IN THE EMPLOYMENT COURT
AUCKLAND

[2013] NZEmpC 238
ARC 31/13

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

Hearing:	24-25 September 2013 (Heard at Auckland)
Appearances:	Emma Butcher, counsel for plaintiff Richard Harrison, counsel for defendant
Judgment:	12 December 2013

REASONS FOR JUDGMENT OF JUDGE M E PERKINS

The employment agreement

[1] The defendant, Ms Lee Harris, was employed by the plaintiff, Asiaciti Trust New Zealand Limited (Asiaciti) between 13 June 2011 and 15 February 2013. She was initially employed as an assistant trust administrator and was subsequently promoted as a trust administrator.

[2] The employment relationship was pursuant to an individual employment agreement dated 9 June 2011.

[3] By virtue of the agreement the employment was subject to a restraint clause limiting the circumstances under which Ms Harris could enter into employment following termination of her employment with Asiaciti. That clause read as follows:

> **9. Non-competition by the Assistant Trust Administrator**
>
> 9.1 The Assistant Trust Administrator agrees that she shall not directly or indirectly be employed by any corporation or firm carrying on the business of the [plaintiff] or the Group [of companies that included the plaintiff] or by any associated entity of such a corporation or firm wherever located for a period of twelve (12) months after termination of the [IEA] for any reason whatsoever. The [plaintiff] may at the written request of the Assistant Trust Administrator agree in writing to waive this clause on such conditions as the [plaintiff] may consider fit. The [plaintiff] agrees that this waiver would not be unreasonably withheld.

[4] It is inferred that the same condition applied to her position as Trust Administrator.

Factual outline

[5] Asiaciti is a member of the Asiaciti Group. That group is a well established registered trust business in the Asia/Pacific Region. Asiaciti is a New Zealand based independent trustee providing services to offshore clients. Ms Lauren Willis, the General Manager of Asiaciti, stated in evidence that the nature of New Zealand trust legislation creates an attractive environment for non-resident private investors to use New Zealand trusts to hold international investments and private assets. She stated that these New Zealand trusts provide non-resident investors with a globally recognised structure for tax effective preservation of private wealth.

[6] Ms Harris, who impressed me as a person having an ambition to progress in her chosen area of employment, was first employed by Asiaciti in a relatively junior position as an assistant trust administrator. She was then promoted to the position of a trust administrator. She had a background as a legal executive in a law firm, but also had her own business providing contract work for lawyers and accountants and providing family trust gifting services directly to the public. In addition to that she undertook a course of study towards obtaining a diploma in international trust management (the STEP diploma). She graduated to this diploma through her efforts and at her own expense.

[7] These activities outside employment with Asiaciti were disclosed by Ms Harris to Ms Willis prior to taking up employment.

[8] Asiaciti did not provide Ms Harris with the progress in her employment that she had hoped for. She resigned her employment and took up new employment with Staples Rodway Limited. Her position with that company was as a trust administrator in their foreign trust division. She was to have no part in the marketing of Staples Rodway's foreign business and her role was simply an administration one.

[9] At the time of termination of employment with Asiaciti, it initially indicated that it would endeavour to restrain Ms Harris from taking up employment with Staples Rodway pursuant to cl 9.1 in the employment agreement. However, in accordance with the requirement that waiver of the restraint would not unreasonably be withheld, negotiations took place in an endeavour to agree on the terms upon which Asiaciti would waive the clause.

[10] No agreement could be reached as to the conditions of waiver. Proceedings were commenced in the Employment Relations Authority (the Authority) by Asiaciti to enforce the restraint. In a determination dated 30 April 2013,[1] the Authority refused to uphold the restraint and also declined to exercise its discretion to modify the agreement under the Illegal Contracts Act 1970. On 15 May 2013 Asiaciti filed a challenge de novo to the determination.

