New Zealand Employment Relations Authority Decisions

Kiwis Stat Limited v Nichols CA138A/10 (Christchurch) [2010] NZERA 704 (27 August 2010)

Last Updated: 10 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 138A/10 5308299

BETWEEN

A N D

KIWIS STAT LIMITED Applicant

TANIA NICHOLS Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Philip Cheyne

Brian Nathan, Counsel for Applicant Amy Shakespeare, Counsel for Respondent

20 July 2010 at Christchurch

27 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kiwis Stat Limited (KSL) is a registered company in business as a specialist medical recruitment agency. Tania Nichols was employed as a locum co-ordinator from March 2006 until she resigned by giving notice in May 2010. The applicable written employment agreement includes restraint of trade and non-solicitation provisions. Ms Nichols commenced work for another medical recruitment agency. In June 2010 KSL successfully applied to the Authority for an interim injunction to enforce those provisions against Ms Nichols.

[2] There has now been a full investigation meeting into KSL's claims for injunctions to enforce the restraints as worded or as amended so as to make them reasonable, and damages against Ms Nichols. Ms Nichols' defence is that the restraints are unenforceable because they do not protect any legitimate proprietary interest, they are too wide to be upheld as reasonable and there is no public interest in enforcing them.

[3] To resolve this problem I will set out more details about Ms Nichols' terms of employment and expand on her work in practice before turning to assess the nature of the proprietary interest asserted by KSL and whether the restraints are reasonable so as to be enforceable.

Ms Nichols' employment

[4] There is a comprehensive individual employment agreement dated 28 April 2006. It includes clause 18 that requires Ms Nichols during and after the employment not to disclose KSL's confidential information. There is also clause 17 which is the main focus of these proceedings. It reads:

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 work 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 12 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 employee 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 remainder of this clause will remain in full force and effect.*

[5] John Cleary is KSL's General Manager. He wrote a letter dated 27 April 2006 to Ms Nichols offering her employment. The letter refers to Ms Nichols' right to seek independent advice and asks her to review the terms of employment and, if happy with them, to sign and return a copy of the letter and the proposed employment agreement. Ms Nichols signed those documents on 28 April 2006 and returned them as requested. She started work for KSL soon after.

[6] Ms Nichols worked from an office in Christchurch but KSL does business throughout New Zealand and Australia. KSL divided up primary responsibility for hospitals and other clients who used its services between a number of consultants, including Ms Nichols. Ms Nichols was initially responsible for a panel of hospitals covering most of the North Island. That later changed so that she was no longer responsible for the North Island hospitals but was instead responsible for hospitals and other clients in Tasmania and parts of Australia. Later still, Ms Nichols resumed responsibility for Tauranga and Whakatane hospitals. There is a dispute about who initiated the changes but that is immaterial for present purposes.

[7] Ms Nichols' role included building relationships with Human Resources or other staff in her panel of hospitals responsible for employing locum doctors to allow KSL the opportunity to supply locums to meet the hospitals' staffing needs. The evidence is that KSL also supplied nurses but the present contest is only about the placement of doctors (particularly locum doctors), reflecting the chronic market shortage of those skills. KSL received fees from the hospital whenever it supplied a locum. KSL also keeps a database on doctors who it can call on to meet hospitals' demands for staff. It was also part of Ms Nichols' role to build relationships with these doctors so that KSL would be able to match their requirements with that of the hospital client. Through her work Ms Nichols got to know some of these doctors quite well. Part of her job involved maintaining regular contact with them in accordance with an allocated calling pattern. Doctors were streamed into various categories depending on the frequency with which they were placed by KSL. Those placed more frequently were on a more regular calling pattern. Ms Nichols' contact with doctors was based on their expressed interest in working in her panel of hospitals. Infrequently she covered for colleagues in respect of their hospitals so had contact with other doctors.

