

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 290A/10  
5278262

BETWEEN                      CATHERINE'S  
   FASHIONWEAR LTD  
   t/a APPAREL HOUSE  
   Applicant

AND                                ALANA ROWE  
   Respondent

Member of Authority:        James Wilson

Representatives:             Elizabeth Briggs for the applicant  
   Clive Bennett for the respondent

Investigation Meeting:      23 October 2009 at Auckland

Submissions received:      30 October 2009 from the applicant  
   2 November 2009 from the respondent

Determination:                12 July 2010

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**DETERMINATION OF THE AUTHORITY**

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**Replacement Determination**

On 21 June 2010 I issued a determination (AA 290/10) in respect to this matter. Regrettably that determination contained a number of errors. While most of those errors were minor and did not affect the outcome, one was more serious. This more serious error was that that determination did not make it clear that I had considered one of Apparel's claims, that Ms Rowe had solicited Apparel's clients, but that I rejected that claim. **In the interests of clarity I have corrected those errors and the attached determination replaces the earlier determination which is withdrawn in its entirety.** I extend my sincere apologies to the parties for any embarrassment or inconvenience these errors may have caused.

## **Apparel House's application**

[1] On 27 August 2009 Catherine's Fashionwear Ltd t/a Apparel House (Apparel) filed a statement of problem in the Authority asking the Authority to:

- determine that the respondent, Alana Rowe, had breached her employment agreement; and
- issue a compliance order instructing Ms Rowe to desist from her activities with Apparel's supplier; and
- award Apparel damages against Ms Rowe in the sum of \$250,000; and
- impose penalties on Ms Rowe and to direct that payment of these penalties be made to Apparel.

## **Background**

[2] Ms Rowe commenced employment with Apparel on 14 July 2008 as a Product Manager. Shortly afterwards she signed an employment agreement (dated 5 August 2008) which contained the following terms:

### **23 RESTRAINT**

*23.1 Non – Competition: The employee shall not any time during the term of this agreement or for a period of six months after the termination of this agreement, carry on or be connected, engaged or interested either directly or indirectly or alone or with any other person or persons and whether as principal, partner, agent, director, shareholder, employee or in an advisory role, or otherwise in any business in direct competition with the supplier of the employer, or the employer carried on within New Zealand, Australia, or any other country whose clients the employee is working with, without the express written consent of the employer.*

*23.2 No Solicitation/Clients: The employee shall not at any time during the term of this agreement or for a period of six months commencing on the termination of employment the employee will not (without the employer's prior written consent) endeavour to entice any of the employer's clients or suppliers away from the employer, or accept employment or engagement with any client of the employer with whom the employee has been involved in the nine months prior to the termination of his or her employment.*

**No Solicitation/Employees:** *For 6 months commencing on the termination of the employee's employment the employee will not (without the employer's prior written consent) whether on his or her own account, or as a consultant or contractor to, or a partner, agent, employee, shareholder or director of any company, directly or indirectly employ or solicit the services of, or offer employment to:*

*(a) any person who is employed by the employer or was employed by the employer within the nine months preceding the date of termination of the employee's employment; or*

*(b) any person who is employed by client of the employer, or was employed by a client of the employer within nine months preceding the date of termination of the employee's employment.*

**23.3 Other activities:** *For a period of six months after the termination of employment the employee will not, without the employer's permission either;*

*(a) advertise, publicise or permit the advertising or publicising of the employee's former connection with the employer, or*

*(b) do any act or thing which may injure, or impair or reduce the business, goodwill or reputation of the employer or its standing in the eyes of the public or any of its clients.*

**23.4 Consideration already included:** *The employee acknowledges that the remuneration under this agreement includes consideration for entering into this restraint.*

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[3] Apparel says that it had been clearly explained to Ms Rowe before her commencement, that her employment agreement would include these clauses. Ms Rowe accepts that, despite some concerns regarding the restraint provisions, she did sign the agreement.