The nature of the employment

[11] There was a conflict in the evidence between Ms Willis, the sole witness for the plaintiff, and Ms Harris as to the extent of her duties with Asiaciti in the context of the restraint. Ms Willis stated that Ms Harris:

a. Had "primary responsibility for five of the plaintiff's largest clients";

b. "Responsibility for a number of other smaller clients and their trusts";

c. "Direct visibility of Asiaciti's entire client base";

[1] [2013] NZERA Auckland 154.

d. And "further visibility" as a result of having "responsibility for preparing the quarterly reporting update to the Inland Revenue Department in relation to the trusts underlying the Managed Trusts Companies."

[12] Ms Willis, however, confirmed that while Ms Harris had access to confidential information and would "be dealing on a frontline basis with clients", her role was only administrative. She also maintained that Ms Harris had extensive contact with senior members of "her" trust clients. Concern was expressed at Ms Harris' French speaking capabilities, that she was effective and ambitious and held herself out as an authority on trusts. These apparently were grounds for fuelling Ms Willis' belief that Ms Harris would breach the agreement.

[13] As I have indicated Ms Harris' background was as a legal executive. She referred in her evidence to her duties. She completed Company Office annual returns for the managed trustee companies. She prepared quarterly reporting to IRD. She managed information on clients' banking records. She clearly dealt with day to day correspondence (mainly electronic) with clients. She said in evidence that she was closely supervised by Ms Willis and in-house legal counsel.

[14] My assessment of the evidence is that Ms Willis overstated Ms Harris' role in her evidence. She overstated her level of responsibility and oversight of the clients' business. Ms Willis' use of the words "primary responsibility", "responsibility" and "visibility" was an attempt to enhance Ms Harris' role in the company, which was as a relatively junior administrator. This is corroborated by the evidence of Ms Hinei Meha who worked as in-house legal counsel for the plaintiff when Ms Harris was in employment there. Ms Meha gave evidence in support of Ms Harris.

[15] When Ms Meha took employment as in-house counsel with Asiaciti, she indicated that she did not think the restraint clause was reasonable. She negotiated a variation of the clause so that its ambit and therefore the restriction on her, was considerably limited. She stated that she was responsible for training Ms Harris. Ms Harris was always answerable to her and her documentary work required final approval from Ms Willis. Neither Ms Meha nor Ms Harris corresponded directly with principals of the clients. She confirmed that Ms Harris' operation of her own

business was common knowledge and that she did not consider there was any conflict of interest as a result. She expressed surprise at the present action against Ms Harris in view of her junior role and the unlikelihood of her being able to act in breach of the restraint having regard to the nature of the business.

The circumstances of the termination of employment

[16] An agreement could not be reached between Ms Harris and Ms Willis as to improvement in her terms and conditions of employment particularly the issue of increased remuneration. The issue of Ms Harris' domestic trust work and her own business activities arose. Ms Willis claimed that Ms Harris had not disclosed the extent of her private domestic trust work. Ms Harris maintained that she had.

[17] In view of her dissatisfaction Ms Harris then took up employment with Staples Rodway. In her evidence she discussed the circumstances under which she became dissatisfied with her employment at Asiaciti following a discussion with Ms Willis and her accepting a more lucrative position with Staples Rodway. Ms Harris stated that there was an adverse reaction from Ms Willis when Ms Harris informed her of her resignation and employment with Staples Rodway. Ms Willis indicated that the restraint of trade would be enforced. In her evidence Ms Willis stated that Ms Harris' reaction was that the restraint of trade was unenforceable. She did not make any request for waiver. However, following the initial discussions Asiaciti and Ms Harris entered into negotiations to see whether undertakings could be given with a view to the waiver being considered.

[18] Following the resignation Asiaciti indicated to Ms Harris that it did not require her to attend the workplace during the period of notice of one month. Ms Harris referred in her evidence to this as being the period of gardening leave. Initially there had been some request by Ms Harris to be able to attend at Staples Rodway for the purposes of initial training, but for obvious reasons this was not agreed to by Ms Willis.

