

Determination Number; WA 107/05

File Number: WEA 189/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Total Beauty Supplies Limited (applicant)

AND Jodie Northway (respondent)

REPRESENTATIVES Lorne Campbell for the applicant
Peter Northway for the respondent

MEMBER OF THE AUTHORITY Denis Asher

INVESTIGATION Palmerston North, 24 June 2005

DATE OF DETERMINATION 4 July 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. The Company asks the Authority to resolve the question of whether a restraint of trade provision in Ms Jodie Northway's individual employment agreement is reasonable and can be enforced – statement of problem received on 13 May 2005. If it is not the Company asks the Authority to modify it by way of s. 8 of the Illegal Contracts Act 1970. It also seeks an order requiring Ms Northway to comply with the restraint of trade provision, damages and penalties of \$5,000 for the respondent's

failure to give one month's notice of termination of employment and unspecified damages for breach of the restraint of trade provision. Costs are sought.

2. Ms Northway does not accept she acted in breach of her employment agreement and brings a counter claim for \$519.50 which she says the Company illegally deducted from her final pay – statement in reply received 16 May.
3. The parties underwent mediation but their employment relationship problem remained.

Investigation

4. During a telephone conference held on 10 June 2005 the parties agreed to a one-day investigation in Palmerston North commencing at 10.00 a.m. on Friday 24 June 2005. The parties usefully provided written statements in advance of the investigation.
5. Efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful.

Background

6. Key background details are as follows.
7. The Company was incorporated in 1984. It is in the business of importing, manufacturing and distributing professional hair care products, colouring products, retail shampoo and conditioning products, furniture, electrical equipment etc to hairdressing retailers and schools throughout New Zealand. The Company holds agencies for various products as well as marketing its own brand.
8. Ms Northway has worked in the hairdressing industry since leaving school aged 16 years. Following her apprenticeship she opened her own salon which she operated for four years. She has also tutored in hairdressing at the Wanganui Polytechnic.
9. Ms Northway commenced employment with the Company as its Salon Area Manager for Lower North Island on 1 September 2003. Her terms and conditions of

employment were set out in an individual employment agreement signed by the Company on 20 August and by Ms Northway on 24 August of that year.

10. On 31 March 2005 Ms Northway gave the Company four weeks' notice of the termination of her employment, expiring on 28 April 2005.
11. On 20 April the Company, by its counsel, Mr Lorne Campbell, wrote to Ms Northway reminding her of the restraint in her employment agreement and asked her to confirm that she would not breach it. Ms Northway replied on 26 April challenging the validity of the restraint.
12. During the four weeks' notice of the termination of Ms Northway, the Company did not raise with her its concern that she had not given a month's notice of termination as required by her employment agreement.
13. The Company says that, after collecting its motor vehicle from Ms Northway, it was assessed and damage to the value of \$519.50 was repaired. That sum was deducted from the respondent's final pay.

Ms Northway's Individual Employment Agreement

14. Clause 13 of the individual employment agreement provides verbatim as follows:

RESTRAINT OF TRADE

The employee shall not at any time during the term of this agreement and for a period of six months after termination of employment with the company for any reason

- a) *carry on or be connected, engaged, interested either directly or indirectly or alone or with any other person or persons and whether as principal, partner, agent, director, shareholder, employee or otherwise in any business in competition with the employer which is carried on within a radius of 100 kilometres of the employee's area of responsibility without the express written consent of the management of the company, provided that such consent shall not be unreasonably withheld, or*

- b) *employ or solicit the services of, or offer employment to, any person who was, during the last 6 months of the employee's employment, employed by the company, whether or not that employment had ceased at the time of the soliciting or proposed employment, or*
- c) *solicit business from or deal with in any way whatsoever, any person, firm, or company who is then or was during your employment with the Employer, a client or customer of the Employer, or induce or try to induce any such person, firm or company to withdraw custom from the Employer.*

15. Clause 4 d) of the same agreement provides verbatim for the following:

The employer may make rateable deductions from the employee's salary and bonuses for sickness or accident (when there is no special leave entitlement) default or at the employee's written request. Further the employer may make such deductions from the employee's salary and bonuses as are necessary from time to time to pay for the employee's purchases of the employer's products or any other debt due to the employer whatsoever.

