IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEMPC 151
CRC 39/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	KIWIS STAT LTD Plaintiff
AND	TANIA NICHOLS Defendant

Hearing: 8 and 9 November 2010
(Heard at Christchurch)

Appearances: Brian Nathan, counsel for plaintiff
Amy Shakespeare, counsel for defendant

Judgment: 9 November 2010

ORAL JUDGMENT OF JUDGE A A COUCH

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[1] The issue in this case is whether the restraint of trade provisions in the employment agreement between the parties should be enforced. Those provisions were expressed to apply for a period of 12 months.

[2] The defendant was employed by the plaintiff from 22 May 2006 until 21 May 2010 when she left to take up employment with a competitor of the plaintiff, Triple0. The plaintiff sought an interim injunction from the Employment Relations Authority. That was granted on 30 June 2010. The effect was to compel the defendant to ceased employment with Triple0.

[3] The substantive issues were then the subject of an investigation meeting on 20 July 2010 with a determination being given on 27 August 2010. The Authority

found that the restraints were enforceable but that it was only reasonable to give effect to them for three months. Rather than make a permanent injunction, the Authority ordered that the interim injunction be discharged on 10 September 2010. After that, the defendant was reemployed by Triple0.

[4] The plaintiff has challenged the whole of the substantive determination and the matter proceeded today by way of a hearing de novo. The plaintiff originally sought both interim and permanent relief and an urgent hearing of the claim for interim relief was scheduled for 29 September 2010. Prior to that date however, the plaintiff abandoned the claim for interim relief and it was only the claim for substantive relief that remained to be heard today.

[5] As it is now nearly six months after the defendant left the plaintiff's employment, there remains a sense of urgency in deciding this matter. There obviously would be no value to the parties in giving a decision after it could be effective. That is the principal reason for giving an oral decision today.

Essential Facts

[6] I had concise but detailed evidence of the relevant facts. This was given by John Cleary the General Manager of the plaintiff, by the defendant and by Andrew Arps, the General Manager of Triple0. I have taken all of that evidence into account.

[7] The plaintiff's principal business is to locate and place doctors in hospitals on locum or other short term assignments. In essence the plaintiff is a broker. It receives a request from hospital to help fill specific vacancies. The plaintiff then identifies doctors who are suitable and available and proposes them to the hospital. If accepted by the hospital, the plaintiff becomes entitled to a fee from the hospital based on the payment made by the hospital to the doctor.

[8] The defendant was employed as a "locum coordinator". Her role was to receive requests from a particular group of hospitals and to match a doctor to each request.

[9] The parties had a written employment agreement, two clauses of which were:

17. Restraint of Trade and Non-Solicitation

17.1 The employee acknowledges that whilst performing his/her duties hereunder, he/she will be privy to confidential information and trade secrets belonging and pertaining to the employer's business. The employee further acknowledges that during the course of employment the employee may obtain personal knowledge of or influence over customers and employees of the employer.

17.2 In consideration of the employee's remuneration, the employee undertakes that he/she will not directly or indirectly, either during her employment or for a period of twelve (12) months following the termination thereof, whether on her own account or for any other person, company or entity:

17.2.1 Induce, or endeavour to induce, any officer or employee of the employer to leave his/her employment with the employer;

17.2.2 Induce, solicit, approach or accept approaches from any person, company or entity who was at any time within the period of twelve months prior to the ending of the employee's employment, a customer of the employer or was negotiating with the employer with a view to doing business, for the purpose of providing goods or services similar or related to those provided by the employer.

17.2.3 Carry on, or be concerned or interested in any business similar to or likely to be in competition with the activities of the employer, whether alone or jointly with any other person, firm or corporation or as a director, agent, associate or employee. The provisions of this clause shall apply throughout New Zealand but only as to such activities with companies or persons who are actual or potential competitors of the employer.

17.3 Each of the undertakings contained in each of the sub-clauses of clause 4.2 constitute a separate undertaking by the employee and is separately enforceable by the employer.

17.4 The employee undertakes to fully inform any prospective employer proposing to employ the employee during the term of this Restraint of Trade and Non-solicitation clause, of the provisions of this clause.

17.5 In the event the employees fails to comply with any of the provisions of this clause the employee shall pay the employer the sum of $10,000.00 in liquidated damages.

17.6 If any part of this clause is subsequently held to be void or is otherwise modified, the reminder of this clause will remain in full force and effect.

18. Confidentiality

18.1 The employee shall not at any time or for any reason, whether during the term of this agreement or after its termination, use or disclose to any person any confidential information relating to the affairs, clients, or trade secrets of the employer, except so far as may be reasonably necessary to enable the employee to fulfil his/her obligations under this agreement.

18.2 This clause relates to all information, whether or not it is recorded or memorised and includes all information that is or may be of use to the competitors of the employer.

18.3 This clause shall not apply to information which has entered the public domain otherwise than as a result of a breach of this clause by the employee.

18.4 In this clause, "confidential information" means any information relating to the business or financial affairs of the employer. Without limiting the foregoing, "confidential information" shall also include:

18.4.1 Any trade secrets, specialised know-how or practices in the employer's industry or in any other industry in which the company may from time to time engage in business, customer lists, customer requirements, performance reports or profitability figures or reports;

18.4.2 Profitability of contracts, margins on products and services, and other financial information in relation to the business or in relation to any customer which are or may be of commercial value to a competitor; and

18.4.3 Information pertaining to any other employee of the company that is protected from disclosure under the Privacy Act 1993.

[10] Initially the defendant had responsibility for 17 or so hospitals in the central and upper North Island. In September 2008 some hospitals in Tasmania were added to the defendant's list. In August 2009 the defendant was given responsibility for a number of other hospitals in Australia and all New Zealand hospitals were taken off her list. In late March 2010, Tauranga and Whakatane hospitals were returned to the defendant but I am told she subsequently made no placements to them.

[11] The plaintiff maintains a sophisticated and extensive database containing details of all hospitals and a list of more than 5,000 doctors. Of these, about 100 are frequently placed by the plaintiff and were described as the "A" list. Mr Cleary said they provided 80 percent of the plaintiff's income. Another somewhat larger group of "B" doctors provided most of the balance. The database was used to record information about doctors and their placements to assist in identifying suitable candidates for future placements. Information was recorded by any staff dealing with a doctor and was accessible to all staff.

[12] In her job, the defendant had to assess each request received from a hospital on her list, attempt to find a doctor with suitable qualifications and/or experience and then see if that doctor was available and willing to accept the placement. I accept the defendant's evidence that, in doing this work, 90 percent or more of the information about doctors she used was obtained from the database. The database also recorded all communications with hospitals and doctors. It had automatic dialling and email creating facilities so that people in the defendant's position did not need to remember or look up numbers or addresses.

[13] On occasions, the defendant's work involved persuading or encouraging doctors to accept particular placements but, for reasons I expand on later, this seemed to be the exception rather than the rule.

[14] The defendant was one of fourteen locum coordinators employed by the plaintiff. She reported to a supervisor who reported to Mr Cleary. The defendant was not involved in management nor did she have knowledge of the plaintiff's strategy or future plans.

[15] While each locum coordinator had prime responsibility for a list of hospitals, each of them could approach any doctor in the database to fill a position. Thus each doctor was liable to be contacted by a number of the plaintiff's staff over time. Schedules provided by the plaintiff showed that, of the doctors placed most often by the defendant, she was responsible for only 20-25 percent of those placements. Similarly she was involved in only a minority of contacts with these doctors by email or telephone.

[16] In addition to responsibility for a list of hospitals, each locum coordinator had a list of doctors to be routinely called. The defendant had five or six "A" list doctors she was required to call weekly, about ten "B" list doctors to call monthly and twenty or so "C" list doctors to call every three months.

[17] Requests to the plaintiff from hospitals were usually made by a member of the medical staffing unit. These units typically comprised several staff and the evidence of the defendant was that there was considerable turnover of staff in the units. I accept that evidence.

[18] The plaintiff has two main competitors in New Zealand. They are Triple0 and Med Recruit. Hospitals tend to use more than one company to locate staff and often all three. Similarly, most doctors are registered with more than one company. For the hospitals, the aim is simply to find a suitable doctor to fill a vacancy. For doctors, the aim is to find work which meets their needs and preferences.

[19] The placements vary greatly in length and frequency but statistics provided by the plaintiff showed that, for doctors most frequently placed, the average length of placement was about 16 days and the time between placements about 20 days.

[20] On 7 May 2010 the defendant gave two weeks' notice to Mr Cleary. She left on 21 May 2010 in accordance with that notice and began working for Triple0 on 24 May 2010.

[21] The defendant was aware of the restraints of trade in her employment agreement with the plaintiff at the time she took up employment with Triple0. She took legal advice which was that the restraints were "too draconian" to be enforceable.

Relief sought by the plaintiff

[22] In the statement of claim the plaintiff seeks an injunction restraining the defendant from "working in breach of clause 17" of the employment agreement. This is obviously very broad and vague. In the course of the hearing it was established that what the plaintiff seeks is an injunction preventing the defendant

from working for Triple0 and preventing the defendant from having business dealings with hospitals or doctors who were customers of the plaintiff during the 12 months prior to the defendant leaving the plaintiff.

[23] Mr Nathan clarified that the plaintiff does not allege any breach of clause 17 other than in relation to working for Triple0 and that no claim for damages is made under cl 17.5 or generally.

Principles and issues

[24] There was little dispute between counsel about the principles to be applied in a case such as this. Rather the dispute centres on the application of those principles to the facts of this case.

[25] The starting point is that a restraint of trade or employment will usually be unenforceable as contrary to public policy. By way of exception, restraints may be enforceable to the extent reasonably necessary to protect the legitimate proprietary interests of the plaintiff. I deliberately used the word "may" as an injunction is a form of equitable relief to be granted as a matter of discretion. The law favours competition and it will be most unusual that a provision whose purpose is solely to inhibit competition will be enforced.

[26] The essential issues in this case are:

a) Did the plaintiff have a proprietary interest in relationships between the defendant and hospitals and the defendant and doctors. If so what was the nature and extent of that interest?

b) Are the plaintiff's legitimate interests adequately protected by means other than an injunction?

c) To what extent are the plaintiff's legitimate interests at risk if the restraints are breached? Does the extent of risk require injunctive relief?

Proprietary interest

[27] Dealing firstly with doctors, Mr Nathan's primary submission was that the plaintiff's business is not simply a matter of casually placing doctors into hospitals. He submitted that it is critical to properly assess a doctor's skills and qualifications, to verify these and then be able to determine the suitability of those skills and qualifications for particular vacancies. For the defendant, Ms Shakespeare did not take issue with that proposition.

[28] The evidence is that virtually all of the information necessary to carry out those tasks was contained in the plaintiff's database. The evidence of the defendant was also that this was where she actually obtained that information on almost every occasion.

[29] Mr Nathan submitted that to carry out her work the defendant also needed to develop personal relationships with doctors, including a knowledge of such factors as where they prefer to work, the length of placement they prefer, what their family circumstances are and how they prefer to travel. The defendant accepted that such information may have been of some assistance on occasions but that it was not critical. I accept that evidence which is consistent with the nature of the plaintiff's business. It was common ground that the plaintiff operates in a seller's market in the sense that demand for doctors in most cases exceeds supply. Brokers such as the plaintiff will approach any doctor who appears to meet the hospital's essential requirements for a placement and it is then largely a matter for decision by the doctor whether or not to accept any particular placement.

[30] It is of considerable importance in this case that the relationship the plaintiff has with each doctor does not rely on any single employee. As the plaintiff's statistics showed, several locum coordinators had working relationships with each "A" list doctor. In every case, the defendant's involvement with any particular doctor was a minority of the plaintiff's overall involvement with that doctor and, in most cases, no more than 25 percent. The relationships with doctors were very much more with the plaintiff than with the defendant.

[31] In relation to doctors, I conclude that the plaintiff has a proprietary interest in the information contained in its database and that this interest is both legitimate and substantial. As regards the plaintiff's interest in the relationships between the defendant and individual doctors, I find this is legitimate but far from substantial.

[32] I find that the value of the relationships the defendant had with hospitals was also legitimate but again far from substantial. Placements were initiated by the hospitals and frequently sent to multiple providers. The hospitals were interested principally in finding a doctor to fill a vacancy and, in the seller's market I have described, this could be difficult. Any relationships with hospitals were inevitably with the staff handling placements and the high turnover of such staff would have made it unusual for relationships with individuals to be longstanding.

Adequacy of other mechanisms

[33] Ms Shakespeare submitted that there were three other mechanisms in place in this case to adequately protect the plaintiff's interests.

a) The confidentiality provision in cl 18 of the employment agreement protected information in the plaintiff's database to the extent that the plaintiff had a proprietary interest in it.

b) Hospitals have terms of trade with the plaintiff which require them to pay a fee to the plaintiff if they engage a senior doctor through other channels and if that doctor has been placed with them by the plaintiff during the preceding 12 months.

c) Junior doctors have terms of trade with the plaintiff which require them to inform the plaintiff if they are accepting placement through alternative channels in a hospital in which they have been placed by the plaintiff. In default the plaintiff may claim a fee and/or expenses from the doctor.

[34] In relation to the confidentiality provision, Mr Nathan submitted that the defendant could inadvertently use confidential information during her employment by a competitor and that the plaintiff could only be protected by preventing her from working for a competitor. He attempted to draw support for this proposition from my decision in *Allright v Canon*[1] but properly accepted that the facts of the two cases are significantly different. I do not accept that the sort of risk which was decisive in that case exists to any real extent in this case. The defendant had no involvement in management of the plaintiff or its business strategy. Information in the database might be useful to a competitor but it is not of a nature likely to be used inadvertently as it is specific to particular doctors. I also accept the defendant's evidence that she had no reason to remember most of the information in the plaintiff's database and does not do so.

Extent of risk to the plaintiff

[35] An important factor in deciding this case must be the extent of any risk to the plaintiff's legitimate interests if the defendant is not restrained from working for Triple0. As far as the contents of the database are concerned this risk is adequately dealt with by cl 18 of the employment agreement which the defendant accepts she is bound by.

[36] Turning to the plaintiff's interest in personal relationships the defendant may have had with doctors and staff of hospitals, this turns on two factors. The first is the ability of the defendant to use any personal relationship she may have had to influence doctors and/or hospitals while she was employed by the plaintiff. The second is the likelihood and effect on the plaintiff's business of any such influence being used on behalf of another employer.

[37] I find this risk to the plaintiff to be very small. As I have recorded earlier, the defendant was only one of several or many staff of the plaintiff who dealt with each doctor. The plaintiff's relationships with doctors have continued through other staff and, to the extent that the plaintiff had the loyalty of a doctor, that is most unlikely to have been significantly affected by the defendant leaving.

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[1] (2009) 9 NZELC 93.141

[38] As regards hospital staff, I find that the plaintiff had very little interest in personal relationships between hospital staff and the defendant. In any event, the defendant had very little if any contact with hospital staff in New Zealand after August 2009. Any relationships hospital staff may have had with the defendant would inevitably have gone or been transferred to other staff of the plaintiff.

[39] I find that the terms of trade that the plaintiff has with hospitals and junior doctors are also a factor reducing the case for injunctive relief.

[40] Overall I find that injunctive relief is not justified in this case.

[41] In summary:

a) The plaintiff's claim fails.

b) Pursuant to s 182(3) of the Employment Relations Act 2000 the determination of the Authority is set aside and this decision stands in its place.

Comments

[42] I want to acknowledge the detailed and thoughtful submissions of both counsel. Although I have made only passing reference to them in this judgment, I have taken them fully into account and derived considerable benefit from them.

[43] I wish also to commend counsel on the exemplary manner in which this case has been presented. The evidence-in-chief has been relevant and concise. Cross-examination has been well prepared and focussed. Submissions have been thoroughly researched.

[44] The conclusion I have reached differs from that reached by the Authority. I sense that a major reason for that difference is that I was provided with statistical evidence not made available to the Authority and which established that the importance of the defendant's role in the plaintiff's business was distinctly less than

might have been inferred from other evidence. I note also that some evidence which the Authority found persuasive was not given to the Court.

Costs

[45] Costs are reserved. I encourage the parties to reach agreement on costs if they can. If they are unable to do so, counsel for the defendant has 20 working days in which to file a memorandum. Counsel for the plaintiff is then to have a further 15 working days to respond.

A A Couch
Judge

Oral judgment delivered at 4.21 pm on 9 November 2010