[8] Typically a hospital would send an email to the various recruitment companies it dealt with giving details of any vacancy. Ms Nichols would then attempt to match the hospital's requirements with the skills, qualifications and interests of available doctors using KSL's database. It is common ground that this could require an element of persuasion or selling of the role on the part of Ms Nichols in her dealings with the potential appointee. In other words, Ms Nichols might have to persuade a doctor to accept an appointment that fell outside their indicated area of interest.

[9] Doctors typically register their interest for work with several recruitment agencies; hospitals do not restrict their

recruitment searches to one agency either. There is no evidence to indicate that any hospitals have a preferential supplier arrangement with any of the recruitment agencies. The fee payable by the hospital goes to the agency who first supplies the solution to the hospital's staffing need.

Ms Nichols' resignation

[10] It is not necessary to canvass why, but Ms Nichols gave two weeks notice of resignation on 7 May for her employment to end on 21 May 2010. Before resigning Ms Nichols sought legal advice about the effect of the restraint of trade provisions. She was apparently told that the provisions were unenforceable because they were *too draconian* and that she should be vague about her plans if asked by KSL about her employment intentions.

[11] Ms Nichols resigned because she had been offered and had accepted alternative employment with a competitor to KSL (Triple0). Triple0 knew about clause 17 before finalising the employment with Ms Nichols.

[12] On 7 May, when asked by Mr Cleary what she intended to do when she finished with KSL, Ms Nichols said that she was going back to general recruitment. Ms Nichols had worked in that field before the job with KSL. In evidence Ms Nichols accepts that her response to Mr Cleary was misleading. Later, Mr Cleary came to hear a rumour that Ms Nichols was going to work for Triple0. As a result Mr Cleary asked Ms Nichols if she was going to a medical recruitment company. Ms Nichols denied that and said again that she was going to work in general recruitment.

[13] Ms Nichols started work for Triple0 in Christchurch on 23 May 2010. KSL wrote to Ms Nichols the next day. The letter asserts that Ms Nichols has breached clause 17.2.3 of her employment agreement, requires her to cease her employment with Triple0 and give an undertaking to comply with the restraint of trade provisions no later than 27 May 2010, failing which KSL would commence legal proceedings. This letter was delivered to Ms Nichols at her new workplace.

[14] Ms Nichols sought other legal advice and her solicitor wrote to KSL's solicitor on 27 May 2010 as instructed by her and Triple0. The letter asserts that the restraint of trade provisions are unenforceable because they do not protect any proprietary interest and because they are unreasonable. There is nonetheless an offer to meet to discuss matters.

[15] On 8 June 2010 KSL lodged its statement of problem with the Authority seeking interim and permanent injunctions and damages against Ms Nichols. As noted, the Authority ordered Ms Nichols to cease working for Triple0 pending the disposition of the substantive claims.

[16] The current position is that Ms Nichols is not working for Triple0 but her appointment was to a role similar to that she had with KSL. With Triple0 Ms Nichols spent her first three weeks on induction then started working mostly on hospitals and with doctors with whom she had not had any relationship with while at KSL. By that time, these proceedings had been initiated. Ms Nichols did contact four hospitals in Australia that had been part of her panel at the time she left KSL because it was thought that the restraints would not apply to work in Australia. As mentioned below there is evidence of contact with a doctor as well.

Enforceability of the restraint - proprietary interest

[17] It is common ground that KSL must show it has a proprietary interest capable of protection; that it is reasonable that the specified activities be restrained; that the period of the restraint is reasonable and that the geographical limits of the restraint are reasonable. The contest is about the application of the law to the present facts. I accept the submission of counsel for Ms Nichols that I should analyse each of the limbs of the restraint provision separately as to the existence of a proprietary interest as different considerations arise.

[18] The first limb (clause 17.2.1) restrains Ms Nichols from enticing away KSL's current employees. While it is accepted by Ms Nichols that KSL has a proprietary interest in its current employees, there is no suggestion that she has attempted to do anything in breach of this first limb. It is not necessary to say any more about this part of the restraint.

