IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 528
3135801

	BETWEEN	DIANNA WATTS Applicant
	AN+D	CROMBIE LOCKWOOD (NZ) LIMITED Respondent

Member of Authority:	Leon Robinson
Representatives:	Charles McGuinness, counsel for the Applicant June Hardacre, counsel for the Respondent
Investigation Meeting:	25 August 2021 by internet video conference
Submissions received:	31 August 2021 from Applicant 1 September 2021 from Respondent
Determination:	26 November 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dianna Watts (Ms Watts) left her senior insurance broker role with Crombie Lockwood (NZ) Limited (Crombie Lockwood) to set up an insurance broking business with a co-worker. She was unable to reach an accommodation with Crombie Lockwood on a reduction and partial waiver of her post-employment restraints before her departure and now asks the Authority to determine that the restraints are unreasonable and unenforceable.

[2] The parties were unable to resolve the problem between them by mediation.

The Authority's investigation

[3] The Authority establishes the facts of this employment relationship principally through an investigation meeting held by internet video conference. The parties and their witnesses lodged written statements of evidence and were examined under oath or affirmation by the Authority and the representatives. The Authority also received documentary evidence and heard submissions from counsel on the evidence taken and relevant matters of law.

[4] 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.

The issues

[5] Crombie Lockwood is a New Zealand insurance broking company offering tailored personal and business insurance solutions to its clients and employing approximately 950 people, 500 of whom are employed as insurance brokers.

[6] Ms Watts came to be employed by Crombie Lockwood when it acquired Lumley General Insurance (NZ) Limited in 2008. She was initially employed by Crombie Lockwood in Hamilton as a Relationship Manager (that role now titled Insurance Broker) on a salary of $75,000.00 under an employment agreement signed on 1 May 2008.

[7] In 2010 Ms Watts was promoted to the role of Group Broking Manager.

[8] On 1 October 2013 Ms Watts and Crombie Lockwood entered into new terms of employment recorded in a written individual employment agreement. The new agreement recorded a salary of $100,586.00 and included new restraint provisions:-

> **25 Restraint of trade after employment ends**
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> 25.1 The Employee acknowledges that:
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> (a) during the course of the Employee's employment, the Employee will obtain confidential information concerning the business, clients and finances of the Employer and its related and associated companies.
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> (b) disclosure of the confidential information could materially harm the Employer and its related and associated companies;

(c) the undertakings set out below are reasonable and necessary for the protection of the Employer and its related or associated companies' goodwill; and

(d) the remedy of damages may be inadequate to protect the interests of the Employer and the Employer is entitled to seek, and obtain, injunctive relief, or any other remedy in any court to protect its interests.

Non-compete

25.2 For an 8 week period in the Restricted Area as defined in Schedule 2 commencing on the termination of the Employee's employment (however terminated), or any such lesser period and/or area that the Employer in its sole discretion may elect, the Employee must not (without the Employer's prior written consent) solely or jointly with any person, whether as a consultant, contractor, partner, agent, employee, principal, executive officer, joint venturer, member, advisor, shareholder, director or otherwise howsoever, directly or indirectly, carry on, be engaged, concerned or interested in or otherwise associated with any trade or business which competes with any trade or business carried on by the Employer or any of its related or associated companies as at the date of termination of the Employee's employment.

Non-Dealing and Non-Solicitation of clients and customers

25.3 The Employee agrees that the Employee will not, at any time during the term of the Employee's employment, and for the 24 months commencing on the termination of the Employee's employment (however terminated), and without the Employer's written consent, solely or jointly with any person, whether as a consultant, contractor, partner, agent, employee, principal, executive officer, joint venturer, member, advisor, shareholder, director or otherwise howsoever, directly or indirectly:

(a) accept instructions from or otherwise deal or trade with any person who or entity which, within the 24 month period prior to the termination of the Employee's employment, was a client of the Employer or of any related or associated company;

(b) provide services to or otherwise deal in trade with any person who or entity which within the 24 month period prior to the termination of the Employee's employment; was a customer of the Employer or of any related or associated company; or

(c) induce or solicit or endeavour to induce or solicit, any person who or entity which, within the 24 month period prior to the termination of the Employee's employment, was a client or customer of the Employer or of any related or associated company, to cease doing business with the Employer or with any related or associated company, or to reduce the amount of business which the person or entity would normally do with the Employer or with a related or associated company.