- 16. Clause 16 a) of the agreement provides that it may be terminated *"by either party giving one month's notice in writing."*
- 17. Appendix III of the employment agreement is a motor vehicle policy. It provides for the recovery of the insurance excess where the employee is at fault in an accident.

The Company's Position

- 18. The Company says that Ms Northway, during the course of her employment, built up *"a wealth of knowledge about the applicant's sales and business practices and its relationship with its clients in the area"* serviced by her, and:

"It would be grossly unfair for the respondent to be able to exploit that knowledge immediately after her resignation for the benefit of the applicant's competitors."

(statement of problem)

19. In his witness statement, the Company's Managing Director, Mr Imre Rapcsak, says that the Company has a proprietary interest in the performance of Ms Northway's work. He repeats the claim that she build up a wealth of knowledge about its sales and business practices and its relationship with its clients in the area she serviced. He says she had no knowledge when she started and that she has built up a personal relationship with the customers, knows their likes and dislikes, their buying patterns and product preferences. She knows the qualities of the Company's products, can influence customer buying decisions and can entice customers away to her new employer. Mr Rapcsak says it would be grossly unfair for the respondent to be able to exploit that knowledge immediately after her resignation for the benefit of Company competitors. He asks the Authority to defer determining the extent of damages until the end of the 6-month period of restraint provided for in Ms Northway's employment agreement.
20. The Company also claims that Ms Northway's failure to give proper notice not only breached her contracted obligation but caused damage to it.
21. The Company says there is no suggestion that Ms Northway has breached her obligations to it of confidentiality.

Discussion and Findings

Restraint of Trade

22. For the following reasons I am not prepared to uphold the restraint of trade provisions set out in clause 13 of the respondent's individual employment agreement.
23. It is well established that restraints of trade are void and unenforceable unless proven to be reasonably necessary to protect proprietary interests of the former employer and in the public interest: *Cain v Turner and Growers Fresh Ltd* [1998] 3 ERNZ 314, *Gallagher Group Limited v Whalley* [1999] 1 ERNZ 490, etc. This is because, as a matter of public policy, an employer is not entitled to protection from mere competition by a former employee and the latter is entitled to use to the full any personal skill or experience acquired in the service of their former employer: *Welsh v Cooney* [1993] 1 ERNZ 407, etc.

24. As was graphically illustrated by Ms Northway's father and advocate, Mr Peter Northway, when the 100 kilometre radius is added to his daughter's area of responsibility it effectively cuts out most of the North Island from south of Hamilton. Mr Rapcsak could not explain the basis of, and the reason for, the 100 kilometre add-on to Ms Northway's area of responsibility. I am satisfied it is an arbitrary and is therefore unreasonable.
25. Similarly, Mr Rapcsak was unable to account for the six-month term of the restraint: it bears no relationship to any business cycle or industry requirement. I am satisfied that it also is arbitrary and is therefore also unreasonable.
26. No evidence has been unearthed by the investigation to justify amending this clause, either in respect of its geographic extent and/or its duration.
27. I do not accept that the Company, on a balance of probabilities basis, has established that, during the eighteen months of Ms Northway's employment, she built up a wealth of knowledge about the Company's sales and business practices and its relationship with its clients such that it would be – as it claims – grossly unfair for her to be able to exploit that knowledge immediately after her resignation for the benefit of a competitor. I reach this conclusion by taking into account the size of Ms Northway's area of responsibility – it comprised Taranaki, Manawatu, Hawke's Bay and Gisborne – and the number of her client base, approximately 400 clients. It was apparent from the records produced by the Company that Ms Northway had limited contact with these clients. In some instances she would have visited only the once, and in others not at all: of the 400 clients Ms Northway says she has visited 240. I conclude that, while the Company has a record with some of these clients extending over 25 years, Ms Northway's employment was for a significantly briefer period and was one in which she had significantly limited opportunity to contribute to – or become part of – any plainly valuable proprietary interest which the Company might now legitimately protect.
28. It would also be unfair to apply a restraint in respect of persons and business that the respondent has had not contact whatsoever.

29. The Company's claimed proprietary interest must also be measured in the light of this being a highly competitive industry, both in the area serviced by Ms Northway and nationally. Mr Rapcsak described as "*complete*" the overlap of his Company's products and those of Ms Northway's new employer. Ms Northway says, in respect of her new employer, that its customer list has a nine out of ten percentage of overlap with the applicant's. The parties agree that many of the clients stock a minimum of two different brands, so as to provide customers with a measure of choice, although Mr Rapcsak says that since Ms Northway left the Company's employment there is a new trend of clients "*going just for (the Company's products)*". Mr Rapcsak accepts his Company faces more than three competitors in the region previously serviced by the respondent: Ms Northway estimates the number to be upward of eight. I conclude from the above that the Company does not enjoy a market share that stands to be undermined by Ms Northway's departure to a competitor.
30. Conversely, applying the restraint sought by the Company will have serious implications for Ms Northway's employment, financial and domestic situations: she is unable to return to full-time hairdressing because of an (uncontested) overuse injury. She is unable to return to tutoring employment because of her (uncontested) claim that no positions are presently open. With her partner, Ms Northway recently took on a mortgage in respect of a new home in Wanganui: her ability to move out of the district is thereby significantly constrained. Her efforts to obtain a sales position outside of hairdressing, etc have been unsuccessful to date.
31. I note also that the Company has elected not to seek to apply identical restraints in respect of other former sales employees who have left to take up work with the applicant's competitors. This is because, the Company says, other employees brought into the Company sales expertise acquired from elsewhere whereas Ms Northway's derived entirely from her employment with the respondent. While this is an area of discretion for the Company, this evidence confirms the clear impression that this is a highly competitive industry in which employees typically move freely from one competitor to another. I am satisfied that it would be arbitrary and unfair to constrain Ms Northway from doing the same when other employees have not been similarly restrained.

32. The Company has failed to meet its obligation to show the reasonableness of the restraint it would have applied to Ms Northway.

Failure to Give Notice

33. This is a make-weight claim: the employment agreement does not provide a definition of a month whereas the Concise Oxford Dictionary (10th Edition) does: it describes a month as, amongst other things, "*a period of 28 days or four weeks*". Ms Northway's notice met that requirement. Besides, the Company had every opportunity to raise within the disputed period with the respondent its view that lengthier notice was required: it did not do so. It did not do so, I find, because it had no real concern about this matter. Mr Rapcsak's complaint was that the respondent would be able to work for a competitor "*that much sooner*" (oral evidence). He agreed that that much sooner, in this instance, amounted to one day. There is no evidence of measurable damage to the Company in respect of that one day, arising out of this disputed matter. For these reasons its claims must fail.

Illegal Deduction

34. I do not accept that the Company was entitled to deduct monies from Ms Northway's final pay in respect of damage to its motor vehicle. This is because:
- a. The appendix to the employment agreement provides for payment of any excess when the damage "*is found to be the fault of the driver*". Ms Northway disputes being at fault. No opportunity was provided the respondent to contribute to the Company's findings before it reached the decision to hold her responsible. That is unfair. It cannot be reasonably said that the damage was the fault of Ms Northway.
 - b. More importantly, the Employment Court has found that it is more than likely that the Wages Protection Act 1983 would render a deduction clause ineffective since the employer had purported to reserve the right to deduct money from wages without obtaining express permission: *Harrison v Tuckers Wool Processors Ltd* [1998] 3 ERNZ 418 (not subsequently overturned by the Court of Appeal). Ms Northway was not provided with

any opportunity to comment before the deduction was effected, hence she did not provide express permission. The monies must be returned to the respondent immediately.

Remedies

35. The amount of \$519.50 illegally deducted from Ms Northway's final pay must be returned to her by the Company: consistent with its indication given during the investigation repayment can be expected immediately following receipt of this determination.

Determination

36. For the reasons set out above I find against all of the claims brought by the applicant, Total Beauty Supplies Limited, against the respondent, Jodie Northway.
37. I find in favour of Ms Northway's claim against Total Beauty Supplies Limited to have it immediately restore to her the sum of \$519.50 (five hundred and nineteen dollars and fifty cents) illegally deducted from her final pay, and direct accordingly.
38. Costs are reserved at the request of the parties. However, I make the following preliminary observations: given that the applicant has not succeeded in its claim whereas the respondent has, while noting that Ms Northway was represented by her father and has not incurred any legal or filing costs, costs should probably – in all fairness – lie where they fall.

Denis Asher

Member of Employment Relations Authority