[19] The second limb (clause 17.2.2) is directed at restraining Ms Nichols post employment with KSL from dealing with any KSL customers. Both counsel refer me to *The Broadcasting Corporation of New Zealand v. Nielson* [1988] NZHC 959; (1988) 2 NZELC 96,040. There, the High Court said:

I turn now to the question of the enforceability of the covenant in restraint of trade. Such a covenant is prima facie unlawful, but will be upheld to the context that the employer is able to establish that it is reasonably necessary for the protection of the proprietary interest which the law recognises that he has in what may be called his trade secrets and his trade connections; and provided further that the restraint is not unreasonable from the point of view of the employee and that it is not in conflict with appropriate considerations of public interest.

[20] Counsel for KSL submits that the relationship between Ms Nichols and the hospitals (including the hospitals' HR and recruitment staff) and between Ms Nichols and doctors on KSL's database, gives rise to a protectable proprietary interest. It is helpful to deal with each group in turn.

[21] It is accepted for Ms Nichols that hospitals are KSL's *customers* for the purpose of clause 17.2.2. Regarding an employee's relationship with customers being a basis for a protectable interest, the High Court in *Nielsen* said this:

The employer's interest in maintaining his trade connection does not entitle him to obtain protection against every employee who deals with his customers, but only against those who because of the nature of the employment are likely to have personal knowledge of or influence over the customers and hence over where they place their custom to such an extent that it is within their powers to entice them away. The position was put thus by Lathan CJ in ***Lindner v. Murdoch's Garage*** *atp.363:*

"Where an employee is in a position which brings him into close and personal contact with the customers of the business in such a way that he may establish personal relations with them of such a character that if he leaves his employment he may be able to take away from his former employer some of his customers and thereby substantially affect the proprietary interest of that employer in the good will of his business, a covenant preventing him from accepting employment in a position in which he would be able to use to his own advantage and to the advantage of his former employer the knowledge of and intimacy with the customers which he obtained in the course of his employment should, in the absence of some other element which makes it invalid, be held to be valid."

[22] The evidence is that hospitals do not restrict themselves to dealing with only one recruitment agency. Their interest is in securing medical staff and they use all available channels to do so. Mr Cleary gave evidence about the extent of Ms Nichols' contact by email and phone with hospitals during her employment. There were, for example, 272 phone contacts and 3,628 email contacts between Ms Nichols and Tauranga Hospital. Mr Cleary also said that the level of contact indicates the high likelihood that Ms Nichols would have developed close relationships with people at Tauranga Hospital. There is also an email received by Ms Nichols from one such person which indicates that Ms Nichols was very well thought of by the recruitment co-ordinator at Whakatane Hospital.

[23] However, it is a significant step from the formation of a close working relationship with a recruitment co-ordinator to saying that Ms Nichols would have any influence over where they place the hospital's business so as to be able to entice them away from KSL to some other recruitment agency. The evidence is that the hospitals advertise their vacancies widely and the recruitment agency with the quickest response of a suitable appointee wins that business. This not something that is influenced by any personal relationship between the hospital recruitment co-ordinator and the agency consultant.

[24] I find that Ms Nichols' position was not such as would enable her to entice away any recruitment co-ordinator or hospital from using KSL to meet the hospital's need for medical staff. At least in respect of hospitals, there is no protectable proprietary interest in the nature of a trade connection that KSL can enforce.

[25] More must be said about the doctors who Ms Nichols placed on behalf of

KSL.

[26] The first point is whether those doctors are *customers* of KSL for the purposes of clause 17.2.2. It is common ground that KSL does not charge any fee or receive any payment from doctors who KSL maintains on its database or who are placed by the company. KSL only derives income from the hospitals once it has successfully arranged a placement to meet that hospital's need.