(d) for completeness, clause 25.3 prohibits the Employee from assisting a new employer or its staff in dealing in trade with, or inducing or soliciting, any person who or entity which, within the 24 month period prior to the termination of the Employee's

employment, was a client or customer of the Employer or of any related or associated company.

Non-Solicitation of employees

25.4 The Employee agrees that the Employee will not, at any time during the term of the Employee's employment, and for 12 months commencing on the termination of the Employee's employment (however terminated), and without the Employer's written consent, solely or jointly with any person, whether as a consultant, contractor, partner, agent, employee, principal, executive officer, joint venturer, member, advisor, shareholder, director or otherwise howsoever, directly or indirectly, induce or solicit, or endeavour to indue or solicit, any person who or entity which was at any time within the 24 month period prior to the termination of the Employee's employment, an employee, director, executive, manager, consultant, agent, representative, associate, contractor or adviser to the Employer or to any related or associated company, to terminate his, her or its employment other relationships with the Employer (or as the case may be related or associated company), whether or not that person would commit a breach of that person's contract or employment agreement.

Extension of restraints

25.5 These restraints extend to all of the Employer's related companies as well as any entity to which the Employer's operations are transferred and which continues to employ the Employee.

Restraints reasonable

25.6 The Employee agrees that these restraints are reasonable in all the circumstances and are intended to operate to the maximum extent. However, if a court finds any of them to be void and unreasonable for the protection of the interests of the Employer's or its related or associated companies, and would be valid if part of the wording was deleted or the period or area of activity was reduced, the Employer agrees to accept any modification to this clause required to make the restriction enforceable. The above restraints are separate, distinct and several, so that the enforceability of any restraint does not affect the enforceability of the other restraints. The Employee also recognises that they have received reasonable consideration for these restraints in the remuneration the Employer provides.

25.7 Any Reference in this agreement to clients of the Employer includes clients of any related company to the Employer as the term Related Company is defined in the Companies Act 1993.

[9] In 2014, Ms Watts' salary was increased to $112,000.00 as recorded in a letter of variation dated 23 September 2014.

[10] In August 2015 Ms Watts was permitted to step out of her management role into a Senior Broker role. A letter of variation dated 12 August 2015 recorded the change in position and also, that all other terms of employment remained the same.

[11] On 12 November 2020 a limited liability company Affiliated Insurance Brokers (Waikato) Limited was incorporated in which Ms Watts was a shareholder and director. A co-worker Kim Oettli (Ms Oettli) was also a director and held shares too by way of a corporate shareholding.

[12] On 23 November 2020 Ms Watts gave three months' notice of resignation from her employment with Crombie Lockwood. Ms Oettli also gave notice of her resignation that same day.

[13] Crombie Lockwood acknowledged Ms Watts' advice by letter of the same date correcting Ms Watt's last day of employment (after the applicable notice period) as 22 January 2021. Ms Watts was advised too that Crombie Lockwood had elected to require her to serve out her notice period on garden leave. The letter also reminded Ms Watts of her post-employment obligations.

[14] Ms Oettli wrote by email of 3 December 2020 to Crombie Lockwood's Acting Executive People and Culture Scott Cresswell (Mr Cresswell) seeking engagement with Crombie Lockwood about her and Ms Watts' post-employment obligations. In particular, the advice indicated Crombie Lockwood's waiver of rights was sought so as to permit Ms Oettli and Ms Watts to continue to do business with six Crombie Lockwood clients.

[15] Ms Watts was also seeking engagement with Crombie Lockwood to obtain its agreement that the relevant 24-month non-solicitation, and non-dealing of clients and customers restraint, be reduced to 12 months and, that the scope of the relevant non-solicitation restraint be reduced to clients that she had had involvement with.

[16] Crombie Lockwood would not agree to consider a waiver without first having the details of the six customers. The details were not provided and consequently there was no agreement from Crombie Lockwood to vary or waive Ms Watts post-employment obligations.

[17] By email dated 25 January 2021 Ms Watts and Ms Oettli confirmed that the new company they had set up was called Affiliated Waikato and was part of the Steadfast Broker Network.

[18] On 18 February 2021 Crombie Lockwood became aware of a Disclosure Statement provided by Ms Watts declaring that she is a registered financial adviser

posted on the Affiliated Insurance Brokers Limited website. The Disclosure Statement was prepared on 26 January 2021.

[19] Ms Watts' LinkedIn page detailed her experience as Director of Affiliated Insurance Brokers Limited as having commenced from February 2021.

[20] Crombie Lockwood formed a view that Ms Watts had acted contrary to her post-employment obligations. It instructed its solicitors to correspond with Ms Watts and counsel wrote to her by letter of 12 March 2021. The letter sought to remind Ms Watts of her obligations by:-

(a) confirming that Crombie Lockwood did not agree to vary or waive any of Ms Watts post-employment obligations in the 2013 employment agreement; and

(b) noting that Ms Watts had commenced employment with AIB on 26 January 2021 in breach of her eight week non-compete restraint under the 2013 Employment Agreement; and

(c) putting Ms Watts on notice that if she breached any of her other post-employment obligations Crombie Lockwood would initiate proceedings in the Employment Relations Authority and seek appropriate remedies.

[21] On 1 April 2021 Ms Watts lodged the statement of problem seeking determinations from the Authority that the restraints are unreasonable and unenforceable.

[22] On 21 April 2021 Crombie Lockwood lodged its statement in reply stating its view that the restraints are reasonable and enforceable.

[23] The issues to be decided include these:-

(a) is the "non-compete" restraint at clause 25.2 of the IEA too broad in scope and an unlawful and unenforceable anti-compete clause?;

(b) is the "non-dealing and non-solicitation of clients and customers" restraint at clause 25.3 of the IEA unreasonable and unenforceable regarding the;

i. duration; and

ii. the scope of the class of persons or entities covered by the clause.

(c) is the "non-solicitation of employees" restraint at clause 25.4 unreasonable and unenforceable in;

i. duration; and

ii. the scope of the class of persons and entities covered by the restraint.

Is the non-compete restraint reasonable and lawful?

[24] As a matter of public policy, the law supports the free mobility of labour so that people are able to earn a living. Generally, the free mobility of economic resources is regarded as being in the public interest. Restraints of trade are contrary to these public policy considerations and are prima facie unlawful.

[25] The law permits restraints only to the extent that they are reasonable to protect legitimate proprietary interests and are drafted only so wide as is reasonably necessary to protect legitimate proprietary interests. In *Gallagher* Group the Court of Appeal restated the legal principle as follows:-

> … covenants restricting the activities of employees after termination of their employment are, as a matter of legal policy, regarded as unenforceable unless they can be justified as reasonably necessary to protect proprietary interests of the former employer and in the public interest.

[26] In *Air New Zealand v Kerr*, Judge Ford explained the steps to be applied in deciding on whether a restraint could be upheld. He stated the court or the Authority must:-

i. first determine what the clause means when properly construed; and

ii. second, the former employer must establish a legitimate proprietary interest capable of protection; and

iii. third, if such an interest is established, then the restraint must be shown to be no wider than is reasonably necessary.

[27] The restricted area of clause 25.2 as defined in Schedule 2 is "Hamilton – Waikato and Bay of Plenty Region and within 50 of Head Office".

[28] Ms Watts asks the Authority to determine that the clause 25.2 restraint is unlawful and unenforceable because it is a "non-compete" clause that is too broad in scope.

[29] I consider clause 25.2 to be a clause which seeks to protect Crombie Lockwood against mere competition. I do not accept that Crombie Lockwood is entitled to protection against mere competition.

[30] However, I accept that as a matter of law, such a covenant may be valid where the employee is in a position to acquire so close a personal acquaintance with customers so as to be able to sway them.

[31] Furthermore, I consider that Ms Watts by virtue her experience and the positions she held with Crombie Lockwood over a considerable period of time was in such a position so as to hold personal acquaintances with Crombie Lockwood customers to be in a position to sway them. I accept that Ms Watts was intimately aware of Crombie Lockwood names and contact details of current and prospective clients, client insurance requirements, pricing information, renewal dates for insurance policies. I have no doubt that she possessed intimate knowledge of the nuances of specific client relationships that enabled her to operate very effectively and successfully for Crombie Lockwood over many years. It is primarily that intimate client relationship knowledge and know how that I consider Crombie Lockwood is entitled to protection of. For this reason, I consider Crombie Lockwood is entitled to the protection it procured which otherwise it would not be entitled to rely on.

[32] I am particularly mindful too that Ms Watts is an experienced and highly qualified insurance broking professional. She has considerable years' experience in the industry and as such is very experienced in commercial business matters. I regard her as a sophisticated business professional. As such, I consider that Ms Watts is to be held to the promises she made when she entered into the October 2013 restraint provisions. Whether or not she appreciated the significance of them, she is to be held to them. Agreements are made to be kept.

[33] I note too that Ms Watts' disclosure statement was prepared on 26 January 2021. That disclosure statement confirmed her involvement with a new entity competing with Crombie Lockwood. Ms Watts engaged in preparatory steps to be involved with a competitor of Crombie Lockwood before her employment with it ended. Her

engagement with that entity was in place immediately during the commencement of the purported 8 weeks restraint period. I infer from these facts that Ms Watts had no intention of respecting the restraint against competition provision she was bound by.

[34] I contrast the above inference against the bona fides Ms Watts and Ms Oettli purported to demonstrate when they sought to enter into good faith discussions with Crombie Lockwood to negotiate variations of the restraint provisions. While they sought to demonstrate good faith to Crombie Lockwood in seeking to engage, their other actions in setting up in competition before the employment had actually ended demonstrated was wholly inconsistent and quite unprincipled.

[35] I now consider the garden leave period Crombie Lockwood directed Ms Watts to serve as her notice period. For that two month period, Crombie Lockwood was protected against Ms Watts operating to compete with it. The two month notice period effectively operated as a two month restraint period. Viewing the effect of the garden leave period this way, I conclude that Crombie Lockwood ought not be permitted to enforce the non-compete clause against Ms Watts having effectively obtained the same benefit by requiring her to serve out her notice period as garden leave. For clarity, I consider Ms Watts has contemporaneously observed her garden leave notice period as the non-compete period of her IEA.

[36] For the foregoing reasons, I conclude the non-compete clause to be reasonable and enforceable but Ms Watts ought to be released from it because Crombie Lockwood had already achieved the same benefit of it through its requirement that Ms Watts serve out her notice period as garden leave.

[37] I therefore answer the first issue for determination by finding that the 'non-compete' restraint at clause 25.2 of the IEA is not too broad in scope as to be unlawful and unenforceable. It is for the other reasons that I have outlined that I consider the non-compete restraint cannot be enforced against Ms Watts.

Is the non-dealing and non-solicitation of clients and customers restraint unreasonable and unenforceable regarding the duration and scope of class of persons or entities?

[38] Ms Watts seeks a determination that the scope of the restricted clients in clause 25.3 is unreasonably wide and unenforceable.

[39] It is submitted on Ms Watts behalf that this covenant has been expressed in the broadest possible terms and is a 'blunt tool' with no refinement or nuance. It is further submitted that the thrust of clause 25.3 is to restrict all competition in the same way as the non-compete clause seeks to do being focused on restricting Ms Watts from having anything to do with any of Crombie Lockwood's clients whether or not she had ever met them before. It is submitted too, that Crombie Lockwood's proprietary interest must be limited to unfair influence that Ms Watts might have over her ex-clients.

[40] Ms Watts' evidence was that she was not privy to any of Crombie Lockwood's strategic or business information or involved in the development of any strategies or trade secrets. She gave evidence she had no idea how the premiums and pricing would work. She said all she did was enter client information into an algorithm and the algorithm then generated an appropriate premium and policy for the client. Crombie Lockwood does not accept Ms Watts involvement was so limited only to inputting data into an algorithm.

[41] Ms Watts became very experienced and skilled in brokering insurance for clients in the transport sector. He success grew out of her love of cars and it was accepted that she had distinguished herself in this regard.

[42] I accept the submission that the proprietary interest worthy of protection is the client/customer relationships built up and the influence she held with Crombie Lockwood clients. Those nurtured relationships and that influence belonged to Crombie Lockwood and Ms Watts ought not be permitted to use the same to her personal advantage against her former employer.

[43] It is submitted that the restraint should only be drafted no wider than allowing Crombie Lockwood to replace Ms Watts but not so as to allow a new or inexperienced broker to train up and gain as much experience as Ms Watts had. I agree with the submission if it permits a period of time for Crombie Lockwood to secure its relationships with its clients.

[44] I agree that the assessment of reasonableness takes place at the time that the agreement was entered into. In October 2013, Ms Watts was a less experienced insurance broker than she was at the time her employment terminated.

[45] I accept that the restraint duration and scope ought only be as wide as is reasonably necessary. I accept too that the restraint ought only operate to permit Crombie Lockwood to prepare for and meet fair competition from Ms Watts.

[46] It is submitted that the restraint at clause 25.3 is drafted too widely – the scope of clients that it applies too is too wide and the duration is too long.

[47] I do not accept that the scope of clients is too wide. I certainly do not consider it unreasonable. I incline to the view that the restraint being applicable to a client or customer of the employer within 24 months of the termination of employment is reasonable. It matters not that Ms Watts had any dealings with the client or customer. The material point is that Crombie Lockwood has a proprietary interest in the client or customer, not that she had actual knowledge or dealings with them. I consider this 24 month qualification as being a fair representation of Crombie Lockwood's current, relevant and material customer base so as to fairly represent the proprietary interest that is sought to be protected.

[48] I have a different view however about the duration of the purported restraint. It seems to me that a 24 month period exceeds the period that is reasonable for Crombie Lockwood to prepare to protect and meet the imminent competition Ms Watts might present for it. Instead, I have a view that Crombie Lockwood with the resources and expertise available to it, ought to have a period of 12 months to prepare to meet the competition against it. I consider that 12 months is a reasonable period for which it ought to have protection for the proprietary interest it has in its customer and client base.

Is the non-solicitation of employees restraint at clause 25.4 unreasonable and unenforceable in duration and scope of persons and entities?

[49] I do not consider the parameters of this restraint unreasonable or unenforceable. I am fortified in this view because of the conclusions I have reached about the parameters of clause 25.3.

[50] I do not accept that the scope of clients is too wide. I certainly do not consider it unreasonable. I incline to the view that the restraint being applicable to an employee of the employer within 24 months of the termination of employment is reasonable. I consider it reasonable that Crombie Lockwood would seek to protect its investment in employees who were employed within 2 years of Ms Watt's employment ending. That

seems to me to be a fair representation of the propriety interest sought to be protected especially having regard to conventional rates of employee turnover.

[51] I consider the 12 month non-solicitation of employees restraint duration sufficient protection for Crombie Lockwood to be assured that its employee workforce may not be interfered with and that its investment in that workforce is protected.

The outcome

[52] I thank Crombie Lockwood for providing the Authority with the comparison of restraint related employment terms and conditions.

[53] Ms Watts asks the Authority to determine the restraints at clauses 25.2 to 25.4 are unreasonable and unenforceable. It is submitted that it would be against public policy if the Authority employed its ingenuity to carve out a modified restraint.

[54] I do not agree. I consider that in all the circumstances it is appropriate that the parties be held to restraints but modified ones having regard to the matters I have outlined above. Accordingly, pursuant to section 83 of the Contracts and Commercial Law Act 2017 and section 164 of the Employment Relations Act 2000 I therefore modify the Non-dealing and Non-solicitation of clients and customers restraint at 25.3 of the IEA so that the duration of that restraint is reduced from 24 months to 12 months. In all other respects the restraints remain unmodified:-

> **Non-Dealing and Non-Solicitation of clients and customers**
>
> 25.3 The Employee agrees that the Employee will not, at any time during the term of the Employee's employment, and for the 12 months commencing on the termination of the Employee's employment (however terminated), and without the Employer's written consent, solely or jointly with any person, whether as a consultant, contractor, partner, agent, employee, principal, executive officer, joint venturer, member, advisor, shareholder, director or otherwise howsoever, directly or indirectly:

[55] For the sake of clarity, I also determine that the restraints be reduced by the period of garden leave Ms Watts served as her notice period.

[56] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are unable to do so Ms Watts may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Crombie Lockwood would then have 14 days to lodge any reply memorandum.

[57] I thank counsel for the assistance they have provided to the Authority in this investigation.

Leon Robinson
Member of the Employment Relations Authority