IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 178
ARC 31/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ASIACITI TRUST NEW ZEALAND LIMITED Plaintiff
AND	LEE HARRIS Defendant

Hearing:	24-25 September 2013 (Heard at Auckland)
Appearances:	Emma Butcher, counsel for plaintiff Richard Harrison, counsel for defendant
Judgment:	25 September 2013

ORAL JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] I need to give a decision in this matter today, but what I am going to do is give an outline of my reasons for my decision in summary and I will give fuller reasons at a later date. I think it is fair to both parties that they know of my decision in this matter having heard the evidence over the last two days, at this stage, because of the fact that the time is running on the restraint. I do reserve the right to consider the whole of the case in the submissions when I do prepare the full reasons at a later date.

[2] The challenge is dismissed. The restraint of trade is too wide and on normal principles applying is unenforceable. The law jealously guards the right of employees to pursue their chosen occupations and earn a living and this right will not be lightly interrupted by the Courts in upholding in circumstances where it is not

proved or appropriate restraints couched in terms such as the restraint in this case. The policy of the law relating to such restraints is based on that underlying principle which Mr Harrison succinctly referred to in his submissions.

[3] The restraint in this form contains considerable difficulties for the plaintiff in view of the fact that it is worldwide in operation, extends for twelve months, contains a ninety day trial period, with right, therefore, to dismiss without justification, and also contains a waiver provision requiring the employer to act reasonably. That right was not taken up in this case but there may well be a reason for that. I will come to that shortly. Ms Harris, the defendant, was a junior trust officer with employment of relatively short duration. Her previous background was as a legal executive, she was on a low income comparatively speaking with others in the company, and in the wider legal industry.

[4] Her employer, the plaintiff was, and is, a New Zealand registered company carrying out business solely in New Zealand. It has its place of operation in Auckland. The restraint clause is, as I have said, far too wide, and I am not prepared to modify it as pleaded, so that it might become enforceable and I make that decision in respect of my discretion for the following reasons. First, a reasonable term even if enforceable in any event would have been three months, which has long since expired. Secondly the evidence of the plaintiff as to the proprietary interest it seeks to protect is inadequate. Ms Willis' evidence on the point could really only be considered as in summary form and cursory. Thirdly the evidence as to the need to restrain Ms Harris is inadequate. The restraint is imposed on all employees without consideration of the individual need for it and its requirements. So any attempt by this employer to justify it is retrospectively based and without sound basis in principle. Fourthly, at her level of employment Ms Harris' employment agreement would not warrant the clause. She was a trusted administrator and carried to the job skills that she had learned as a legal executive and from her own educational advancement. Fifthly, so far as is relevant and in consideration of the discretion to modify there is nothing that points to any consideration for the restraint and in that respect I also refer to the comparative evidence of Ms Willis' own income. Finally there is no evidence of compliance with ss 162 and 164 incorporated by s 190 of the Employment Relations Act 2000. Those sections incorporated into this Court's

jurisdiction require those matters to be considered when dealing with an application to modify under the Illegal Contracts Act 1970 as effectively this application is in its second part.

[5] Going on with my decision I am satisfied on the evidence of Ms Harris based on the contemporary documents, that Ms Willis was of the view at the interview of Ms Harris that from the outset the clause was unlikely to be enforceable. That would be obvious anyway. The law in this area is now well established with plenty precedent for advice to employers. Ms Meha who had worked as an in-house counsel for the defendant acknowledged in her evidence the weakness of the clause. Indeed she negotiated a different clause before commencing employment with the plaintiff. The evidence of Ms Willis is more substantially based on and aimed at the need for confidentiality which is contained in other unobjectionable clauses of the agreement. It is a totally separate issue not pleaded and there is no evidence of any breach by Ms Harris.

[6] The restraint clause contains a waiver. This is not to be unreasonably withheld. There is undisputed evidence of Ms Willis' adverse reaction to Ms Harris' resignation where she effectively indicated she would not then consider waiver because Ms Harris had not asked her for it. If Ms Harris had asked for it at a later date, Ms Willis would have been contractually bound to consider it. Her reaction, which was a petulant response, may have had the effect of putting Ms Harris off at that point from seeking a waiver. The waiver in any event in my view, arose again in a form during negotiations where the plaintiff sought undertakings. The evidence shows that the undertakings were too wide and unreasonable. Ms Willis' evidence on this point of the undertaking could only lead to the accusation that she was being facetious. She indicated that Ms Harris' refusal to give the undertaking sought caused concern. The undertakings would have seriously fettered Ms Harris' ability to perform duties in her new job. In any event the extent of the undertaking would have breached the requirement as to reasonableness which in my view is enshrined in the agreement if it applied at that point and it may well do. The evidence of Ms Willis as to the allegations of Ms Harris as to dealings with clients and potential clients, clearly remained unmodified even after she would have seen and been able to consider Ms Harris' brief of evidence and also the evidence of Ms Lim. It is

particularly pertinent in respect of Ms Willis' allegations as to Ms Harris' connection to Ms Lim who also gave evidence as I say. Upon this evidence, Ms Willis' allegations are susceptible to the allegation that they have been raised by her simply as makeweights.

[7] I come now to the matter of costs having set out the basic outline of my reasoning and as I say I will put my decision in a fully reasoned way at a later date.

[8] Insofar as costs are concerned it is my view that this clause was so obviously wide as to never be enforceable under New Zealand law. I have already said that the right to work and the means to earn a living are jealously guarded by the law, hence the policy reasons for holding such clauses ab initio unenforceable without sanction of the Courts. It did not take long during the course of this trial to ascertain the position in this case relating to that clause and hence my brief attempt to allow the parties to see if they could resolve the matter. Unfortunately they could not. I will deal with the submissions on costs, but I do make the point that I will be seriously considering whether Ms Harris should, in the circumstances of this case, have full reimbursement for the costs that she has expended in this matter. In that regard, I will give each party seven days to file memoranda as to costs.

M E Perkins
Judge

Oral judgment delivered at 5.01pm on 25 September 2013