

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN I C Frith (NZ) Ltd
AND Camille Young
REPRESENTATIVES Rick Hargreaves for Applicant
Sarah-Jane Neville for Respondent
MEMBER OF AUTHORITY Yvonne Oldfield
INVESTIGATION MEETING 22 August 2006
DATE OF DETERMINATION 24 October 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Camille Young, the respondent in this matter, has been a qualified insurance broker since 1999. She gained her introduction to the field after starting work as personal assistant to Mark McKinnon in 1995. Once she had qualified she became what she describes as "second in charge" in Mr McKinnon's newly established brokerage company, "Total 2000 Limited." She was a key part of the business, responsible for managing her own accounts and developing relationships with clients. In return she was well remunerated. It appears that after many years of working together Ms Young and Mr McKinnon developed a high level of trust in each other. Despite playing a crucial role in his business she never had a written employment agreement and there was never any suggestion that she should enter into a restraint of trade.

[2] On or about 7 November 2005 Mr McKinnon sold his business to the applicant's parent company¹. On 30 November 2005 the applicant and Ms Young executed a written employment agreement. It contained the following clause:

"18 Restraint of Trade

18.1 The employee agree [sic] that he shall not at any time while he remains employed by the employer and for the period specified in Schedule A after the termination of that employment for any reason whatsoever either on his own account or for any person, firm or company directly or indirectly canvass, solicit or attempt to solicit any insurance business from any person, firm or corporation who or which has been a client or customer of the employer during the six months immediately preceding the termination of the employee.

18.2 The above restraints are separate from one another. If any one of them is unenforceable, the rest are not affected.

18.3 The employee agrees that these restraints are reasonable for the protection of the employer's business. The employee also agree [sic] that he has received reasonable

¹ When this matter was first lodged with the Authority the applicant was identified as "IC Frith Ltd" however all parties are now in agreement that Ms Young was employed by the NZ subsidiary, IC Frith (NZ) Ltd.

consideration for these restraints in the remuneration the employer provides and in the payment made under the purchase document."

[3] The agreement does have attached a schedule marked "A". It sets out the position description, starting date, notice period, remuneration, hours of work, and some general responsibilities of the position. It contains no reference at all to a restraint of trade or its terms.

[4] Ms Young was not privy to the terms of the sale and did not receive any payment from either of its parties in relation to it.

[5] Unfortunately, Ms Young was never as happy working for the applicant as she had been with Total 2000 Limited. She resigned on 27 March 2006, and on 24 April 2006 she commenced work with a competitor of IC Frith (NZ) Ltd.

[6] The applicant now says that Ms Young has acted in breach of restraint of trade.² As a first step to the resolution of the employment relationship problem, IC Frith (NZ) Ltd has asked the Authority for a declaration that the post employment restraint in the employment agreement is enforceable and/or that the Authority modify it as deemed fair and reasonable.

[7] IC Frith (NZ) Ltd says that in the absence of a specified term, the restraint amounts to one of on-going duration. It concedes that this would be unreasonable (and therefore unenforceable) and argues that the proper course for the Authority is to modify the terms of the agreement by reducing the (indefinite) term to a reasonable length, which it puts at six months. In all other respects, IC Frith says the restraint provision is reasonable and so enforceable. Specifically it says:

- the scope of the restraint is reasonable; it applies only to clients with whom Ms Young did business on its behalf in the six months preceding the end of her employment;
- There is a proprietary interest which the applicant has sought to protect (the 'book of business' purchased when Mr McKinnon sold his company;)
- A restraint is reasonably required to protect this interest (Ms Young having taken employment with a competitor) and
- Ms Young was provided with the draft employment agreement some three months before she signed it and so must have turned her mind to the issue of the post termination restraint. During that time there were discussions between her and the applicant about remuneration. The agreed remuneration package must therefore be taken to include consideration for the restraint.

[8] Ms Young's position is that:

- the parties failed to turn their minds to the issue of restraint of trade prior to the execution of the agreement and there was no consideration for such a provision, and
- since there is no reference to any restraint in Schedule A, the agreement does not contain a post termination restraint of trade and there is nothing for the Authority to consider in relation to reasonableness and enforceability.

² The applicant also alleges that Ms Young has breached her obligations of confidentiality. Although she admits the existence of these obligations she disputes any breach. At the applicant's request the investigation of that aspect of the employment relationship problem has been put "on hold" at this stage.

[9] The applicant counters this with a further argument: that if it should be found that there is no express restraint this is a case in which a restraint of trade can be implied into the employment agreement.³

[10] Both parties agreed that as a function of the close relationship established between broker and client, restraints of trade are common within the brokerage industry. Coupled with the fact of the respondent's purchase of the book of business of Total 2000 Ltd this indicated that a restraint was needed to protect a real proprietary interest. I am satisfied that clause 18 would be reasonable in requiring a broker not to "*canvass, solicit or attempt to solicit any insurance business from any person, firm or corporation who or which has been a client or customer of the employer during the six months immediately preceding the termination of the employee.*" Indeed Counsel for Ms Young has not mounted an active argument to the contrary. Duration aside, therefore, no issues arise as to whether the scope of the restraint was reasonable.

[11] In summary, the issues which remain for determination are:

- i. Whether during their negotiations the parties turned their minds to the issue of restraint of trade and whether there was consideration for a post termination restraint of trade;
- ii. whether the employment agreement contains a restraint provision (express or implied,) and
- iii. if so, whether the Authority should modify the duration of any such restraint to a reasonable (and so enforceable) duration.

(i) Did the parties turn their minds to the issue of restraint of trade and was there consideration for a post termination restraint of trade?

[12] The association between Total 2000 Ltd and the applicant began in mid 2004 when Mr McKinnon moved his offices into the premises of IC Frith (NZ) Ltd. Ms Young worked alongside the applicant's account managers from then on. One year later Ms Young became aware that Mr McKinnon was engaged in negotiations for the sale and purchase of the business and that both he and IC Frith (NZ) Ltd envisaged that she would move across to the applicant company when the sale went ahead. She promptly asked the applicant's managing director, Anthony Jones, about what terms and conditions she could expect if this happened. He reassured her that there would be no change from what she was currently getting. Unfortunately however he had not at that time obtained full details of what those terms and conditions were.

[13] The applicant's local manager, Fiona Jamieson, told me that at the time the sale and purchase of Total 2000 Ltd was being negotiated, she was aware that it had no written agreement with Ms Young and that Ms Young was not subject to a restraint of trade provision. She also knew that the "book of business" being purchased included clients who dealt primarily with Ms Young. Nonetheless, she said, the need to secure Ms Young's ongoing employment did not feature in pre-sale discussions between the two companies or indeed with Ms Young herself. Ms Jamieson told me that she simply assumed that Ms Young would be happy to join IC Frith (NZ) Ltd.

[14] Ms Young did agree to start work with IC Frith (NZ) Ltd in the expectation that the terms she had enjoyed under the previous owners of the business would continue. Although the sale and purchase was not completed until 7 November 2005, the applicant paid Ms Young's wages from 1 August 2005 at the latest. Both Ms Young and IC Frith (NZ) Ltd have agreed that I should fix the beginning of her employment as 1 August 2005.

³ Mr Hargreaves cites United Pukekohe v Grantley [1976] 3 NZLR 762 (HC) and Norris v Zealfresh International Ltd [1998] 3 ERNZ 574 as authorities for the principle that a restraint may be implied into an employment agreement.

[15] By this date also she had received a draft employment agreement. Like all the employment agreements entered into by the applicant, it was based on a standard form document drafted by its solicitors. Terms specific to Ms Young (which were flagged for her attention) were contained in the attached schedules and included her name, title, remuneration and holiday entitlements.

[16] Ms Young was immediately concerned that the draft agreement did not secure her previous terms. She had no issue about base salary or commission (which she had been getting since 1 August) but she did have concerns about the company vehicle to be supplied, private use of mobile phone, attendance at conferences, and whether bonus payments were discretionary. Discussions ensued between her, Ms Jamieson, and Mr McKinnon on the question of what her previous terms and conditions had been. There is no dispute that there was no discussion of Clause 18. Ms Young told me that she had focussed her attention primarily on the schedule to the draft agreement although she was aware that clause 18 was in the draft agreement. She told me she just ignored and thought it did not apply to her as it was not in Schedule A and had not been part of her previous conditions.

[17] Clause 18 had not been tailored in any way for Ms Young. Branch manager Fiona Jamieson told me that she had not read the draft agreement properly and mistakenly thought that it contained a six month restraint of trade. She and Mr Jones told me that no specific consideration was provided for the restraint provision. They felt that the salary being offered to Ms Young was more than competitive for a position at her level (being more than what was paid to others at her level in their organisation) and covered everything in the agreement including the restraint.

[18] Eventually the matters in dispute were resolved and an employment agreement was executed on 30 November 2005. It did not provide for bonuses on the terms Ms Young claimed to have enjoyed previously. In sum, the remuneration was at or below what she had received in her employment with Total 2000 Ltd.

Determination

[19] Although the parties discussed other issues before signing the agreement, they did not talk about the issue of restraint. Clause 18 was not drafted specifically for this employment agreement rather it appears to have been included almost by default. The retention of the meaningless phrase "*the payment made under the purchase document*" indicates that no thought went into it. I am not satisfied that the parties turned their minds to the issue of restraint of trade at the time the agreement was entered into.

[20] Counsel for the applicant has argued in submissions that the remuneration package included consideration for the restraint. I do not accept this submission. There was no increase in Ms Young's remuneration when Clause 18 was introduced into her terms and conditions of employment (on 30 November.) At that time she had already been employed by the applicant for almost four months. There can have been no consideration for the introduction of a restraint provision.

(ii) Does the agreement contain an express or implied post termination restraint of trade?

[21] I do not accept the applicant's submission that in the absence of a specified period, the restraint contained in clause 18 must be of indefinite duration. The restraint is to be "*for the period specified in Schedule A.*" Nothing has been specified so the period specified must be nil and the restraint must be of nil duration. A restraint of nil duration is not a restraint. It follows that the employment agreement does not contain an express restraint of trade provision.

[22] This leaves the question whether a restraint of trade can be implied into this employment agreement. The authorities cited on this point can be distinguished from the present case on several grounds. United Pukekohe v Grantley [1976] 3 NZLR 762 (HC) involved a restraint on someone with a proprietary interest in a business which was being sold. Norris v Zealfresh

International Ltd [1998] 3 ERNZ 574 also concerned a defendant with a proprietary interest. He was a majority shareholder, senior employee, and a director of the company and had ensured that another employee of lesser status had accepted a restraint. Unlike the present case each dealt with interim relief and only arguable cases were made out. Finally in the present case negotiation and consideration have been found to be absent. For these reasons I remain unconvinced that a restraint can be implied into this employment agreement.

(iii) Should the Authority modify the duration of the restraint?

[23] I have concluded that the parties did not turn their minds to the issue of restraint of trade, that there was no consideration for a post-termination restraint of trade, and that the agreement does not contain a restraint of trade, express or implied, capable of being modified. The issue of modification does not, therefore, fall to be determined.

(iv) Costs and other further issues

[24] This determination does not dispose of all elements of the employment relationship problem. It is therefore premature to address the issue of costs and that matter is reserved. A conference call will be scheduled to discuss how to proceed with the outstanding issues between the parties.

Yvonne Oldfield
Member of Employment Relations Authority