

[3] Truescape is a duly incorporated company carrying on the business of visual communication technology in 3D visualisation, focusing in areas of business, large scale energy and infrastructure projects. Truescape operates in New Zealand, Australia, Canada and the United States.

[4] Samuel Chaffey is the Executive Chairman of Truescape and he gave evidence on its behalf. Mr Chaffey says that there is no further money due to Mr Hastie. He says that Mr Hastie entered into an employment agreement with a 12 month non-solicitation clause.

[5] The parties attempted unsuccessfully to resolve both matters at mediation.

The Issues

[6] The Authority needs to determine the following issues:

- Is money owed to Mr Hastie?
- Is the non-solicitation clause reasonable?

Is money owed to Mr Hastie?

[7] Remuneration is set out in the Second Schedule to Mr Hastie's employment agreement as a commencing base salary of \$70,000 per annum and a performance bonus of \$30,000 per annum paid six monthly in review with the General Manager, Global Business on achievement criteria for that six month period. The performance bonus was expressed in the Second Schedule to take immediate effect and would be reviewed in April 2011.

[8] Mr Hastie says that he was not paid his performance bonus on a pro rata basis for the period that he worked just short of eight weeks. He says that his performance targets were not determined and set within the first week of his employment as his letter of offer of employment said they would be and it was not until approximately ten days before the end of his employment that he received the targets. Mr Hastie said in his evidence at the Authority investigation meeting that if the performance targets had been set at the outset of his employment he would have understood what sales should be focused on and the targets he was required to achieve and would have operated in a different way.

[9] Mr Hastie provided his record of sales whilst he was employed at Truescape and Truescape provided their record of Mr Hastie's sales. There is a difference in the sales figures.

[10] Mr Hastie accepted that the difference in the figures could be explained in part due to the fact that some of the sales he was involved in did not progress and therefore were closed. Some of the other sales referred to in Truescape's documents were noted as *existing client*, and referred to only limited involvement from Mr Hastie in the sale.

[11] On the sales figures provided by Mr Hastie he seemed in all probability to have met the targets provided to him some 10 days before his employment terminated. On the figures provided by Truescape he did not meet the targets and would therefore have been ineligible for a performance bonus. Mr Hastie accepted that the Truescape figures would have been generated from Truescape's sales systems and he was not in a position to challenge their accuracy.

[12] I accept the figures provided by Truescape in all likelihood accurately reflect the sales made by Mr Hastie for the period September, October and November 2011. On those figures I am not satisfied that Mr Hastie would have been eligible to have received a bonus described in his letter of offer as an *at risk bonus* on a pro rata basis for the period he was employed on sales made. I do not find therefore, in answer to the problem that Mr Hastie set out in his statement of problem, that he is owed money by Truescape for a performance bonus.

[13] Mr Hastie's argument at the investigation meeting was wider than a claim that he was owed money. He stated that he had been disadvantaged because his performance targets had not been set in accordance with his letter of offer, within the first week. Mr Chaffey explained in his evidence that Mr Hastie's sales targets were not prepared immediately because the company wanted to get an understanding of what targets would be appropriate and that required an initial assessment of Mr Hastie as an employee. The evidence did not support that Mr Hastie was aware of this. It appears that Mr Hastie became very frustrated at not being provided with his targets and they were eventually provided a week and a half out from the termination date.

[14] I regard the claim as presented by Mr Hastie at the Authority investigation meeting as a different claim to that set out in his statement of problem. For completeness though an employee can be disadvantaged when sales targets are set at a

later date than the parties agreed and it did appear to me that there should also have been better communication with Mr Hastie about the reasons for the delay. Ultimately however I am not satisfied that there is any money owing to Mr Hastie.

[15] In conclusion therefore I do not find that Mr Hastie has made out his claim that he is owed anything further by way of remuneration.

Non-solicitation clause

[16] Mr Hastie referred in his application to the Authority to wanting clarification about the non-solicitation clause. His attention had been drawn to the clause following the termination of his employment by Truescape. I commend Mr Hastie for coming to the Authority to obtain a determination where he takes issue with the reasonableness of the duration of the restrictive covenant. Mr Hastie says that the duration of the covenant should be 3 months and I have taken his application as seeking some relief from the 12 month duration. Mr Chaffey in giving his evidence explained that the company wanted in particular protection from Mr Hastie using confidential information in dealing with clients following termination.

[17] Clause 17 provides as follows:

17. Non Solicitation of Clients and Employees

*17.1 Except with our prior written consent you **will not** for a period of 12 months after you end your employment with us:*

17.1.1 Entice or seek to entice our existing employees to work for any other employer, or

17.1.2 Offer to perform services or supply products (other than services or products not currently offered or provided by us) or otherwise solicit or entice the custom of; or

17.1.3 Seek an agreement or contract (other than an agreement of employment or a contract for services or products not currently offered or provided by us) with; or

17.1.4 Perform services or supply products (except under an agreement of employment or for services or products not currently offered or provided by us) for; or

17.1.5 Use your name or permit your name to be used for the purpose of or with a view to obtaining the custom of:

any customer of ours to whom we have provided services or supplied products during the period of 24 months preceding termination of this agreement; or any holding Company of such customer or any subsidiary Company of such Company or holding Company.

17.2 *It is acknowledged by both of us that the remuneration under this agreement includes a component in recognition of this restraint.*

Note: This clause has been included in your agreement to protect our interest in our clients. It does not prevent you from being employed by a competitor of ours. It specifically deals with approaching our clients or soliciting their custom during the restraint period but we can agree on variations in specific circumstances.

[18] Mr Hastie did not argue that there should be no restraint at all but that the duration of the covenant should be limited. The market in which Truescape operates is a specialised one and potentially it could be vulnerable in terms of its clients and the use of confidential information by a departing employee to perform services or supply products to their clients. Mr Chaffey confirmed in his evidence that there was no evidence that Mr Hastie had breached the non-solicitation clause. Mr Hastie confirmed in his evidence that he did not have any lists of clients or other confidential information belonging to Truescape.

[19] I turn to the scope, geographical area and duration of clause 17. The scope of the non-solicitation covenant is wide. It is expressed to include any customer Truescape has provided services, or supplied products, to during the period of 24 months preceding termination of the agreement between Mr Hastie and Truescape. It includes any holding company of such customer or subsidiary company. There is a likelihood given Mr Hastie's employment was only for a short period that he would be unaware whether or not a company or potential customer was or had been a customer of Truescape. The clause also prevents Mr Hastie using his name or allowing his new employer to use his name to retain any customer of Truescape who has been a customer during the period of 24 months, for 12 months. The scope of the clause where there is a very short period of employment is unreasonable.

[20] The covenant is not limited as to its geographical area and therefore could include clients within a geographical area wider than the Australasian area Mr Hastie operated within. That is unreasonable.

[21] The duration of the clause is 12 months. In considering reasonableness I have had regard to the notice period. The employment agreement provides for different notice for those on a trial period and for other employees. The notice for termination within a trial period is two weeks and after the trial period ends the notice is four weeks. Employees are viewed differently before and at the end of the trial period for notice and yet are both bound by a covenant for a period of twelve months.

[22] I find that the duration of the covenant period is unreasonable. Three months in my view is a reasonable period for the non solicitation covenant. That period provides adequate protection to Truescape and recognises Mr Hastie's role and length of employment.

[23] The Authority has the power under s.162 of the Employment Relations Act 2000 to make orders under the Illegal Contracts Act 1970 to modify the restrictive covenant. I have had regard to s.164 of the Employment Relations Act 2000 that provides restrictions on the power of the Authority to cancel or vary an individual employment agreement. It requires the Authority to identify the problem in relation to the agreement and direct the parties in good faith to attempt to resolve it. I am satisfied that before the mediation took place the Authority, Mr Hastie and Truescape had identified the problem about the reasonableness of the duration of the restrictive covenant in clause 17. Truescape knew that Mr Hastie considered three months to be reasonable. I am satisfied that the parties attempted in good faith to resolve that problem using mediation and notwithstanding that the issue is not resolved.

[24] I am further satisfied that there would not be any appropriate or adequate remedy other than modification of clause 17.

[25] I have found the scope, duration and geographical area of the restrictive covenant to be unreasonable. Given the passage of three months since Mr Hastie's termination has expired and the fact there is no evidence of breach during that time there is little practical purpose served in modifying or varying clause 17 other than its duration. I therefore exercise the power under s.8 of the Illegal Contracts Act 1970 and modify clause 17.1 of the employment agreement between Kelvin Hastie and Truescape Limited to now read:

*17.1 Except with our prior written consent you **will not** for a period of 3 months after you end your employment with us:*

The rest of clause 17 remains unchanged.

Costs

[26] Mr Hastie has been unsuccessful in terms of his claim that he is owed further remuneration but has been successful in modification of the non-solicitation clause.

[27] I find that Mr Hastie is entitled to reimbursement of his filing fee of \$71.56 and also his return air fares to travel to the investigation meeting. Mr Hastie is to provide to Ms McLenaghan a copy of his airfares to attend the investigation meeting and this is to be reimbursed by the company.

Helen Doyle
Member of the Employment Relations Authority