice the length of the non-compete restraint. If three months, at point of agreement, was all that was then required to protect the proprietary interests from competition then that must be sufficient for non-dealing and non-solicitation. On this basis I find the non-dealing and non-solicitation clauses lasting six months are wider than is reasonably necessary and are enforceable if shortened to be reasonable. They are modified to make them reasonable by reducing the time frame to three months so making them reasonable and enforceable.

Would Ms O'Brien breach the restraints by starting work with MWR on 25 January 2022?

[62] Another way of charactering this issue is – if Ms O'Brien starts work with MWR on Tuesday will she be in competition with Discovery? The parties' non-compete restraint defines competition as direct or indirect involvement in any capacity '…in any business or activity in competition with…' MRW. While the clause is broad, it not so

[11] Contract and Commercial Law Act 2017, s 83.

broad as to allow a construction restraining an employee working for another entity which is not in competition with Discovery. Such a clause has been held to be unreasonably broad and unenforceable. [12]

[63] Dr Ellis gave expert opinion evidence to the Authority on whether Discovery is in competition with MWR, whether Ms O'Brien's new role with MWR would be in competition with Discovery and whether the journalistic functions of her new role would be the same or similar as her existing role with Discovery to the benefit of MWR.

[64] The following extract from his written evidence on whether MWR and Discovery are in competition is instructive:

> [30] As stated earlier, all New Zealand news media compete with each other for audience and, in the commercial sector, for advertising revenue. It is, however, a complex environment that has been significantly impacted by the effect of trans-national search and social media entities on both finances and reach…This has increased the sense of commercial competition between local actors as each tries to attract advertisers to its medium and its brands. As a corollary, competition for audience increases as this is the key driver in attracting advertising – selling ears and eyeballs.
>
> [31] Inter-media competition in specific timeslots is affected by a number of factors beyond audience attraction. For example, one cannot watch television while driving a car but can listen to radio. Nonetheless, there are sufficient audience numbers to create some inter-media competition in the same timeslots as, even in Auckland a three-hour commute is unlikely and audiences could have simultaneous access to radio and television. In the 6am to 9am 'breakfast' slot, 36 per cent of the available audience 15+ listen to radio and 22 per cent watch television. These numbers were larger in the past but both radio and television have now been superseded by online video in that timeslot (38 per cent).
>
> [32] In my opinion, therefore, I see a degree of competition between Discovery and MediaWorks in that timeslot just as I see competition between those organisations and NZME for share of audience and revenue.

[65] I have carefully considered the evidence given on behalf of Ms O'Brien and in particular Mr Gurney's evidence that while he accepts Discovery and MWR could be said to be in competition for audience 'in the margins', that competition is neutralised by the following factors – radio and television breakfast audiences are habituated to their preferred medium, the pool of potential advertisers is fundamentally different and MWR do not see 'The AM Show' as its competitor. I have also considered the media commentaries produced in evidence which on the whole describe 'the competition' as

[12] *Transpacific* at [31].

between Ms O'Brien's new breakfast radio show and other radio shows currently in the same timeslot.

[66] The wording the parties have agreed to in the non-compete restraint is clear that a departing employee's involvement in any capacity with any business or activity in competition with Discovery is to be restrained. There is clear evidence before the Authority that Discovery and MWR are media competitors in the broad sense and expert opinion evidence that there is a degree of competition between them for "ears and eyeballs" in the breakfast time slot. Ms O'Brien raises a number of objections to the reasonableness of the use of the restraints to protect Discovery's proprietary interests including:

- her successor is well able to establish herself in the role without the enforcement of the non-compete restraint, which was the situation she found herself in when she took on the role;
- industry practice suggests to seek to enforce a non-compete restraint is unusual and indicates Discovery's actions are punitive;
- such a restraint is an unreasonable encumbrance of the exercise of skill and knowledge and offends against free speech and the New Zealand Bill of Rights; and
- there is no risk she will disclose any confidential information for example about her team's salaries or Reid polling because she understands the importance of its confidentiality and there is no need for her to do so because she is not setting up or heading a team at MRW and MRW are not going to commission polling.

[67] Discovery says the three months is necessary because this will give sufficient time to 'bed in' the new political editor and shore up its business contacts including Reid polling and confidential sources. In addition it relies on the evidence of Mr Crawford that he did not believe in long non-compete restraints, his view that for a senior employee three months was reasonable and he would seek to enforce it in the circumstances currently before the Authority.

[68] There was not a lot of detail provided to the Authority as to the steps Discovery had taken or intended to take to complete the 'shoring up' and 'bedding in' process necessary for the business to adjust to the loss of Ms O'Brien. Ms O'Brien's role in this

'shoring up' must be acknowledged – she provided support, coaching and assistance to members of her team in the period leading up to her going on annual leave on 20 December 2021 (on which she has remained for the balance of her notice period) expressly in preparation for the new political editor commencing. She also offered to continue to be available during her period of leave.

[69] It is accepted the role of political editor is a significant role in which it will take time for the new incumbent to establish herself and Discovery's business will need to take steps to build her profile. The adjournment of Parliament on 19 December and the Christmas/New Year programme shut down along with annual leave of key staff, including the new political editor, has delayed this bedding in period somewhat. While the evidence suggests, notwithstanding being on annual leave the new political editor is likely to have started work to establish herself in the role, the timing of the start of her role during the summer break is not ideal and no doubt was a factor well within the contemplation of the parties.

[70] There is no evidence before the Authority to suggest Discovery's newsroom would operate conceptually any differently (ie without editorial priorities) to that of MWR's intended newsroom. I am satisfied Ms O'Brien, who has worked in the Discovery newsroom for fourteen years, including over three years as an editorial leader, is aware of its editorial priorities. To paraphrase Dr Ellis Ms O'Brien is 'steeped' in how Discovery puts together its news, with particular emphasis on political news, because she has been a key part of the production of that news programme. She is going to a role which Mr Gurney said will have 30 per cent political content. She is also going to a role with an established profile which, on the evidence is attributable at least in part to holding a key position with Discovery, and which I am satisfied will be, at least in the short term, of benefit to MWR. In these circumstances is it reasonable for Discovery to apprehend a risk to its proprietary interests in Ms O'Brien taking up such a role with, as the evidence has established, a competitor.

[71] I am not drawn to the submission that it is not industry practice to enforce restraints for key media talent. The arrangements referred to are very likely to result from commercial negotiations the starting point for which will be the contractual arrangements between the negotiating parties. These are individual to those parties as is the outcome of any negotiations. The opportunity for the parties to this employment relationship problem to negotiate a similar arrangement has passed.

[72] The industry practice argument dovetails into the submission Discovery's actions are punitively or acrimoniously motivated. Invariably in matters such as this, the employee is subject to commercial dynamics between competitors. This appears to be the situation here. In the absence of clear evidence of, for example, breach of good faith obligations, that commercial dynamic as a factor influencing Discovery's decision to enforce the restraints is a commercial reality. It is not persuasive evidence of a punitive or acrimonious motivation.

[73] Ms O'Brien seeks to rely on definitions contained in the share sale agreement between Discovery and Mediaworks Holdings Limited to inform the interpretation of the restraints. This document is dated 6 September 2020. Any relevance the share sale agreement definitions could have is limited because they could not have been in the contemplation of the parties when they entered the restraints in February 2018. Further, the Authority has found the evidence establishes on an objective basis that Discovery and MWR are competitors. The share sale agreement definitions do not assist.

[74] The evidence establishes if Ms O'Brien starts work with MWR she will be working in competition with Discovery.

Should compliance orders with the restraints be issued?

[75] Given the restraints as modified are reasonable and enforceable if Ms O'Brien commenced work with MRW on 25 January 2022 she will be in breach. It is appropriate that a compliance order is made.

Has Ms O'Brien breached terms of the employment agreement?

[76] Ms O'Brien denies she has breached the term of employment regarding conflict of interest or the duty of fidelity. Her reasons for that view included the following:

Conflict of interest

- this term of the employment agreement is unenforceable because it is contained in the general 'Terms of Employment' document and fails to set out genuine reasons based on reasonable grounds for its inclusion;
- there are no genuine reasons for the conflict of interest provision;

- if it was lawful and reasonable MWR does not compete with Discover; and
- her inclusion in the media announcement could not directly or indirectly compromise Discovery's standing.

Duty of fidelity

- the quote was provided for MWR's media release with the understanding MWR and Discovery were liaising regarding the content of the announcement;
- Discovery first raised concerns about the inclusion of the quote in the media release by way of statement in reply dated 21 December 2021; and
- the image of Ms O'Brien captured in the promotional video was not taken in work time, was for short duration and would likely only have been seen by those visiting MWR social media platforms.

Conflict of interest

[77] The operative part of the conflict of interest clause is 'While employed by [Discovery] you must not… be involved in any business that is in competition with [Discovery]. If you believe a conflict may exist you are encouraged to discuss this with your manager, preferably before any such arrangement is entered into'.

[78] The clause as a whole is clear in its terms – employees are to be mindful of circumstances which might occasion a conflict of interest. The rationale is because such circumstances might compromise Discovery's standing. In the specific instance of involvement, as defined, with a competitor business it is prudent to first speak to your manager. The clause is reasonable and enforceable.

[79] This determination has found Discovery and MWR are in competition. Ms O'Brien was involved in MWR's business before her employment with Discovery ended – she approved a quote for inclusion in a press release announcing her appointment to MWR along with the launch of a new talk radio brand and allowed her image to be videoed for the purposes of a promotional video for that new brand. I am satisfied there was a prima facie conflict of interest in her involvement in both activities.

[80] Ms O'Brien did not discuss this conflict with her manager before the activity was undertaken, as indicated in the conflict of interest clause. Why? The Authority understands she did not because, based on the advice it is understood she had taken, she did not believe she was moving to a competitor role. In the face of Discovery's view it and MWR were competitors, which she was aware of from 26 October, it was rash to, subsequent to that date involve herself in the business of MWR without the approval of Discovery. I find those actions amounted to a breach of that term of the employment agreement. Reliance on inferences of approval drawn from other people's involvement in promotional material is not strong, particularly given Discovery's expressed intention to enforce the restraints on the basis Ms O'Brien was taking up employment with a competitor.

Duty of fidelity

[81] The implied duty of fidelity required Ms O'Brien not to act in a way that undermines the relationship of trust and confidence between herself and Discovery. Ms Bristow's evidence was she was shocked and extremely disappointed to see Ms O'Brien involved in MWR's marketing and brand campaign while still employed by Discovery because she was one of its most public and high profile employees. Ms Bristow said permission was not sought or given. Ms Bristow said if Ms O'Brien had asked for permission for the quote and image to be used by MWR as it was used, she would have declined because while Ms O'Brien was still an employee of Discovery, including still appearing on television in her Discovery role, this would be confusing for audiences and implied her current role, using the wording of the media release quote, was not "building something… special, new or exciting".

[82] Clearly, it is Discovery's view the subject actions undermined the parties relationship of trust and confidence. Is this reasonable? My view is yes because a more cautious approach on Ms O'Brien's part was warranted given Discovery's expressed view of the enforceability of the restraints and the fact agreement had to be reached about the announcement of her new role. MWR cannot indemnify Ms O'Brien for the breach – it was not a party to the obligation and it was her obligation to uphold.

If so, should compliance orders be issued?

[83] There is no basis to issue compliance orders in respect of the found breaches because Ms O'Brien's employment with Discovery ended on Friday 21 January 2021 along with all duties and obligations owed under the terms of employment (other than those surviving termination). The terms she breached did not endure beyond the end of the employment.

Is Ms O'Brien liable to a penalty for found breaches?

[84] In considering whether a penalty is warranted and, if so, at what level, I have had regard to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.[13]

[85] There are two statutory breaches. The breaches are sufficiently interrelated to warrant a globalisation of breaches. The maximum penalty against a person is $10,000.

[86] The objects of the Act include building productive employment relationships through the promotion of good faith. Ms O'Brien's actions have been found to amount to a breach of an express provision of the employment agreement and undermined the relationship of trust and confidence. The breaches resulted from Ms O'Brien's failure to consider the impact of her involvement with MRW's business on Discovery in light of the obligations owed under the employment agreement. That said, the manifestations of the breaches (the quote and images) were published by a third party (MWR) and they remain published. There is no evidence before the Authority that Ms O'Brien requested MWR to remove them however Ms O'Brien made a public apology to Discovery at the investigation hearing and, as was accepted, her apology must be considered to have been made in mitigation of the breaches.

[87] Though the actions amounting to breach were made in the knowledge of Discovery's view of the enforceability of the restraints Ms O'Brien appears to have taken advice herself and relied on the assurance of MWR. As said above this was imprudent because, in the face of the clear dispute between the parties, at the very least

[13] *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

Ms O'Brien could reasonably have been expected to raise the specific issues (the inclusion of the quote and the use of the images for promotional activity) with Discovery and to seek its view. Given this the actions must be seen as intentional. Ms O'Brien's culpability cannot be said to be high given she was not responsible for publishing the material at issue and, in all the circumstances, the breaches cannot be considered significant.

[88] There was no evidence of direct loss or damage suffered by Discovery resulting from Ms O'Brien's breaches, such as loss of business. However there has been the significant amount of time and resources expended in seeking compliance with obligations owed under the employment agreement as well as the legal cost all of which will not be recoverable through this claim.

[89] There is no relevant previous conduct of Ms O'Brien to consider.

[90] Given the restraints have been found to be enforceable, Ms O'Brien will have a period where she cannot work within their confines. This may create financial difficulties for her and this is a factor to take into account in setting an appropriate level of penalty.

[91] Standing back, looking at that figure, including in comparison to other cases, I conclude that a fair penalty is $2,000. Ms O'Brien is ordered to pay a penalty to Discovery of $2,000 to compensate it for the inconvenience and resources expended in pursuing this matter. The penalty is to be paid within 21 days of the date of this determination.

Outcome

[92] From the date of determination Ms O'Brien is ordered to comply with:

a. the restraint of trade as modified; and

b. the restraints of non-solicitation and non-dealing as modified.

[93] Ms O'Brien must pay a penalty of $2,000.00 for her breaches of the employment agreement within 14 days of the date of this determination. All this sum is to be paid to Discovery.

Costs

[94] Costs are reserved. The parties are encouraged to resolve this issue between them. If that is not possible and a determination on costs is required, any party seeking an order for costs should file and serve a costs memorandum within 14 days of the date of determination and any reply memorandum filed and served within a further 7 days.

Marija Urlich
Member of the Employment Relations Authority