

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 18/10
5290685

BETWEEN KONICA MINOLTA
 BUSINESS SOLUTIONS NEW
 ZEALAND LIMITED
 Applicant

AND VAUGHAN LOVE
 Respondent

Member of Authority: P R Stapp

Representatives: Gillian Service Counsel for the Applicant
 Geoff Bevan Counsel for the Respondent

Investigation Meeting: 28 January 2010 at Wellington

Telephone
conference/additional
information and affidavits: 4 February 2010

Determination: 8 February 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Konica Minolta is seeking to prevent Mr Love from working for Fuji Xerox New Zealand Limited until the expiry of a restraint of trade. The parties are in dispute over the restraint of trade provision that was contained in Mr Love's employment agreement with Konica Minolta.

[2] Mr Love has opposed the application, but has offered some undertakings that have not been accepted by Konica Minolta. He claims that Konica Minolta has not come with clean hands and any relief would be inequitable.

The facts

[3] Mr Love commenced employment as a Commercial Account Manager with Ubix in 2004 under the terms of an employment agreement dated 28 October 2004 (the 2004 Agreement). That agreement contained a three month restraint of trade clause.

[4] In 2005 Mr Love signed a new employment agreement with Konica Minolta dated 15 February 2005 (the 2005 Agreement). That agreement also contained a restraint of trade provision, in much the same terms. The new agreement also contained additional clauses that covered reasonableness and consideration. At the time that the 2005 Agreement was signed Mr Love was an Account Manager. His base was \$50,000, plus a car allowance.

[5] From late 2005 Mr Love became a Major Account Manager working with major government organisations and some large corporate clients. He managed day-to-day accounts and, to a limited extent, sought new business. He stored information about his customers in Konica Minolta's database system.

[6] On 6 November 2009 Mr Love resigned and told his manager that he intended to join Fuji Xerox New Zealand Limited (FXNZ). He gave four weeks notice and his employment terminated on 4 December. He considered that by telling his manager and that nothing was said he could assume he was permitted to go and work for FXNZ, and that in any case something would be worked out over his restraint if there was any issue. He has relied on other circumstances where industry undertakings are often given with the interchange of employment.

[7] He went on garden leave for the duration of his notice period. He started with FXNZ on 7 December 2009.

[8] Mr Love was bound by a confidentiality clause in his employment agreement and the provisions of the Konica Minolta policy handbook. Mr Love has agreed to give an undertaking in regard to comply with the confidentiality required.

[9] Clause 16 in Mr Love's employment agreement contains the following restraint of trade:

16. RESTRAINT OF TRADE

- 16.1 *The Employee shall not, during the term of this Agreement and for a period of three months from the date of termination of the Employee's employment with the Company, for any reason:*
- (a) *Carry on or be connected, engaged or interested, either directly or indirectly, alone or with any other person, in any business which competes directly or indirectly with the business of the Company, without the prior written permission of the Company;*
 - (b) *Directly or indirectly, alone or with any other person, induce or persuade or attempt to induce or persuade any of the Company's clients, suppliers or customers to terminate or restrict their business relations with the Company; or*
 - (c) *Directly or indirectly, solicit or endeavour to entice away from the Company any employees of, or contractors to, the Company.*
- 16.2 *The Employee and the Company consider that the restraints contained in clause 16 are reasonable and necessary for the protection of the Company's goodwill and are intended to operate to the maximum extent. The restraints are separate, distinct and several, so that in the event of any part of clause 16 the restraint being held to be unreasonable and void, the restraints will apply with the modifications necessary to make them effective.*
- 16.3 *The Employee acknowledges that their salary includes consideration for this restraint of trade.*
- 16.4 *The restraints of trade shall survive the termination of this Agreement for any reason.*

[10] Mr Love accepted that as a Major Account Manager with Konica Minolta he had access to confidential information belonging to Konica Minolta. During the course of Mr Love's employment he had access to confidential information such as Konica Minolta's detailed pricing manual, client data base lists, market performance figures, marketing share statistics, current campaign information, unique technology points of difference, product strengths and weaknesses and general business strategy information. He had also developed close working relationships with Konica Minolta's customers.

[11] Mr Love has been replaced by Konica Minolta, and his replacement is responsible for taking care of Mr Love's portfolio along with an existing account manager. It is claimed they need time to get up to speed with the accounts and contracts and relationships.

Undertakings

[12] Mr Love says that he has not commenced sales duties for FXNZ prior to the Authority's investigation meeting. He has provided undertakings in a letter dated 22 January 2010 to Konica Minolta that he will:

- *Comply with his ongoing obligations of confidentiality to Konica Minolta as set out in his employment agreement.*
- *Prior to 4 March 2010, not approach or solicit, or in any way assist another person to approach or solicit any customers who, to his knowledge, were Konica Minolta's customers in the 12 months prior to 4 December 2009 and are not currently clients of Fuji Xerox.*
- *Prior to 4 March 2010 will not directly or indirectly solicit or endeavour to entice away from Konica Minolta any employee of, or contractor to, Konica Minolta.*

[13] During the Authority's investigation meeting he has added the following:

1. *That he will abide by his undertakings set out in the letter dated 22 January 2010.*
2. *That he has not and will not for the rest of his restraint period, solicit the business of his former Konica Minolta accounts, namely [names withheld].*

[14] The undertakings are not acceptable to Konica Minolta.