[19] Following the expiry of the one month of notice, Ms Harris took up employment with Staples Rodway. Ms Willis stated in evidence that by this stage

she had become concerned about the activities and connections with clients by Ms Harris prior to the resignation. Ms Harris' emails were investigated by Ms Willis. There were negotiations in an effort to obtain the undertakings. Ms Harris indicated that she would agree to the undertakings, which were being requested, except for the first very wide undertaking requested by Asiaciti, which had the potential to nullify Ms Harris' abilities to carry out her duties for Staples Rodway. Documents were produced in evidence disclosing the extent of the undertakings sought by Asiaciti, including in particular, the clause which was unacceptable to Ms Harris. It is particularly wide in its effect and ambit, covers even an inadvertent breach, which in turn would impose considerable restrictions on Ms Harris.

The areas of concern in respect of the restraint clause

[20] It needs to be said at the outset that there is no evidence before the Court of Ms Harris having breached the restraint clause, nor of any damages alleged to have been suffered by Asiaciti following Ms Harris departing and taking up employment with Staples Rodway. That part of the employment agreement, the subject of the present proceedings, relates specifically to the prohibition on Ms Harris taking up employment with an employer in competition with the business operated by Asiaciti. The remaining clauses in the agreement under the heading "Non-competition by the Assistant Trust Administrator" relate to a prohibition on Ms Harris, directly or indirectly, going into business in competition with Asiaciti; soliciting employees or agents away; receiving commission, fees or money arising from transactions in which Asiaciti is interested; and soliciting away clients of Asiaciti. These obligations were also covered by those undertakings to which Ms Harris agreed and gave after termination of employment. The period of the restraint was for 12 months following the termination of Ms Harris' employment with Asiaciti. It applied worldwide.

[21] The agreement also contains a confidentiality clause. There is no evidence suggesting that Ms Harris has breached the confidentially clause nor any of the subsequent clauses in the restraint of trade portion of the agreement. During evidence Ms Harris firmly assured the Court that she had not breached these clauses and that it would be contrary to her principles to do so.

[22] Counsel for both parties in their submissions methodically considered the sequence of matters, which the Court needs to deal with in deciding whether Asiaciti had established the pleaded clauses and is entitled to the remedies sought. The remedies sought in this challenge are either an injunction restraining Ms Harris from continuing in her employment with Staples Rodway for the remaining period of the restraint or, if the Court holds that the clause sought to be enforced is indeed unenforceable, whether there should be a modification pursuant to the Illegal Contracts Act 1970, which would then be enforced.

[23] There was conflicting evidence between Ms Harris and Ms Willis as to their discussions in respect of the clause at the time the employment was offered to Ms Harris. Ms Harris asserted that at the interview when she raised objection to entering into the employment agreement with the clause inserted that Ms Willis indicated that the clause was unlikely to be enforceable. Contemporaneously with this discussion Ms Harris made a memorandum recording what Ms Willis had said to her and this document was produced in evidence.

[24] That note records as follows:

> 3.6.11
>
> Re: ROT prvns [provisions] in E/C.
>
> T Lauren – advised thought the prvns [provisions] (9.1 + 9.2) were harsh + oppressive + unlikely to be enforceable. She had the same dscn [discussion] with the owner when she started + thought the same. However the owner is not prepared to negotiate – he has been burnt before + it is not negotiable.
>
> I advised happy to leave it in as didn't think it was enforceable.

[25] Ms Willis did not appear to have made any record herself of the conversation. In her evidence she stated that she did not believe that she agreed with Ms Harris that the restraints were harsh or unenforceable. She stated that she did explain to Ms Harris that when she herself was offered employment by Asiaciti she also queried the restraints in her employment agreement with Asiaciti's owner who explained that he was not prepared to negotiate any changes to the restraints. She went on to state that she told Ms Harris that she would need to make a personal decision, as she herself had done, regarding whether she accepted the offer of employment with the

restraints included. Asiaciti's owner would not enter into negotiation regarding the restraints. She denied telling Ms Harris that the restraints were not enforceable or that she personally thought they were not enforceable and she denied telling Ms Harris that she agreed with her views in this regard.

[26] There is commonality between the two versions as to the position being non-negotiable. On balance and in view of the fact that Ms Harris has a contemporary document recording her understanding of the conversation, it is likely that Ms Willis did say what Ms Harris said was indicated to her at the time of the offer of employment. However, I do not consider that this is a point which has such significance that Asiaciti is not entitled to pursue the matter. This conversation at best was an expression of opinions. There was no agreement that the clause would not be enforced. Ms Harris had a reasonable amount of legal experience even though not legally qualified. She signed the employment agreement with the clause in it and would have been fully aware of the risks of doing so. There is some evidence that she was under financial pressures at the time and needed the employment. However, I do not regard this as being a reason for saying that there was an unequal bargaining position between Ms Harris and Asiaciti. It is therefore of little relevance to the present consideration of enforceability.

The alleged potential for breach of the restraint and the defendant's response

[27] The plaintiff claims a proprietary interest in respect of its trade connections and confidential information. Concerns expressed by Ms Willis relating to the period Ms Harris remained employed with Asiaciti were:

a) The relationship she had built up with the clients and was in a position to take advantage of;

b) Her ability to have a closer, more high level relationship with clients because of her French language skills;

c) Her role as a frontline contact with the clients and her apparent expertise;

d) This ability was evidenced by the fact she was effective and ambitious and held herself out as an authority on trusts in New Zealand.

[28] Ms Willis referred to contact Ms Harris had with apparent senior employees of the five key trust clients of Asiaciti. Mention was also made of the presentations Ms Harris had prepared using Asiaciti's resources. The fear was that she would consider continuing work with these clients after leaving her employment with Asiaciti. Both Ms Harris and also Ms Meha, however, put this into a different context when they considered the line of authority within Asiaciti. As I have indicated, the inference to be drawn is that Ms Willis had exaggerated these aspects.

[29] The confidential information, which Asiaciti alleges Ms Harris had access to, was Asiaciti's precedent documents, fee structures, specific information about actual fees charged and client's trust structures and arrangements. However, not as much elaboration was given on these aspects by Ms Willis as one would have expected. Ms Harris and Ms Meha gave evidence on the extent of these items in reality and the fact that information is already in the public domain and readily available. Insofar as precedents were concerned, Ms Meha stated that with some exceptions the precedents would be unremarkable.

[30] Ms Willis acknowledged that she was aware of other work Ms Harris was doing. She, however, expressed in her evidence that she formed the view that certain activities of Ms Harris during her employment and contacts she had established meant Ms Harris was contacting potential clients of Asiaciti. This information was allegedly uncovered by Ms Willis after Ms Harris resigned by reviewing her emails. Ms Willis, however, does not appear to have expressed much interest in these matters, while Ms Harris was in employment. Ms Harris mentioned the presentation she prepared, which Ms Willis raised as an issue in her evidence but seemed relatively indifferent about during the period while Ms Harris remained in employment.

[31] Ms Willis mentioned the issue of personal business cards which Ms Harris had prepared and her involvement in domestic trust work as opposed to mere gifting services. She claimed the domestic trust work was not disclosed prior to

employment. Ms Willis also mentioned contacts on a social front with middle order employees of clients with whom Ms Harris was dealing and also the contact Ms Harris had with Ms Ethelinda Lim. Ms Harris, however, gave evidence in rebuttal to these issues particularly in respect of the employees of the clients with whom she had contacted by email. She indicated that they were not senior employees; they had a status similar to her own and effectively contact was lost with these people when she terminated employment with Asiaciti. Also there was evidence given that in any event some of these people were no longer employed within the clients' businesses. Ms Harris denied any suggestion of contact with high level managers within the clients' business. Ms Harris stated that her contact would only be with people unlikely to divert business away from Asiaciti. This was corroborated to some degree by Ms Meha. Insofar as Ms Lim was concerned, Ms Harris had had contact with her long before she took up employment with Asiaciti. Ms Lim's own evidence at the hearing was that Ms Harris' contact with her in the limited respects mentioned in any event promoted Asiaciti. As I have already indicated, Ms Harris was ambitious to advance and her evidence satisfies me that while she was with Asiaciti the marketing attempts that she undertook were an effort to advance herself within Asiaciti's employment rather than to divert business away.

Legal principles applying

[32] Ms Butcher made several submissions in respect of the interpretation of the clause in the employment agreement to which this dispute relates. I do not perceive that there is now a suggestion from Mr Harrison on behalf of Ms Harris that the wording of cl 9.1 is not plain on its face. Even though the determination of the Authority considered that the restraint was unreasonably restrictive on Ms Harris by virtue of the wide type of businesses to which she would not be entitled to seek employment, I did not understand Mr Harrison to be pursuing that point to any great extent in the challenge. I agree with Ms Butcher that the words "the business of [the plaintiff]" would be given the meaning she contends for as being specialists in the provision of international fiduciary and trustee services. If the restraint clause was held to be enforceable, even in modified form, those words would be interpreted narrowly to limit the effect of the restraint upon employees such as Ms Harris. It would nevertheless be desirable, for any future use, to tighten the wording of this

aspect of the restraint in view of the fact that some misunderstanding could prevail as evidenced by the interpretation given by the Authority. For instance extending cl 9.1 to cover the group or any associated entity might require some further consideration. However, this dispute is not just an issue as to interpretation, but also whether the clause can be enforced in view of the entire context and circumstances prevailing. In addition, Ms Harris has given undertakings and not argued that clauses other than the employment restraint in cl 9.1 are unreasonable. This is an indication of her responsible attitude in the matter, which became apparent during the course of her evidence. Therefore, even within the narrow ambit of the plaintiff's business, the issue remains as to whether, in the circumstances, Ms Harris should be subject to the restraint.

[33] Both counsel summarised the principles applying to restraint clauses. They arise from previous authorities, which have considered issues such as those present in this case. Mr Harrison, in his submissions, gave a particularly succinct outline relying upon authorities such as *Gallagher Group Ltd v Wally*[2] and *Fletcher Aluminium Ltd v O'Sullivan*[3]. The general principle and starting point is that restraints of trade are contrary to public policy and are void and unenforceable. There are strong policy reasons for that principle to apply as a worker's right to work and to a means of earning a living are jealously guarded in employment law. As Mr Harrison acknowledged in his submission, there is an exception to the general principle in that the right to restraint may be enforceable so long as it is no wider than the circumstances of the case reasonably require. The reasonableness of a restraint clause is to be assessed in the circumstances of each case according to legitimate interests of the parties to the restraint. This involves a balancing of the respective positions between the employer and employee. Where the Court is asked to do so and where such reasonableness is established then the Court may use its powers to modify or ameliorate the contractual provision if necessary.

[34] Subsidiary principles to be taken into account in the assessment are as follows:

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[2] [1999] 1 ERNZ 490.
[3] [2001] 2 NZLR 731, [2001] ERNZ 46 (CA).

a) The restraint will only be enforceable to the extent that it is required to protect a proprietary interest of the employer.

b) The reasonableness of the restraint – timeframe and geographic area – is relevant in determining reasonableness.

c) The scope of the restraint will be considered.

d) The relevant bargaining power of the employer and employee is also relevant.

e) A restraint is generally unreasonable if its injurious effect on the employee is greater than its benefit to the employer.

f) For a restraint to be valid and enforceable an employer must show that valuable consideration was in some form given to the employee in return for it.

[35] Ms Butcher went to some length in her submissions to outline such proprietary interests of Asiaciti in this case in respect of its trade connections and confidential information. The reasonableness and scope of the restraint will involve a consideration of the length of the restraint and the geographic area to which it applies. These are obviously pertinent factors to take into account. In this particular case there was some suggestion that there might have been an unequal bargaining position between Ms Willis and Ms Harris at the time she entered into employment. However, I do not consider that the mere fact that Ms Harris was under some financial pressure necessarily altered the usual position applying between the parties at the time that the contract was being negotiated. The issues of consideration and the respective benefits are particularly pertinent circumstances in the present case where Asiaciti was endeavouring to restrain Ms Harris from pursuing her chosen career for a period of 12 months. I did not perceive Ms Butcher to be submitting in this case, that the balancing exercise between respective benefits would favour Ms Harris. Mr Harrison conceded that consideration can be implied in the remuneration. Ms Butcher submitted that in this particular case the remuneration of Ms Harris was

adequate for full consideration to be inferred. There is some difficulty with that submission on behalf of Asiaciti in view of the fact that Ms Willis, in discussions on remuneration with Ms Harris, stated that the relatively low remuneration offered by Asiaciti was in accordance with what other similar employers were paying in the market. There was no evidence as to whether other similar employees had received consideration for restraint of trade. It is unlikely they did. Ms Willis herself conceded that her own high level of remuneration paid to her in her position as General Manager would include consideration for the very same restraint of trade to which Ms Harris was being asked to comply. To require Ms Harris to seek employment away from her chosen career path for a period of twelve months would be a particularly harsh outcome in this case. That would need to be considered in the context of the issue of consideration for the restraint.

[36] All of the principles, which have been clearly enunciated by counsel in their submissions, are well established by the authorities they referred to.

[37] Mr Harrison also called upon examples of other cases where similar restraint of trade provisions in employment agreements have been upheld or modified. In cases involving far more senior employees to Ms Harris, the Court in each of the examples to which he referred, limited the extent of the restraint to a period of three months.

Discussion and conclusions

[38] I agree with the submission Mr Harrison made on behalf of Ms Harris that while there has been some attempt in Ms Willis' evidence to establish proprietary interests and confidential information, which she maintains need protection, there was very little elaboration on it in either the oral or documentary evidence. The evidence of Ms Harris and Ms Meha answered the allegations made by Ms Willis as to the prospects of damage to the company if the restraint was not enforced. Much of the evidence of Ms Willis was speculative and indeed the plaintiff conceded that it had no evidence of Ms Harris breaching the clause in any event, or Asiaciti having suffered damage as a result. As I mentioned in my oral judgment given at the conclusion of the hearing in this matter, the restraint in this particular employment

agreement also contains considerable difficulties for the plaintiff in view of the fact that the agreement contained a 90-day trial period and also redundancy provisions for which no amelioration was provided as to the operation of the restraint provisions. These are matters that Mr Harrison submitted should be taken into account in deciding on the enforceability of the restraint. Ms Willis herself conceded in her evidence that these issues caused difficulty.

[39] As to the attempt to reach agreement on waiver in return for undertakings, I agree with Ms Harris that Asiaciti's insistence on requiring an undertaking, the extent of which would cause considerable difficulties for Ms Harris in her new employment, was unreasonable in all the circumstances.

[40] As indicated in my oral judgment the restraint clause in this particular case was too wide. That is not referring to the interpretation issue, which I discussed earlier, but rather other factors such as the period of its operation and its geographical application. It is therefore unenforceable and I was not prepared to modify it as pleaded so that it might become enforceable. I made that decision for a number of reasons. First, a reasonable term, even if enforceable in any event, would have been three months. This period had long since expired and taking into account the fact that Ms Harris, for a period of one month, was also on gardening leave, Asiaciti had plenty of opportunity to shore up its position with its clients if indeed it was as concerned as Ms Willis suggested in her evidence. Insofar as geographical extent is concerned, where, as here, the nature of the business is unique to New Zealand because of New Zealand's tax structures, I fail to see why the restraint needed to be worldwide. Any attempt by Ms Harris to solicit Asiaciti's clients was covered by the undisputed clauses. There was no need to endeavour to restrain Ms Harris from taking employment outside New Zealand.

[41] Secondly, the evidence which the plaintiff provided as to its proprietary interests that it sought to protect was inadequate. I accept that there might be some commercial sensitivity in the matter but Ms Willis' evidence on such interests could really only be considered as in summary form and cursory.

[42] Thirdly, the evidence as to the need to restrain Ms Harris in particular was inadequate. The restraint is imposed on all employees without consideration of the individual need for it and its requirements. These considerations need to be taken into account. They must be capable of being properly articulated at the time that the employment commences. In this case it seemed to me that the employer has attempted to justify the restraint retrospectively and without sound basis in principle.

[43] Fourthly, the level of employment Ms Harris occupied in Asiaciti did not, in any event, warrant a clause as wide as that contained in her employment agreement and therefore as restrictive upon her future activities. There was close supervision of her work as evidenced by statements of Ms Meha. She was dealing with middle level employees. It is notable that no evidence was procured from any of the clients to support the allegations made. Ms Harris was a trusted administrator and brought to her position skills that she had learned as a legal executive and from her own educational advancement. I have already mentioned the attempts she made to advance her position within Asiaciti. These did not seem to be appreciated.

[44] Fifthly, insofar as relevant and considering the discretion which the plaintiff asks to be exercised in this case to modify the clause, there is really nothing in the evidence that points to any real consideration for the restraint.

[45] Finally, I note that Mr Harrison referred to ss 162 and 164 of the Employment Relations Act 2000 (the Act) as incorporated by s 190 of the Act insofar as the Court's jurisdiction is concerned. Those sections contain provisions that are to be considered when dealing with applications to modify contractual terms pursuant to the Illegal Contracts Act 1970. Mr Harrison referred to the Court's decision in *Transpacific Industries Group (NZ) Ltd v Harris*[4] where the Court considered that failure to comply with the exclusive provisions of s 164 of the Act would provide an insurmountable hurdle to a plaintiff seeking to have a clause modified. Ms Butcher's answer to this particular submission was that it would already have been resolved by the process which the Authority would have put the parties through leading to the investigation. She also submitted that the Court's statements in respect of these provisions were not conclusive in any event. There is no need in this case to provide

[4] [2013] NZEmpC 97.

a definitive answer on this issue. It is best left for a future case where the positions might be more finely balanced.

[46] In conclusion, applying the principles well established by authority regarding attempts at restraint such as the one in this case, this clause is not enforceable against Ms Harris. The duration is too long and its geographical ambit far too wide to enable the plaintiff to allege that it is the minimum necessary to protect its proprietary interests. This is a case involving a middle order employee. The employer had ample opportunity to make contact with its clients and ensure continuity of its relationship with those clients after Ms Harris resigned. The allegations as to the potential for damage if Ms Harris breached the clause remain speculative. Ms Harris provided quite vehement evidence in response to Ms Willis' assertions. I note that Ms Willis would have been aware of the nature of Ms Harris' responses to her assertions from the Authority's investigation and Ms Harris' brief of evidence filed in advance of the challenge being heard. Ms Willis made no attempt at the hearing to reasonably reply to that evidence or to modify those parts of her own evidence which would be regarded as unsustainable.

Disposition and costs

[47] The plaintiff's applications for orders restraining the defendant or modifying the restraint clause are dismissed.

[48] Asiaciti did not place enough evidence before the Court to properly establish its position in this case. These cases need to be determined on their own facts and having regard to the nature of the employment, the terms of the employment agreement and the particular actions of the employee involved. The principles applying to such matters have now been well established such that an employer, in most cases involving employees at this level, should be easily able to determine for itself whether or not it is likely that it meets the requirements for the restraint to be enforced or modified if that is considered necessary.

[49] If a restraint of trade clause is to be upheld/enforced the employer claiming the need for enforceability, even in a modified form, must establish a clear link

between the proprietary interests needing protection and the duties and responsibilities within the workplace of the employee dealing with those interests and the risk of breach. All of these factors need to be backed up by evidence of sufficient substance. Matters such as actual or likely breach and damage need to be part of the evidential material. Evidence of adequate consideration to reimburse the employee for undertaking the restraint, particularly where a lengthy period and wide geographical ambit is involved, would be required. If an inference is to be drawn as to the existence of such consideration then adequate evidence upon which such inference is to be made would be needed. Evidence to the extent required was lacking in this case.