[4] On 24 February 2009 Ms Rowe resigned from her position at Apparel. She says that this resignation was caused by the stress of dealing with Apparel's Managing Director Catherine Casey. Ms Casey says that while Ms Rowe had raised some issues of stress in January 2009 the company were surprised by her resignation. Although the resignation was to take effect from 24 April 2009 Ms Rowe finished actual work at Apparel at the end of February and was on "garden leave" until the expiry of the notice period. Ms Casey says that this was because she was concerned about Ms

Rowe's stress levels and felt it was in her best interests not to be at work; Ms Rowe says that she was forced out and that her leaving was "unpleasant".

[5] On 1 April 2009 Ms Rowe registered a new company, Rowe Textiles Ltd. She says that this company was to act as a vehicle for her to carry out some contract work. She says that at about this time she was approached by a friend to assist in the development of a new brand and she was hoping that this might evolve into more contract work. She says that in fact no other contract work eventuated but that she had done some casual work on an hourly basis.

[6] Some time after she had resigned from Apparel Ms Rowe was approached by Mr Arthur Blume, one of the Directors of an Australian company, Twin Images, with a view to Ms Rowe acting as Twin Images distributor in New Zealand. Twin Images had been a supplier to Apparel and Ms Rowe had visited their offices in Australia while she was still employed by Apparel. Mr Blume says that the relationship with Apparel had been difficult for some time and not commercially successful. Both Ms Rowe and Mr Blume are adamant that no arrangements have been made prior to Ms Rowe's resignation from Apparel and that this approach was after she had terminated her employment with Apparel.

[7] In July 2009 Ms Rowe and Mr Blume met in Auckland. According to both of them Ms Rowe advised that she would not be able to work as Twin Images agent until the expiry of her restraint period with Apparel. In his statement to the Authority Mr Blume says that he did not believe this was a problem as Ms Rowe would not be actually working in competition with Apparel until early September 2009. Ms Rowe says that at that time she believed that her restraint provision expired six months from the date of her resignation (24 February 2009) and that she was therefore free to act as Twin Images agent in New Zealand from 24 August 2009. According to an affidavit prepared by Mr Blume in mid-October 2009, at that date Ms Rowe had not made any sales on behalf of Twin Images and not received any commission or any other payments from Twin Images.

[8] On 7 August 2009 Twin Images advised Apparel House that their arrangement would not be continuing. Apparently this decision came as somewhat of a shock to Apparel House.

[9] On 18 August 2009 an e-mail from Twin Images to Ms Rowe (regarding the trademarks and labels which they intended to sell in New Zealand through Ms Rowe) was sent in error to Ms Rowe's old, Apparel House, e-mail. It was through this e-mail and that Apparel became aware of the arrangement between Ms Rowe and Twin Images. Shortly afterwards Apparel filed its application in the Authority

### **The issues for determination**

[10] There are several issues that require determination in this matter:

- Are the various restraint clauses in Ms Rowe's employment agreement legal and enforceable?
- If the various restraint clauses are enforceable should a compliance order, requiring Ms Rowe to comply with her employment agreement, be issued as requested by Apparel House?
- If the restraint clauses were enforceable did Ms Rowe breach any of those clauses?
- If Ms Rowe did breach the restraint clauses should she be liable to a penalty as requested by Apparel House?
- If Ms Rowe did breach the restraint clauses are Apparel House entitled to recover damages and if so to what extent?

### **Discussion and determination**

*Are the restraint clauses legal and enforceable?*

[11] Apparel House argue that, even if Ms Rowe did have reservations about the restraint provisions, she was aware of them when she accepted the position and subsequently acknowledged that acceptance by signing her employment agreement. Apparel argue that Ms Rowe, in her position as product manager, had access to trade secrets, including costings, planning, purchase history and discount arrangements and was aware of the commercial relationship with suppliers, agents and customers. This amounted, in Apparel's submission, to proprietary information. A restraint was therefore necessary as, if this information was used, it would enable Ms Rowe to secure business on behalf of herself, a new employer or business partner at Apparels expense. They also argue that the six-month period of the restraint was reasonable because the planning cycle for decision-making regarding product lines etc up to two

seasons in advance. The information would remain sensitive, therefore, for at least six months. They say that the geographical restriction was appropriate because Apparel's business is primarily the selling of children's clothing and accessories in the retail industry and Ms Rowe was able to do business or secure employment in other areas of the retail industry given her skills and experience in marketing and sales.

[12] Mr Bennett, in submissions on behalf of Ms Rowe, submits that Apparel have not identified any specific proprietary interest to be protected and argues that the restraint provisions in Ms Rowe's employment agreement appear to simply attempt to protect Apparel from competition. He suggests that such clauses are not enforceable. Mr Bennett also says that the restraint is unreasonable because at the time she signed her employment agreement with Apparel Ms Rowe had been unemployed and desperately needed employment. Finally he argues that the geographical area of the restraint is too wide and that the period of six months is unreasonable under the circumstances.

[13] **On balance I find that the restraint clauses in Ms Rowe's employment agreement are both reasonable and enforceable.** While I have some reservations regarding the geographical area of the purported constraint, in all other respects the clauses meet the usual tests. The information to which Ms Rowe was privy was of proprietary interest to Apparel. In what is a very competitive market the understanding of suppliers, distribution networks and pricing margins are matters which, if they became available to competitors could have a devastating effect. The period of six months seems reasonable given the seasonal nature of the clothing industry and the relatively long lead time required for the ordering, manufacturing and distribution of products to retail outlets.

*Is a compliance order appropriate?*

[14] By the time Apparel became aware Ms Rowe's alleged breach of the restraint clauses in her employment agreement, and filed an application for compliance in the Authority, the restraint period (six months from the termination of her employment) was almost over. Even if a compliance order had been forthcoming at that time (late August 2009) it would have had no impact on the losses Apparel say that they have sustained. By that time Twin Images had already advised that they were ceasing their

arrangement with Apparel House and any compliance order made against Ms Rowe would not have restored that financial arrangement. As I advised the parties in September 2009 a compliance order would have no practical effect and the issue of a compliance order then (or now) was not appropriate.

*Did Ms Rowe breach the restraint clauses?*

[15] Ms Rowe says that she believed at the time that the six-month restraint period commenced from the date she resigned from Apparel -- 24 February 2009 -- and would therefore expire on 24 August 2009. That she had this belief is corroborated by Mr Blume's evidence that, in July 2009, she advised him that she would not be able to act as an agent for Twin Images until the end of August. What Ms Rowe failed to comprehend was that her employment did not in fact finish until the end of a period of notice/garden leave on 24 April 2009. The restraint period therefore expired on 24 October 2009. Ms Rowe does not dispute that she entered into a business arrangement with Twin Images in July 2009 to become their agent in New Zealand with effect from the end of August 2009. Even if it is accepted that no breach occurred until the end of August it is clear that at least from that date Ms Rowe was...

*...engaged or interested either directly or indirectly .....(with) any other person or persons and whether as principal, partner, agent, director, shareholder, employee or in an advisory role, or otherwise in any business in direct competition with the supplier of the employer, or the employer carried on within New Zealand,...*

**In entering into this arrangement with Twin Images Ms Rowe was in breach of the “no – competition” restraint clause in her employment agreement.**

[16] During the course of my investigation Apparel attempted to provide evidence that Ms Rowe had approached or engaged other employees or agents of Apparel, in breach of the provision in the restraint clause that she refrain from:

*...directly or indirectly employ or solicit the services of, or offer employment to:*

*(a) any person who is employed by the employer or was employed by the employer within the nine months preceding the date of termination of the employee's employment; or...*

And that she had solicited Apparel's clients in breach of the restraint clause that she not...

*...endeavour to entice any of the employer's clients or suppliers away from the employer, or accept employment or engagement with any client of the employer with whom the employee has been involved in the nine months prior to the termination of his or her employment.*

However the evidence of any such solicitation by Ms Rowe of Apparel's employee's or clients is at best hearsay and is far from conclusive. I find therefore that **Ms Rowe did not breach the provision of her employment agreement regarding the employment or solicitation of employees or solicitation of clients of Apparel.**

[17] Apparel has also claimed that, until late September 2009, Ms Rowe listed, on the Rowe Textiles website, the fact that she had been employed by Apparel as a "career highlight". They point out that this is in direct contravention of clause 23.3(a) of the restraint clause in Ms Rowe's employment agreement. Ms Rowe acknowledges the website entry but says that this was an honest mistake and that she removed the reference immediately it was brought to her attention. While I find it difficult to understand why such a provision was necessary, or what harm the entry can possibly have caused Apparel, I accept Apparel's contention that **the entry on the Rowe Textiles web site was technically a breach of Ms Rowe's employment agreement.**

*Should Ms Rowe be required to pay a penalty for the breach of her employment agreement?*

[18] I have found that Ms Rowe did breach her employment agreement. However I am also satisfied that Ms Rowe genuinely believed that, by the time she took up the arrangement with Twin Images, the restraint period would have expired. Although I have found that she also had technically breached her employment agreement by

listing Apparel House on the Rowe Textiles website, I accept that this breach was inadvertent and of such a minor nature as to not warrant the award of a penalty. In all circumstances, while a penalty is warranted for the breach of the non-competition provision of Ms Rowe's agreement, that penalty should be relatively small. **Ms Rowe is ordered to pay a penalty of \$500 for the breach of her employment agreement outlined above.** Any losses or costs incurred by Apparel resulting from Ms Rowe's breach will be dealt with separately. It is not therefore appropriate that this penalty should be paid to Apparel. Rather, in terms of section 136(1) of the Employment Relations Act **the penalty is to be paid to the Authority for remittance to the Crown Bank Account.**

*Are Apparel House entitled to recover losses*

[19] During my investigation of this matter it was agreed that the determination of what if any damages should be awarded should await my determination of whether or not Ms Rowe had breached her employment agreement. As detailed above I have found that Ms Rowe did breach her employment agreement. **Should Apparel House wish to pursue the question of damages they should file and serve details of the losses incurred as a result of Ms Rowe's breach, together with supporting evidence.** Once such evidence is received Ms Rowe will have 28 days in which to file and serve a response. Once this information is received I will discuss with the parties whether or not it is necessary to hold a further investigation meeting before determining what if any damages should be awarded.

### **Costs**

[20] **Costs are reserved.** If Apparel House wishes to pursue damages against Ms Rowe the question of costs should be delayed until after the determination on that matter. If on the other hand Apparel House decide not to pursue damages the parties should discuss the question of costs and attempt to settle the issue between themselves. If they're unable to do so Apparel House may file and serve submissions in respect to costs. In such an eventuality Ms Rowe will have 14 days in which to file and serve a response.

**Summary of findings**

[21] By way of summary of the findings set out in this determination:

- a. **The restraint clauses in Ms Rowe's employment agreement are both reasonable and enforceable.**
- b. **In entering into (a business) arrangement with Twin Images Ms Rowe was in breach of the restraint clause in her employment agreement.**
- c. **Ms Rowe did not breach the provision of her employment agreement regarding the employment or solicitation of employees or solicitation of clients of Apparel.**
- d. **The entry on the Rowe Textiles web site was technically a breach of Ms Rowe's employment agreement.**
- e. **Ms Rowe is ordered to pay a penalty of \$500.00 for the breach of her employment agreement outlined above.**
- f. **The \$500.00 penalty is to be paid to the Authority for remittance to the Crown Bank Account.**
- g. **Should Apparel House wish to pursue the question of damages they should file and serve details of the losses incurred as a result of Ms Rowe's breach, together with supporting evidence.**
- h. **Costs are reserved.**

James Wilson

Member of the Employment Relations Authority