[27] The submission for Ms Nichols is that *customers* means those who buy goods and services and if KSL wanted to extend the effect of the restraint to doctors that should have been done by specific reference. I do not accept this submission. It is clear from the position description which is part of the employment agreement that Ms Nichols needed to establish and maintain functional relationships with two groups externally, *client hospital contacts* and *locum doctors.* The word *customers* is used in the job description to refer to both categories. Reading the restraint provisions in the context of the whole of the employment agreement, I am satisfied that the intention was for the restraint of trade provisions to cover both hospitals and doctors as *customers.*

[28] For there to be an enforceable restraint extending to doctors as customers, KSL must show that Ms Nichols' position brought into close and personal contact with doctors in such a way that she could establish personal relationships with them of such a character that she may be able to take away from KSL some of its former customers and thereby substantially affect the proprietary interests of KSL in the good will of its business: see *Nielsen.*

[29] It is accepted that the names of doctors in New Zealand is publicly available information in which KSL can have no proprietary interest. The names of doctors in Australia are apparently not similarly available and KSL has had to build up a database through its marketing and from other sources. The Australian information may not be as conveniently available, but it must be nonetheless public information as in New Zealand. As a result, KSL has no protectable interest in the names of doctors able to work in New Zealand and Australia. I should specifically record that there is no suggestion that Ms Nichols has taken with her to the new employment any printed or memorised list of names of either doctors or hospitals. The point for present purposes is whether KSL has a protectable proprietary interest in doctors as customers, but I find that it does not simply by dint of their status as doctors.

[30] The evidence is that Ms Nichols as a consultant for KSL came to learn about doctors' preferences as to the location, duration and type of work as well as their skills and suitability for particular appointments. Ms Nichols dealt with 145 doctors during her time at KSL. 71 of these doctors were placed only once by her, but that first placement generally required quite a lot of contact. 25 doctors were placed by her five or more times. At that frequency, such doctors must be regarded as people doing business with KSL on a regular basis so as to be clients (here *customers)* in the sense mentioned in *Peninsula Real Estate v. Harris* [1991] NZHC 2630; [1992] 2 NZLR 216.

[31] Ms Nichols in her evidence referred to at least 14 doctors that she had an ongoing professional relationship with while working at KSL. There is also evidence that one doctor has approached Ms Nichols about the possibility of work since her departure from KSL. There is other evidence of Ms Nichols establishing a *close personal relationship* with a doctor with whom she shared a recreational interest. From all this, at least in respect of doctors, I find that Ms Nichols was in a position where she could establish relationships with doctors so as to be able to take them away from KSL. That gives rise to a protectable pecuniary interest for KSL.

[32] The third limb of this restraint provision is a prohibition on working for any competitor. It is common ground that Triple0 competes with KSL. Having found that KSL has a protectable proprietary interest being its trade connection with doctors, it follows that there would also be a protectable proprietary interest to support this third limb.

Duration

[33] All limbs of the restraint are said to be applicable for 12 months. That period for a relatively junior level position is much longer than would be reasonably necessary to protect KSL's proprietary interest as explained below. Anticipating that, counsel submitted that a period of no less than six months is required to properly protect KSL's interest. That is based on Mr Cleary's evidence that the standard rotation in hospitals is 13 weeks and a doctor is likely to approach the consultant who previously placed them to find a subsequent placement.

[34] That evidence misstates the situation. Based on the information provided by KSL, very few of Ms Nichols' placements could have been for 13 weeks and none of her most frequently placed (five or more times) doctors would have been of that duration. The average length of placements for those doctors varied from under two days to about 53 days. Most fall at the shorter end of that spectrum. A restraint lasting no longer than three months would give adequate protection to allow KSL the opportunity to re-establish a relationship between those repeat customers and its new consultant.

[35] All three limbs of the restraint are expressed to apply for 12 months following termination of the employment. I see no reason to distinguish between the three limbs as to what would be a reasonable duration.

Scope of the restraint

[36] The third limb substantially overlaps the second limb, but it also has the effect of preventing Ms Nichols earning a living by using the skills and experiences she has developed with KSL. However, if Ms Nichols is entitled to work for a competitor, it is difficult to see how there could be effective supervision of a restraint limited to the second limb or non-solicitation part of the restraint. In other words there is every prospect that Ms Nichols could seek to place a doctor using the competitor's database who had also been a KSL customer as defined in the restraint. Ms Nichols might recognise that doctor as a KSL customer but deal with them anyway; or she might not recognise them as a KSL customer. Either situation would be a breach of the second restraint provision but there is a low probability that such dealings would come to KSL's notice. I conclude that it is reasonably necessary to protect KSL's proprietary interest to enforce the third limb of the restraint as well as the second limb.

[37] The third limb of the restraint is expressed to apply throughout New Zealand. That coverage is reasonable in light of the business operation of both KSL and its competitors.

Confidentiality

[38] There is a submission that Ms Nichols has breached clause 18 of her employment agreement with KSL which prohibits unauthorised use of KSL's confidential information during and after the employment. I am directed to the evidence about Ms Nichols' work while at Triple0, referred to above, and it is submitted that the evidence of Ms Nichols' limited dealings post employment with KSLs' hospitals and doctors puts her in breach of clause 18.

[39] I do not accept that there has necessarily been any breach of clause 18. Ms Nichols was not in a senior position with KSL so as to be privy to its confidential business, marketing or other strategic records and plans. She dealt with hospitals and doctors and came to learn something about the placement preferences of the doctors who she dealt with most often. There is nothing confidential to KSL in the names alone of hospitals requiring doctors or doctors seeking placements. The doctors' preferences are their information which they are entitled to share with whoever they choose. The evidence is that doctors typically register with several recruitment firms. As noted above, this is not a case about an employee taking away printed or memorised customer lists so as to compete with their former employer. Indeed, there is some evidence by way of emails showing Ms Nichols' dealings with KSL customers shortly before she left. It shows that she properly met her express and

implied obligations to KSL by encouraging those customers to continue their relationship with KSL's new consultant. That is not consistent with an assertion that Ms Nichols took KSL's confidential information and used it for her new employer.

Damages

[40] I accept the submission for Ms Nichols that there is no proof of any loss having been suffered by KSL caused by Ms Nichols breaching the restraint.

[41] Clause 17 includes a liquidated damages clause. In light of the absence of evidence as to loss or damage, it may be that this provision should be regarded as a penal provision and accordingly unenforceable. I will reserve that point for further investigation.

Summary - Clause 17

[42] KSL has a protectable proprietary interest in the nature of a trade connection with doctors who have been its customers within 12 months prior to the termination of Ms Nichols' employment. There is no other protectable proprietary interest.

[43] Clause 17.2.2 and clause 17.2.3 are expressed to be applicable for too long a period to be reasonable; they would be reasonable if varied so as to apply for no more than 3 months.

[44] The Authority's power under the Illegal Contracts Act 1970 to vary an individual employment agreement is subject to s.164 of the Employment Relations Act 2000. The Authority may make an order only if (regardless of mediation under s.159(1)(b)) it has identified the problem in relation to the agreement; and directed the parties to attempt in good faith to resolve that problem; and the parties have attempted in good faith to resolve the problem using mediation; and despite mediation, the problem has not been resolved; and the Authority is satisfied that any other order would be inappropriate or inadequate.

[45] Here, the parties did participate in mediation by agreement rather than direction prior to the interim investigation. Despite that I consider I am obliged under s.164 to direct mediation which I now do as a matter of urgency. I am told by the mediation service that they can accommodate mediation on an urgent basis within the next two weeks.

[46] Following mediation, but by no later than Friday 10 September 2010, the parties may confirm that the problem has not been resolved and that an order from the Authority is required.

Interim injunction

[47] That creates a difficulty with the interim order. If it continues in force Ms Nichols will be prevented from working for Triple0 despite my indication that varying the restraint to apply for three months (a period ending on 21 August 2010) would make it reasonable and enforceable. Against that, Ms Nichols may have the benefit of KSL's undertaking as to damages. If the order is simply discharged there will be less pressure to arrange mediation.

[48] Balancing the matters, I think the best option is to continue the effect of the interim injunction until 5.00 pm Friday 10 September 2010, following which it is discharged.

Costs

[49] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority