IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 564
5434249

	BETWEEN	MARK REEKIE Applicant
	A N D	BLACKFOOT NEW ZEALAND LIMITED Respondent

Member of Authority:	Rachel Larmer
Representatives:	Richard Harrison, Counsel for Applicant Shan Wilson and Anna Sinclair, Counsel for Respondent
Investigation Meeting:	30 October 2013 at Auckland
Additional information:	29 November 2013 from Respondent 05 December 2013 from Applicant 09 December 2013 from Respondent
Submissions received:	27 November 2013 from Applicant 29 November 2013 from Respondent 02 December 2013 from Respondent 04 December 2013 from Applicant
Date of Determination:	10 December 2013

DETERMINATION OF THE AUTHORITY

A. The restraint of trade in clause 13.2 of Mr Rekkie's individual employment agreement with Blackfoot (NZ) Limited (Blackfoot) is modified by replacing the reference to "12 months" with "eleven months and seven days."

B. Clause 13.2 of Mr Rekkie's employment agreement does not prevent him from soliciting Blackfoot's clients.

Employment relationship problem

[1] Mr Rekkie was employed by Blackfoot as a Media Manager for almost three and a half years. He gave his two months' contractual notice on 26 May 2013 and his employment ended on 26 July 2013. From 03 – 26 July Mr Rekkie was effectively on 'garden leave' notwithstanding Blackfoot did not have the contractual right to put him on garden leave.

[2] Mr Rekkie has set up his own a business which is intended to compete with Blackfoot. He wants to be able to work for the clients he worked for whilst employed by Blackfoot. Blackfoot's position is that he should be restrained from doing so by clause 13 of his employment agreement.

[3] Clause 13 of Mr Rekkie's employment agreement contains a restraint which says:

> *13.1 In the course of your employment you will have access to confidential information about the Company's customers and you will develop strong relationships with the customers. The Company has a right to protect that information and those relationships and to that end, in consideration of the offer of employment you agree to the restraint clause outlined below.*
>
> *13.2 For a period of twelve months from the termination of your employment you may not undertake any work, in any capacity, for any customer or client of the Company for whom, or with whom, you have worked in the twelve month period prior to the termination of your employment.*

[4] In its determination dated 14 November 2013[1] the Authority held that the restraint in Mr Rekkie's employment agreement was unreasonable and unenforceable because it was too long. The parties were directed to mediation under s.164 of the Employment Relations Act 2000 (the Act) to attempt to resolve that problem in good faith. Mediation has been unsuccessful.

[5] Blackfoot seeks modification of the restraint to such extent as the Authority deems reasonable and necessary to protect its legitimate proprietary interests. Mr Rekkie opposes it being modified but says if it had to be modified he would be prepared to accept a restraint in the range of three to six months. He obviously prefers a three month restraint because that means it would have expired by now.

[1] [2013] NZERA Auckland 521.

[6] Mr Rekkie says that if the restraint is modified then it must run from 03 July which was the date he was placed on garden leave. Blackfoot says the restraint must run from 26 July which is the date Mr Rekkie's employment ended.

[7] Blackfoot also claims the clause 13.2 restraint prevents Mr Rekkie from soliciting its clients. Mr Rekkie disputes that. Mr Rekkie says he is only prevented from doing "*work*" for Blackfoot clients, not from soliciting them. He says the restraint does not refer to non-solicitation so it cannot prevent him from soliciting Blackfoot's clients provided he is not the person who actually does the work for them.

Issues

[8] The following issues are to be determined:

(a) Should clause 13 in Mr Rekkie's employment agreement be modified?

(b) If so, how should it be modified?

(c) What date should the restraint run from?

(d) Does the restraint prevent Mr Rekkie from soliciting Blackfoot's clients?

(e) What if any costs should be awarded?

Should clause 13 in Mr Rekkie's employment agreement be modified?

[9] The Authority has the discretion under s.8 of the Illegal Contracts Act 1970 (ICA) to modify the restraint in clause 13 of Mr Rekkie's employment agreement. This discretion must be exercised on a principled basis. There is no presumption that an unreasonable restraint will be modified by the Authority to make it enforceable.

[10] The exercise of the Authority's discretion is constrained by s.164 of the Act which allows modification only if four conditions have been met;

a. The Authority must have identified the problem in relation to the agreement and directed the parties to mediation.

b. The parties must have attempted to resolve the problem in good faith by using mediation.

c. The problem must remain unresolved by mediation.

d. The Authority must be satisfied that any remedy other than an order varying the agreement would be inappropriate or inadequate.

[11] I consider it would be inappropriate given the facts in this particular case for Blackfoot to be left without a limited restraint to protect its legitimate proprietary interest in its client relationships. I am therefore satisfied that all four of the conditions in s.164 have been met, so the Authority may exercise its discretion to modify under s.8 ICA.

[12] The extensive evidence I heard satisfies me that this is a situation in which clause 13 of Mr Rekkie's employment agreement should be modified to make it reasonable and enforceable.

How should clause 13 of Mr Rekkie's employment agreement be modified?

[13] I do not accept Blackfoot's submission that when determining its modification application I should have regard to its claims that Mr Rekkie has *"carried out a course of conduct to encourage clients to follow him to his new business",* has *"not acted in accordance with clause 13.2"* and that he "*has business information taken from [it] without authorisation"* which has given him a *"springboard advantage".*

[14] I have no regard these matters because they are unproven allegations which Mr Rekkie refutes. These matters are the subject of proceedings Blackfoot has brought against Mr Rekkie so will be separately determined when that matter is heard. I make no findings about those allegations at this stage.

[15] In the determination dated 14 November 2013[2] I accepted that Blackfoot has a lessor proprietary interest to protect in respect of the one client[3] who I was satisfied followed Mr Rekkie to Blackfoot due to their previous working relationship with him. I commented that "*it is reasonable to expect a lessor period of restraint to apply to that one client."*[4] That comment was made in the context of determining the reasonableness of the restraint.

[2] Supra.
[3] FPB.
[4] Paragraph [47] of [2013] NZERA Auckland 521.

[16] However, now that I am considering modification of the restraint I have concluded that it is not reasonable or appropriate for me to redraft clause 13 to reflect differing periods of restraint for different clients. My view is that clause 13 should be modified as little as is necessary to provide adequate protection to Blackfoot.

[17] I am not prepared to exercise my discretion to effectively redraft the restraint to provide varying levels of restraint for different categories of clients. I consider that in these particular circumstances[5] it would alter the bargain freely entered into by the parties at the outset of their relationship. It was open to the parties to agree on different levels of restraint for different categories of clients but they elected not to do so.

[18] The evidence I heard satisfies me that it is not appropriate for the Authority to impose new terms to that effect on them under s.8 of the ICA. In reaching that conclusion I am mindful of the Employment Court's recognition in *Pottinger v Kelly Services (New Zealand) Limited*[6] that:

> *"There is also a public interest in observing the sanctity of contract, the enforcement of otherwise reasonable and rational agreements between contracting parties, and the preservation of hard earned commercial property rights."*

[19] When the restraint was entered into Mr Rekkie was required to give two weeks' notice of resignation. That later increased (after he had been employed for some time) to two months' notice of resignation.

[20] There was no contractual right for Blackfoot to place Mr Rekkie on garden leave.[7] This meant he either worked out his notice period or is paid in lieu of notice. The later scenario ends his employment on the date he is paid in lieu of notice. The restriction on Mr Rekkie working with Blackfoot clients (at least from a contractual perspective) is therefore confined to the restraint period.

[21] That differs from the situation in *Air New Zealand v Kerr*[8] where the employer could place the employee on garden leave for some or all of his six month notice period with the employee also being subject to a six month post-employment non-

[5] See paragraphs 36-42, 56 and 57 of [2013] NZERA Auckland 521.
[6] [2012] NZEmpC 101.
[7] Although that is what effectively occurred from 03-26 July 2013.
[8] [2013] NZEmpC 153.

competition restraint. In that situation the total period the employee could potentially be restrained for (had the employer exercised the garden leave option) was 12 months. The Employment Court held based on the particular facts of that case that the six months post-employment non-competition restraint was unnecessary and unreasonable.

[22] The Court in *Kerr* held that a garden leave provision should be taken into account when considering the reasonableness of any post-employment restraint. In Mr Rekkie's case there was no garden leave provision but he was effectively placed on garden leave for the final three weeks of his notice period. I took those three weeks into account when assessing the reasonableness of the restraint because Blackfoot's actions meant Mr Rekkie was effectively restrained from the activities identified in the post termination restraint for longer than the restraint was stated to apply.

[23] I have set the modified duration of the restraint with regard to the contractual notice provisions that applied at the date of Mr Rekkie's resignation.[9] However, I must recognise that notwithstanding there was no contractual right to place Mr Rekkie on garden leave that occurred because he remained employed but stayed away from the workplace and clients and did not do any work from 03-26 July. This is a factor I consider this needs to be reflected when modifying the restraint.

[24] Had Mr Rekkie not been removed from the workplace and therefore effectively restrained for three weeks' longer than the clause 13 restraint allowed then I would have concluded 12 months was reasonable and enforceable in the particular circumstances of this case.

[25] I therefore consider it appropriate to modify the restraint so that Mr Rekkie is effectively only restrained for a total of 12 months which is the period the parties freely agreed at the outset of their relationship. I find that period provides Blackfoot with adequate protection of its legitimate proprietary interest in protecting its client relationships.

[26] I have decided to modify the restraint to eleven months and seven days so that Mr Rekkie is effectively prevented from working for Blackfoot clients who fall within the restraint for no more than 12 months in total. I consider that modification does not alter the bargain entered into by the parties at the time they made it.

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[9] 26 May 2013.

[27] The nature of the industry, the type of services provided and the proprietary interest to be protected satisfies me that a 12 month restraint is adequate and appropriate. I recognise that the nature of Mr Rekkie's role was such that Blackfoot's clients relied on his skill and judgement to such an extent that he would probably gain their custom for any new business he was involved in.

[28] I consider that 12 months is reasonable and enforceable to give Blackfoot adequate time to attempt to establish ongoing relationships between Mr Rekkie's replacement and the clients he worked for during the last 12 months of his employment with Blackfoot. This will require Mr Rekkie's replacement to demonstrate integrity, reliability, sound advice, good performance and tangible positive results. These factors are built up gradually over time so it is not simply a matter of Ms Rekkie's replacement merely meeting with his former clients.

[29] I also consider a restraint of 12 months is adequate time to allow some of the information that Mr Rekkie had about Blackfoot's clients (which did not met the high test for confidential information but which is nevertheless valuable in terms of securing the client relationships) to become stale. This includes but is not limited to the clients' media spend and strategy, feedback on media placements, pricing, key client personnel and client activity levels.

[30] I do not consider that the likely effect on Mr Rekkie of modifying the restraint is more adverse than the effect not modifying it would have on Blackfoot. Mr Rekkie is only prevented from working for 27 clients for 12 months. Given the amount of media placement work there is available in Auckland and given Mr Rekkie's evidence about his reputation and experience the modified restraint is unlikely to be unduly restrictive upon his ability to earn a living.

[31] Mr Rekkie remains free to pursue his chosen business provided he does not work for 27 of Blackfoot's clients for a limited 12 month period post-termination of his employment. The modified restraint does not stop Mr Rekkie from continuing to receive referrals from three individuals who he identifies have been strong supporters of his career and who have referred many clients to him over the course of his employment.

[32] Mr Rekkie also told the Authority that he had particular knowledge and relationships with the media which meant that he was in a position to get better deals

for his clients than his competitors may have been able to. There is no restriction on him dealing with the media so he is able to capitalise on that particular strength without limitation when pursuing his new business activities.

What date should the modified restraint run from?

[33] The restraint expressly states that it is to run from the date of termination. I do not intend to modify that. However, the practical effect of modifying the duration of the restraint from 12 months to eleven months and seven days is that it takes account of the time Mr Rekkie was effectively on garden leave. The restraint expires on 26 July 2014.

Does the restraint prevent Mr Rekkie soliciting Blackfoot's clients?

[34] Interpretation of clause 13.2 involves ascertaining the meaning it would convey to a reasonable person who has the relevant background knowledge which would reasonably have been available to the parties at the time they entered into the employment agreement.

[35] Blackfoot submits the reference to *"undertaking work, in any capacity"* in clause 13.2 prevents Mr Rekkie from soliciting its clients. It says that Mr Rekkie acknowledged in his evidence that he understood that clause 13.2 prohibited him from soliciting Blackfoot's clients so it argues there was a meeting of the minds between the parties over what clause 13.2 was intended to cover.

[36] I do not accept that. It is the wording of clause 13.2 which provides the definition not one party's view of the clause. Mr Rekkie does not accept clause 13.2 restraints him from soliciting clients which fall within the coverage of the clause.

[37] Mr Weatherly's evidence that he would not have employed Mr Rekkie had he known that clause 13.2 did not prevent the solicitation of clients is not relevant to my interpretation of it because the parties recorded the terms of their agreement in an employment agreement. What is relevant is what the parties actually agreed to in the employment agreement.

[38] Blackfoot urges the Authority to imply a prohibition on non-solicitation. I decline to do so. The necessary legal prerequisites for implying terms have not been established.

[39] There is no need to have regard to what the parties say they intended when they entered into the restraint because the words used in clause 13.2 are clear and unambiguous. The restraint prevents "*any work, in any capacity*". It is an anti-competition restraint not a non-solicitation restraint. Working for clients (such as performing services or providing expertise) and soliciting/enticing clients (which involves an element of persuasion) are two entirely different activities. I consider that clause 13.2 has been drafted to reflect that difference.

[40] It would be wrong for the Authority to insert additional words into clause 13.2 which would change the nature of the bargain freely entered into by the parties at the outset of their relationship. I therefore decline to do so.

[41] I find that clause 13.2 merely prevents Mr Rekkie from undertaking any work, in any capacity for the 27 named Blackfoot clients until 26 July 2014. It does not prevent any other actions by him with or towards these clients which does not amount to "*work, in any capacity."* There is no room to imply any additional meaning or restrictions into clause 13.2 other than what already appears in his employment agreement.

What if any costs should be awarded?

[42] The parties are encouraged to resolve costs by agreement. If that does not occur then Blackfoot may file costs submissions within 14 days, with Mr Rekkie having 14 days to file his costs submissions and Blackfoot a further seven days within which to file its costs submissions in reply.

Rachel Larmer
Member of the Employment Relations Authority