[50] Insofar as costs are concerned, Ms Harris would have been put to considerable expense in having to defend the allegations against her. In her successful defence of the proceedings in the Authority, she received an award of costs.[5] No challenge has been lodged to that determination on costs and it will simply stand for compliance if the award has not already been met by Asiaciti. As to the challenge, Mr Harrison has referred in his memorandum on costs to the Court's discretion pursuant to cl 19(1) of Schedule 3 of the Act.

[51] The Court has a wide discretion in awarding costs pursuant to cl 19(1), of sch 3 to the Act. This provides that "the Court may order any party to pay any other party such costs and expenses (including expenses of witnesses) as the court thinks reasonable". The issue of awards of costs has been the subject of three main decisions of the Court of Appeal and the principles to be applied are now well established.[6] The extent of the Court's discretion on costs has been confirmed in those decisions.

[52] Generally an order of costs will follow the event. The usual reimbursement of costs awarded by the Court will be two thirds of actual and reasonable costs incurred by the successful party. However, the discretion is wide and the Court may depart from the usual formulae in appropriate cases.

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[5] [2013] NZERA 224.
[6] *Victoria University of Wellington v Alton-Lee* [2001] ERNZ 305 (CA), *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438 (CA), and *Health Waikato Ltd v Elmsly* [2004] 1 ERNZ 172 (CA).

[53] Ms Butcher has submitted, in answer to Mr Harrison's submission that full indemnity costs be awarded in this case, that Asiaciti had good grounds for pursuing the challenge. I have, of course, mentioned the particular point she raised relating to the Authority's determination on the ambit of the restraint clause. This appeared to be a point which Asiaciti considered of some substance and was the subject of submissions by Ms Butcher. While it appears to have been a point of importance to Asiaciti, I am not satisfied that in all of the circumstances surrounding this case it was sufficient justification to force Ms Harris to defend a challenge.

[54] While I accept it was Asiaciti that initiated the negotiations in an effort to obtain undertakings as a means of resolving the matter, it did not take a reasonable stance in respect of the first undertaking it sought. Ms Harris justifiably refused to agree to that undertaking, which would have caused her difficulties in her new employment. An undertaking as rigid as that disclosed in the documentary evidence was not reasonable. Nevertheless, the matter could have been resolved by undertakings. In view of its intransigence in the matter I consider Asiaciti's waiver was unreasonably withheld from Ms Harris.

[55] During the course of the hearing of the challenge, I took a brief adjournment to enable Asiaciti to reflect upon the stand it was taking and in the hope that there might be some prospect, even at that late stage, of the matter being resolved. It was indicated after a short period that no such resolution was possible and the hearing continued to conclusion. If Asiaciti had reflected a little more carefully on the stand it was taking against Ms Harris in this matter and in particular considered the evidence which was before it following the Authority's investigation, then it may have seen that any challenge would be unlikely to succeed. I understood Ms Butcher's submission that even though the Authority had conclusively rejected the enforceability of the restraint clause in this case, Asiaciti felt that it needed to pursue the matter as one of principle in order for it to know its position in respect of other employees and particularly future employees. This I perceive related to the proper interpretation of the clause as to its breadth and arising out of a particular part of the finding of the Authority. I can understand the concern of Asiaciti in that respect, although it was not really a point pursued by Ms Harris in the challenge, as I have already stated.

[56] Ms Butcher, in her submission on behalf of Asiaciti in respect of costs, conceded that Ms Harris should be awarded costs following the event. She refers to the Court of Appeal decisions of *Binnie* and *Alton-Lee*. I infer that she is submitting that Ms Harris should receive the usual award of two thirds of actual and reasonable costs. She makes no submission that the costs incurred by Ms Harris, which include disbursements and witness expenses, of $22,488.54 (inclusive of GST) are not reasonable.

[57] Having regard to the attendances required in this matter, I consider that Mr Harrison's total charges are reasonable. For the reasons I have given, this is an instance where it is appropriate for the Court to exercise its discretion by providing that Mrs Harris not incur any costs in having to defend the challenge. Accordingly, the plaintiff is ordered to pay Ms Harris reimbursement of costs and expenses totalling $22,488.54.

M E Perkins
Judge

Judgment signed at 11.30am on 12 December 2013