[15] Konica Minolta is critical of Mr Love for not adequately explaining why the undertakings he provided on 22 January were not provided earlier, after correspondence had been entered into on this issue. His inaction at first and subsequent action has caused it not to trust him in his new work place, and thus, the application for a request for him to be restrained to avoid any unintentional release of information.

The law

[16] There is no dispute between the parties on the application of the law. It is accepted that restraints of trade are enforceable if they are reasonable and to be reasonable, a restraint must be necessary to protect a legitimate proprietary interest and be in the public interest.

[17] It is also accepted that the reasonableness of a restraint of trade must be assessed as at the date the restraint was entered into. Also a restraint of trade will be enforceable if it is no wider than the circumstances of the case reasonably requires.

Proprietary interest

[18] It is accepted that there is a proprietary interest. This relates to Konica Minolta's confidential information and customer relationships that require protection. Further more there is acceptance that consideration was given at the time the agreement was entered into in the form of salary.

Confidential information and relationships

[19] Konica Minolta does not trust Mr Love to comply with his obligations. It is concerned that Mr Love's employment with FXNZ is in its government team and that he will be assisting in some form or other with the preparation of FXNZ's "All Government Procurement Reform and Tender Process" and that there is a risk of him inadvertently or innocently disclosing information of a confidential nature, given that he is working in a team in an open plan office.

[20] Evidence from FXNZ is that Konica Minolta has placed too much emphasis on Mr Love's role because he is not senior enough to be involved at the higher levels of strategy in FXNZ, which has its own people and the managers involved have their own offices.

Customer relationships

[21] There are an overlapping number of customer/clients in Mr Love's relationships with Konica Minolta and FXNZ. He was a major contact for the customers in his portfolio at Konica Minolta and had access to Konica Minolta's database.

[22] Konica Minolta's concern is that his relationship with key clients took time to build and it needs time for his replacement to re-establish these.

Duration of restraint

[23] The Konica Minolta restraint provision in Mr Love's 2005 agreement contains three month duration and Konica Minolta considers it needs the time for the new

Account Manager to build a rapport and relationship with Mr Love's customers, even although it now only has approximately a month to run.

[24] The deadline for tender proposals in the "All Government" tender is expected to be mid February 2010 and given Mr Love's knowledge and contacts that he acquired when working with Konica Minolta; it considers it is entitled to prevent him from assisting FXNZ in its tender proposal. Konica Minolta claims the three month restraint is reasonable in these circumstances.

Determination

[25] There is a proprietary interest to protect and the enforcement of the restraint is in the public interest because of the competitive nature of the industry. The parties entered freely into the restraint arrangements at the time.

[26] The length of the restraint (3 months) and the geographical scope of the restraint are reasonable given the nature and competition in the industry but particularly between Konica Minolta and FXNZ.

[27] Mr Love has deliberately breached his restraint taking up his position with FXNZ in the knowledge he had a restraint and that it was not raised properly until after he had started. There is no evidence of any other breach by Mr Love of the confidentiality and the remaining terms of the restraint required under his employment agreement. There is a bargain between the parties that has to be honoured as it is an agreement to be kept. This is supported by the proprietary interest for the restraint and the consideration given for it at the time and the risks of any unintentional disclosure or procurement of business that would be potentially detrimental to Konica Minolta. This is also because of Mr Love's location, involvement with FXNZ employees and the overlap of clients and the nature of the industry's competition. Further there is a risk of Mr Love disclosing or misusing the confidential information innocently or inadvertently and that any breach would be difficult for Konica Minolta to detect and this is a factor supporting the reasonableness of the restraint. He is also working in the same geographical location, which is another factor.

[28] In considering the above I have rejected the submissions made by Mr Love's representative that undertakings that have been reached in other circumstances with other employees changing their employment between the companies should mitigate any enforcement of the restraint.

[29] Mr Love is in breach of his non-competition restraint. He has been employed by FXNZ contrary to the restraint. His employment arrangements with FXNZ mitigate his claim that the enforcement would seriously impact on his ability to earn a living.

[30] With the knowledge that Mr Love is now employed by FXNZ, and where there is a contractual employment relationship, I make the following order to enforce the restraint:

- Until 4 March 2010 Mr Love is not to carry on or be connected engaged or interested, either directly or indirectly, alone or with any other person, in any business of FXNZ which competes directly or indirectly with the business of Konica Minolta, without the prior written permission of Konica Minolta.

[31] For completeness I record Mr Love's undertakings but modify them to comply with the terms of the restraint in the employment agreement, and I order as follows:

- Until 4 March 2010 Mr Love will comply with his on going obligations of confidentiality to Konica Minolta as set out in his employment agreement.
- Until 4 March 2010 Mr Love is not to directly or indirectly, alone or with any other person, induce or persuade or attempt to induce or persuade any of Konica Minolta's clients, suppliers or customers to terminate or restrict their business relations with Konica Minolta; and
- Until 4 March 2010 Mr Love is not to directly or indirectly, solicit or endeavour to entice away from Konica Minolta any employee of, or contractors to, Konica Minolta.

[32] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority