

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 521  
5434249

BETWEEN                      MARK REKKIE  
   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  
  
Submissions Received:        31 October 2013 from Applicant  
   01 November 2013 from Respondent  
   05 November 2013 from Applicant  
  
Date of Determination:        14 November 2013

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**DETERMINATION OF THE AUTHORITY**

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- A.    The restraint of trade clause 13.2 in Mr Rekkie’s individual employment agreement is unreasonable and therefore unenforceable.**
- B.    In accordance with s.164 of the Employment Relations Act 2000 the parties are directed to attend mediation before the Authority may determine whether the restraint should be modified.**

**Employment relationship problem**

[1] Mr Rekkie was employed by Blackfoot as its Media Manager from 08 February 2010 until 26 July 2013. Blackfoot was started by its Managing

Directors Scott and Emma Weatherley as an advertising agency in 2008 and has since grown to be a full service agency.

[2] Mr Weatherley approached Mr Rekkie in early 2010 (when it was a small agency with only three employees) and offered him employment. Mr Rekkie was specifically employed to start Blackfoot's media department. A key part of his role was developing and maintaining relationships with clients to ensure Blackfoot's business grew. His employment agreement expressly recognises he was to use his expertise to assist in growing the business. Mr Rekkie did that by providing media strategy, planning and purchasing solutions to Blackfoot's clients.

[3] Mr Rekkie's starting salary was \$100,000 (to be reviewed after three months) and his employment was terminable by either party on two weeks' written notice, with the notice period for redundancy depending on the length of service. By the time Mr Rekkie resigned his salary had increased to \$140,000 plus use of a company car, laptop and mobile phone. His notice period increased in November 2011 by agreement to two months which signifies his importance to Blackfoot's business.

[4] The parties entered into a written employment agreement dated 08 February 2010 which included confidentiality and restraint clauses. Mr Rekkie was already in employment when Blackfoot offered to employ him<sup>1</sup>. He was given a reasonable period of time to consider Blackfoot's proposed individual employment agreement before he signed it and he agreed to the offered terms without expressing any concerns.

[5] Clause 13 of Mr Rekkie's employment agreement 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.*

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<sup>1</sup> Mr Rekkie worked for Media Counsel Limited until it went into liquidation in early 2010. He says his employment transferred to MediaCom Limited (an international media company) as soon as Media Counsel went into liquidation so he left his employment with MediaCom to work for Blackfoot.

[6] On 26 May 2013 Mr Rekkie gave Blackfoot two months' notice of his resignation. It was agreed he would work out his notice period with his last day of work being 26 July 2013. On 07 June 2013 Mr Rekkie established an entity called "*Independent Media New Zealand Limited*" which operates in competition to Blackfoot.

[7] Mr Rekkie wants to be able to work for his previous Blackfoot clients but Blackfoot has told him it intends to enforce his restraint. Mr Rekkie seeks a declaration from the Authority that the restraint is void and unenforceable. Alternatively if the Authority finds a restraint is reasonably necessary and is in the public interest then Mr Rekkie says the Authority should modify it by reducing its duration from 12 months to no more than three to six months. His preference is three months which means it would have expired before the Authority's investigation meeting.

[8] Whilst Mr Rekkie was working out his notice period Blackfoot became concerned he was breaching his employment agreement so it put him on garden leave<sup>2</sup> for 23 days from 03 July 2013 until his employment ended on 26 July 2013. Blackfoot alleges that after Mr Rekkie's employment ended he also breached his continuing restraint and confidential information obligations.

[9] Blackfoot has filed proceedings regarding these alleged breaches which are to be heard separately. Blackfoot's claims are therefore as yet still unsubstantiated allegations which I note Mr Rekkie strongly denies. Blackfoot invites me to uphold the current restraint partly to protect it from potential damage it believes may flow from Mr Rekkie's alleged breaches of his employment obligations.

[10] I decline to do so because the evidence in support of such allegations is limited, is not properly tested and at this stage has not been proved on the balance of probabilities. I therefore put those allegations to one side in determining this matter.

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<sup>2</sup> Mr Rekkie's employment agreement did not provide for garden leave which is a situation where an employee remains employed but stays away from the workplace and does not utilise their normal employment related contacts with clients and the like.

[11] Blackfoot claims the restraint is reasonable and enforceable. It seeks a declaration that Mr Rekkie may not work for or solicit<sup>3</sup> the 27 clients it identifies in the client list filed with the Authority on 01 November 2013. Mr Rekkie accepts the restraint (if enforceable) prevents him from working for the named clients but he disputes that it also prohibits him from soliciting these clients.

[12] Blackfoot argues the restraint is necessary to protect its legitimate proprietary interest in its confidential information and its business connections with the clients Mr Rekkie worked for during the last 12 months of his employment. Blackfoot is not seeking to prevent Mr Rekkie from working with three named clients who would otherwise fall within the restraint because it recognises he has a special personal connection/relationship with them.

[13] If the Authority declares the current restraint unenforceable then Blackfoot seeks modification of the clause to alter the terms of the restraint (such as its duration) to such extent as the Authority may deem reasonable and necessary to protect Blackfoot's legitimate proprietary interests.

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

### **Issues**

[15] The following issues are to be determined:

- (a) Does Blackfoot have a legitimate proprietary interest it may protect?
- (b) If so, is the restraint reasonable?
- (c) If not, should the restraint be modified?
- (d) What date should any restraint run from?
- (e) Is Mr Rekkie prohibited from soliciting clients who fall within the restraint?

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<sup>3</sup> Clause 13.2 does not refer to non-solicitation of clients.

## **Does Blackfoot have a legitimate proprietary interest to protect?**

[16] Blackfoot bears the onus of establishing that at the time the restraint was entered into it was necessary to protect its legitimate proprietary interests which required protection in relation to Mr Rekkie's employment.

[17] A restraint which merely attempts to limit or reduce competition is unenforceable. A restraint cannot be used to prevent an employee from competing with their former employer or to prevent a former employee from using their skills, experience, general knowledge and know how after their employment has ended. A restrictive covenant may be held to be reasonable in order to prevent an employer's confidential information being passed on, however unwittingly, by a former employee provided it is limited to an appropriately short period.<sup>4</sup>

[18] Mr Rekkie disputes Blackfoot has a legitimate proprietary interest which it is entitled to protect. Mr Harrison submits that there has been no evidence provided by Blackfoot that could reasonably be considered to come within the level of confidential and commercially sensitive information that would normally be seen in cases where a restraint has been upheld as necessary to protect a proprietary interest.

[19] Mr Harrison submits that in order for Blackfoot's restraint to be reasonably necessary Mr Rekkie would have had to have access to truly confidential information that requires additional protection beyond which can be provided by the confidentiality clause in his employment agreement.

[20] Clause 11 of Mr Rekkie's employment agreement already prevents him from divulging or communicating confidential information about Blackfoot and its customers and activities without prior approval except as required in the performance of his normal duties. These confidentiality obligations are expressly stated to continue after his employment with Blackfoot ends.<sup>5</sup>

[21] Mr Harrison submits that when assessing whether or not there is a legitimate proprietary interest the focus cannot be on protecting relationships, but must be on the unfairness that might arise if an employer's confidential information which could be

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<sup>4</sup> *Warmington & O'Neill v. AFFCO New Zealand Ltd* [2012] NZEmpC 19, citing *Littlewoods Organisation Ltd v. Harris* [1978] 1 All ER 1026.

<sup>5</sup> Clause 11.1 of employment agreement.

valuable to a competitor is not protected and could be unwittingly or otherwise be disclosed by the former employee.

[22] Mr Harrison says there is no legitimate proprietary interest to protect because Blackfoot has not supplied the Authority with copies of information which would fall within the limited categories of confidential information identified by the English Court of Appeal's decision in *Faccenda Chicken Ltd v. Fowler & Ors*<sup>6</sup>. Mr Harrison submits that clause 11 of Mr Rekkie's employment agreement which prohibits the use or communication of confidential information is more than adequate to cover any confidential information which may exist.

[23] Clause 13.1 of the employment agreement acknowledges that Mr Rekkie in the course of his employment had access to confidential information about Blackfoot's customers and that he would develop strong relationships with those customers. The restraint expressly states that it is to protect that confidential information and those customer relationships.

[24] I find that Blackfoot did not establish on the balance of probabilities that Mr Rekkie continues to retain genuinely confidential information in terms of the limited *Faccenda Chicken Ltd v. Fowler & Ors*<sup>7</sup> definition.

[25] Mr Weatherley's evidence was that Blackfoot provided a future media strategy for its clients at the beginning of each year which it then reviewed over the course of the year, in addition to undertaking any specific additional work the client required. However, there was no specific evidence to establish that Mr Rekkie had information about clients' future media strategies which were still in the development stage, i.e. still being analysed and debated. The evidence suggested that future planning was just starting around now and Mr Rekkie's employment around the middle of the year.

[26] I do not accept Mr Harrison's submission that an employer may not have a legitimate proprietary interest in protecting its trade or business connections unless the employee has confidential information relating to those connections which is not adequately protected by on-going confidentiality obligations. The English Court of Appeal in *Faccenda Chicken*<sup>8</sup> recognises that an employer may protect a former

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<sup>6</sup> [1985] 1 All ER 724.

<sup>7</sup> Supra.

<sup>8</sup> Supra.

employee from exercising their personal influence over customers being pursued in order to entice them away.

[27] The Employment Court has also recognised that an employer may have a proprietary interest in protecting (among other things) business and trade connections; see *Hally Labels Limited v Powell*,<sup>9</sup> *Credit Consultants Debt Services NZ Ltd v Wilson (No 3)*<sup>10</sup>, *Airgas Compressor Specialists v Bryant*<sup>11</sup> and *Pottinger v Kelly Services (New Zealand) Ltd*<sup>12</sup>.

[28] The Employment Court in *James & Wells Patent and Trademark Attorneys v Snoep*<sup>13</sup> commented that a 12 month restraint which prevented a lawyer from working as a patent attorney for his former employer's clients was reasonable so it must have accepted the employer had a legitimate proprietary interest to protect for injunctive relief to have been granted to the employer.

[29] The Court also upheld a two year restraint in *Marine Helicopters Ltd v Stevenson*<sup>14</sup> which prevented the employee from working in the same area and for customers he had worked for when employed by his former employer. This again suggests the Court will recognise an employer's client relationships as a business connection which may be protected.

[30] I find that the nature of Mr Rekkie's role was such that Blackfoot's clients dealt with him directly and personally to the virtual exclusion of others and that their relationship was such that the clients he worked for learned to rely on his skill and judgement to the extent that he would probably gain their custom for any new business he was involved in.

[31] This is one of those situations where Mr Rekkie has acquired such close knowledge of the clients personally and of their business needs and the like to the extent that he is likely to be able to sway their decisions regarding their media placement decisions. Blackfoot's model gave Mr Rekkie direct, one-on-one contact with the clients, which is what resulted in him developing close working relationships

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<sup>9</sup> [2011] NZEmpC 63.

<sup>10</sup> [2007] 1 ERNZ 252.

<sup>11</sup> [1998] 2 ERNZ 42.

<sup>12</sup> [2012] NZEmpC 101.

<sup>13</sup> 28 October 2009, Couch J, CC 16/09.

<sup>14</sup> [1996] 1 ERNZ 472.

with the clients which in turn has given him the ability to exercise some personal influence over Blackfoot's clients.

[32] I also find that Mr Rekkie had information, that although it may not strictly fall within the *Faccenda Chicken* categories of confidential information, is nevertheless pivotal to the development and retention of Blackfoot's clients. This includes but is not limited to the clients' media spend and strategy, feedback on media placements, pricing, key client personnel, client internal dynamics, client activity levels and which other communication providers each client worked with.

[33] I consider that has placed Mr Rekkie in a strong position to harm Blackfoot as a result of unfair competition. I consider that it is this close working relationship together with the inside information he has about the clients' needs and operations together with the associated personal influence Mr Rekkie has over the clients he worked with during the last 12 months of his Blackfoot employment which creates a legitimate proprietary interest which Blackfoot may protect, provided it does so for no more than is reasonably necessary.

#### **Is the restraint reasonable?**

[34] Restraints are unenforceable unless justified as reasonably necessary to protect a legitimate proprietary interest and in the public interest Reasonableness is to be determined at the time the restraint was entered into.<sup>15</sup>

[35] Having established it has a legitimate proprietary interest it may protect, Blackfoot must establish that the restraint is no wider than is reasonably necessary to protect that interest. Blackfoot bears the onus of establishing that the restraint is enforceable and reasonable at the time it was entered into and that it is reasonable in terms of the interests of the parties and the public interest.<sup>16</sup> The public interest requires the restraint to be limited to no more than adequate protection.

#### *Nature of the bargain*

[36] I do not consider this was an unfair bargaining situation. Mr Rekkie was in a strong bargaining position. He was in employment and it was Blackfoot that approached him to secure his services. Mr Rekkie had sufficient time to take advice

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<sup>15</sup> *Gallagher Group Limited v Whalley* [1991] 1 ERNZ 490 (CA).

<sup>16</sup> *Transpacific Industries Group (NZ) Ltd v. Harris & Green Smart Environmental Ltd* [2013] NZEmpC 97.

on the employment agreement before accepting the offer of employment. He had also been subject to a restraint in his employment with Media Council Limited and was aware of restraints being widely used within the industry. I consider he was well placed to make informed decisions about the terms of employment Blackfoot had proposed.

[37] Mr Rekkie did not raise any issues or concerns about the reasonableness or appropriateness of the restraint at the time that it was negotiated and agreed by the parties. He freely and willingly agreed to a 12 month post - employment restraint in return for a six figure salary. I consider there is nothing in the nature of the bargain that makes it unreasonable.

#### *Nature of Blackfoot's business*

[38] When the parties entered into the restraint Blackfoot was a relatively new start up business. Mr Rekkie was taken on to run the media side of the business. The parties had a common intention to grow the business. Mr Rekkie's employment agreement expressly recognises the importance of his role in growing the business. He was seen and treated as a key senior manager in the business.

[39] The media/advertising business is a highly competitive environment and strong client relationships are key in terms of winning and retaining business. It was clearly within both parties' contemplation that Mr Rekkie would build strong and close relationships with Blackfoot's clients which would put him in a unique position to influence those clients in future.

[40] It was reasonable for the parties to enter into a restraint to give Blackfoot a reasonable opportunity to secure its client relationships if Mr Rekkie's employment ends.

#### *History of employment*

[41] Mr Rekkie was a key employee and he dealt almost autonomously directly with the clients, the relationships which Blackfoot is now seeking to preserve. He had an intimate knowledge of their businesses and therefore had their confidence in a way that his replacement is going to have to earn over time. It is reasonable for his replacement to have some time to be able to do that.

*Industry practice*

[42] The parties gave conflicting evidence about industry practice. Blackfoot's position was that it was common for senior employees in the media/advertising industry to agree to 12 month post-termination client restraints whilst Mr Rekkie's view was that three months was more normal. I consider the evidence that I heard on this point was not determinative so I find industry practice is a neutral factor in terms of my assessment of the reasonableness of the current restraint.

*Clients Mr Rekkie claims followed him to Blackfoot*

[43] Mr Rekkie's evidence was that a number of clients followed him to Blackfoot. That is disputed by Blackfoot. The evidence did not establish that Mr Rekkie had brought any clients into the business with him when he first started at Blackfoot.

[44] There are only four clients that Blackfoot seeks to restrain Mr Rekkie from working for who Mr Rekkie claims followed him to Blackfoot within the first 12 months of his employment.

[45] There was only limited (untested) hearsay written evidence from two of these four clients that their prior dealings with Mr Rekkie relationship with had influenced the decision to engage Blackfoot. One of these two written statements supports Mr Rekkie's view that the client transferred its business to Blackfoot because of him. However the other is ambiguous because it refers to Mr Rekkie having "won" the client for Blackfoot which implies there may have been more than the client's prior dealings with Mr Rekkie that was at play in Blackfoot winning their account.

[46] In terms of the other two disputed clients there is a lack of evidence that it was Mr Rekkie's prior relationship that resulted in the decision to place their business with Blackfoot. Therefore overall the evidence only established on the balance of probabilities that one of the four clients in issue placed work with Blackfoot because of their pre-existing relationship with Mr Rekkie.

[47] I am prepared to accept that Blackfoot has a lesser proprietary interest to protect in respect of that one client.<sup>17</sup> However, I still consider Blackfoot has a proprietary interest over the time and resources Mr Rekkie applied to maintain and develop that client relationship whilst employed by Blackfoot. It is reasonable to

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<sup>17</sup> That client is FPB.

expect to lesser period of restraint to apply to that one client. I also consider it reasonable for Blackfoot to seek to protect the other three client relationships with the restraint.

### *Consideration*

[48] Consideration for a restraint is necessary but mutual promises intrinsic in the offer and acceptance of employment may be sufficient to establish consideration.<sup>18</sup>

[49] Mr Harrison submits that there was no consideration. He says that an offer of employment is not in itself consideration and does not have any intrinsic value. He submits that because Clause 13.1 of Mr Rekkie's employment agreement expressly refers to consideration it cannot be implied.

[50] I find that there were mutual promises between made by the parties. Mr Rekkie promised to restrict his post-employment work activities by agreeing to a 12 month restraint to apply to clients he had worked with in 12 months before his employment ended. In return Blackfoot promised to provide him with on-going employment, career progression opportunities and remuneration.

[51] Mr Harrison argues that Mr Rekkie's remuneration of \$100,000 was inadequate which makes the restraint unreasonable. I do not agree. Mr Rekkie received a six figure income which had increased at the time of his resignation to \$140,000 plus company vehicle, laptop and mobile phone. That is not inadequate.

### *The scope of the restraint*

[52] The restraint is limited to those clients Mr Rekkie dealt with in the last 12 months of his employment. Blackfoot has reduced that further by advising it will not enforce the restraint for three clients with whom Mr Rekkie has a close personal connection.<sup>19</sup> That leaves 27 clients who fall within the restraint.

[53] I consider that the scope of the restraint is limited because it only applies to clients for/with whom Mr Rekkie worked in the last 12 months of his employment. The restraint relates to his current ability to influence these client relationships which

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<sup>18</sup> *Fuel Espresso Ltd v. Hsieh* [2007] NZCA 58.

<sup>19</sup> This is not the four clients he claimed to have brought to Blackfoot in the first 12 months of his employment.

I consider indicates that the restraint is limited to protecting that proprietary interest rather than just attempting to prevent competition.

*Nature of the restraint*

[54] Mr Harrison submits that the use of the words “*any work*” in the restraint makes it unreasonable because it prevents Mr Rekkie doing any work for the named clients not just from working as a media manager/director. I do not agree.

[55] Mr Harrison says it is also unreasonable because it is wider than the usual non-solicitation restraint because it prevents Mr Rekkie from working for any of the 27 named clients even if it is the client who approaches him and wants to use his services. I consider that is reasonable in the circumstances because the restraint would not be as effective in protecting the business connection if the clients could immediately follow Mr Rekkie.

*Duration of restraint*

[56] Mr Harrison submits that the length of the restraint is far longer than necessary and therefore anti-competitive rather than protecting a proprietary interest.

[57] Blackfoot says it can take six to 12 months on average to obtain a new client and that it could invest many hours of time worth tens of thousands of dollars into a client relationship before it would recoup that by winning a number of jobs for the clients. Blackfoot claims 12 months is necessary to allow it sufficient time to reinforce to its clients that its performance was not dependent on an individual employee such as Mr Rekkie but resulted of its business operations as a whole.

[58] Blackfoot also claims it needs 12 months to build client relationships and trust subsequent to Mr Rekkie’s departure. Mr Weatherley says that because Blackfoot is about creating strategies and plans for its clients, it is crucial that there is sufficient time to get to know a business and its dynamics so that they can recommend what should happen in the future. Mr Weatherley also believes 12 months is essential because of the “*extent of the damage that Marks’ already done through talking to our clients about his new business*”.

[59] Blackfoot's allegations about Mr Rekkie have not been proved to the required standard so I am not prepared to accept that 12 months is reasonable because of the damage Blackfoot claims Mr Rekkie has done to its business.

[60] Whilst 12 months may be the ideal for Blackfoot from its perspective it is important to note that what an employer may consider optimal is not the test to be applied. A restraint must be no more than is adequate to protect the employer's legitimate proprietary interest. I consider that means it must be at the lowest possible level.

[61] When considering what is adequate I take into account that Blackfoot prevented Mr Rekkie from working for any clients for the 23 days before his employment ended. That means that if the current restraint is enforced Mr Rekkie would effectively be prevented from working for the 27 named clients for more than 12 months. I consider that duration is too long so that makes the restraint unreasonable.

#### *Public interest considerations*

[62] It is not in the public interest for unreasonable restraints to be enforced so I find that the restraint in clause 13.2 of Mr Rekkie's employment agreement is unenforceable.

#### **Should the restraint be modified?**

[63] Blackfoot wants the restraint modified under the Illegal Contracts Act 1970 in accordance with the Authority's powers under s.162 of the Employment Relations Act 2000 (the Act).

[64] Section 164 of the Act provides that the Authority may only modify a restraint if it has identified the problem in relation to the agreement and has directed the parties in good faith to resolve that problem. Under s.164 the parties must mediate to resolve the problem and only if mediation is unsuccessful and if the Authority is satisfied that any other remedy would be inappropriate or inadequate may the Authority modify an agreement.

[65] Blackfoot submits mediation has already occurred. That may be correct but it was not mediation in terms of what is required under s.164 of the Act because the

parties did not attend mediation subsequent to the Authority identifying a problem with the restraint in Mr Rekkie's agreement.

#### *Identification of problem*

[66] In accordance with s.164 of the Act I identify to the parties that there is a problem with the restraint in clause 13.2 of Mr Rekkie's employment agreement because it is of an unreasonably long duration. That means it is longer than is merely adequate to protect Blackfoot's legitimate proprietary interest in protecting its client relationships for a limited time after Mr Rekkie's employment has ended.

#### *Direction to mediation*

[67] The parties are directed to mediation to occur on or before 26 November and to attempt to resolve in good faith the problem arising from the unreasonable duration of the restraint.

#### **What date should the restraint run from?**

[68] At this stage I have held the restraint to be unenforceable so there is no point determining when a restraint should run from. I will determine that issue if the parties not do resolve the problem over the duration of the restraint at mediation and I am required to determine Blackfoot's request that I modify the restraint.

#### **Does the restraint prevent Mr Rekkie from soliciting Blackfoot clients?**

[69] This is a moot point at this stage because I have concluded the restraint is unenforceable. I will determine the non-solicitation issue if mediation regarding the duration of the restraint is unsuccessful and I am required by the parties to determine whether the restraint clause should be modified.

#### **Outcome**

[70] I find that the restraint in clause 13.2 of Mr Rekkie's employment agreement is unreasonable and therefore unenforceable. The parties are directed to mediation to resolve the problem with the duration of the restraint in good faith before the Authority will consider modifying it.

## **Costs**

[71] Costs are reserved.

**Rachel Larmer**  
**Member of the Employment Relations Authority**