

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Axiom Rolle PRP Valuation Services Ltd (Applicant)
AND Rahul Ramesh Kapadia (Respondent)
REPRESENTATIVES Chris Patterson, counsel for applicant
Jim Roberts and Andrew Flexman, counsel for respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 5 August 2005
SUBMISSIONS RECEIVED 11 and 12 August 2005
DATE OF DETERMINATION 15 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant company, Axiom Rolle PRP Valuation Services Ltd (referred to as “ARL”), complains that the respondent Mr Rahul Kapadia acted flagrantly and grossly in breach of the terms of an employment agreement entered into between the parties. In particular, breaches are alleged of express and implied terms of confidentiality and fidelity.

[2] To resolve the employment relationship problem ARL asks the Authority to order Mr Kapadia to pay general and exemplary damages as well as penalties, to repair the harm caused by the breaches. ARL also seeks to recover commissions allegedly received by him on behalf of the company but which he failed to disclose.

[3] Mr Kapadia answers the claim by contending that he was never employed by ARL, or if he was that his employment was not agreed to until after the times he is alleged to have acted in breach of any terms of it.

[4] There are other proceedings currently between the parties. They are before the Employment Court awaiting decision, but I am told by counsel that their outcome is likely to have little or no bearing on the matters to be determined by the Authority.

Return to mediation

[5] Counsel, Mr Patterson for the applicant, and Mr Roberts and Mr Flexman for the respondent, have greatly assisted the Authority by reaching agreement about many of the factual circumstances

relevant to this case and by identifying key issues to be resolved. They have also agreed that in this determination I need only decide four of those key issues and that once I have done so they will then return to mediation and try to resolve the problem by that process. The quite unusual circumstances of the case and the proliferation of proceedings generated by it, make that a sensible course to follow.

[6] The four issues for the Authority now to determine are as follows;

- (1) Was there an employment relationship at all between ARL and Mr Kapadia?
- (2) If so, when did it commence?
- (3) Did ARL have a genuine interest in seeking to acquire a 'Knight Frank' franchise?
- (4) Did Mr Kapadia's actions (as an employee) jeopardise or interfere with ARL's plans to acquire the Knight Frank franchise?

Findings of relevant facts

[7] The following facts, which are I find established by the evidence, are of relevance in determining the four issues. From May 2003 Mr Kapadia was employed under a contract of service by the firm known as Rolle Knight Frank (referred to as "RKF") which conducted a valuation and real estate business. His position was real estate agent and also manager of RKF's Auckland office. There is no dispute about the terms and conditions of that employment.

[8] RKF terminated Mr Kapadia's employment on 9 September 2004. This was because RKF had agreed to sell its business to ARL (as nominee of the purchaser) and to stop trading from that date. The transfer was the subject of an agreement signed by vendor and purchaser on 2 September 2004. Possession date was agreed to be 10 September.

[9] Special terms of the transfer agreement included the following;

All current staff of Rolle Limited [the vendor RKF] will have their existing employment contracts assigned to the purchaser [ARL].

and;

All Holiday Pay liability for all current staff is to be assumed by the purchaser.

[10] I find that Mr Tony Kidd, the owner and managing director of ARL who negotiated and executed the transfer, at material times believed that an assignment of employment as expressly provided for under the first of the above two special conditions, was effective as against any employee of RKF such as Mr Kapadia. This was a mistake of law on his part, as the consent of Mr Kapadia was required before he could become employed at the will of ARL. (Amendments to the Employment Relations Act 2000 which came into force on 1 December 2004, have not removed from employees affected by the transference of a business the legal right to choose whether or not to transfer to the new employer; see s.69O.) I find that although Mr Kidd knew that a written employment agreement was required to be entered into with Mr Kapadia, he believed this was just a matter of form and necessary only to ensure compliance with s.65 of the Act.

[11] On 3 September, the day after signing the transfer agreement, Mr Kidd arranged to meet all the RKF staff in their Auckland office. Mr Kapadia, who was the manager of that office, met Mr Kidd for the first time that day. A director and principal shareholder of RKF announced to the staff the change of ownership of the business and introduced Mr Kidd to them.

[12] At the 3 September meeting RKF staff were informed that they would be offered employment with ARL on the same terms and conditions they had with RKF. The staff were also told that their accrued holiday entitlements would be transferred to the new owner ARL.

[13] On 8 September all staff including Mr Kapadia received a letter from the CEO of RKF advising that their employment was to be terminated the following day and that at the same time RKF was to cease trading. All staff were told they were to be paid by RKF up to that date. They were also given the following advice;

.....the new Rolle Limited [ARL] has accepted assignment of all staff contracts including liability for holiday pay and variations by letter to salaries, etc that have previously been agreed with you.

Mention was made in this letter of a “new contract” which was to be drawn up “at some point”, but in a way that suggests this was seen only as a matter of recording rather than creating an employment agreement.

[14] There is no dispute that Mr Kapadia no longer had a job with RKF after 9 September 2004. In the following weeks, and until his purported dismissal by ARL on 15 October 2004, he reported to his office as usual and the outward appearance remained that he continued to be employed in the same or similar job that he had been doing since May 2003.

[15] However there is evidence showing that, at least to begin with, Mr Kapadia was uncertain or undecided about his employment status after 9 September. While still employed by RKF he had begun making representations to the franchisor of Knight Frank to try and secure that brand for a private venture he and another RKF employee had embarked on. I consider it likely that Mr Kapadia was interested in pursuing that venture as far as he could, while at the same time he wanted to make or have a connection with ARL even if only for a brief period. The incentive for this was the possibility that with ARL his \$100,000 per annum job would continue as it had been with RKF before the transfer of the business or, if there were significant changes to his position, that he would be made redundant. In that event he would become entitled to a payment of \$50,000 as provided in his RKF employment agreement.

[16] In his statement of evidence Mr Kapadia said that Mr Kidd had mentioned to him several times that under the ARL structure for the business he, Mr Kidd, would be the Auckland manager. This proposal would obviously have meant a significant change to Mr Kapadia’s position, since he was then the Auckland manager. Mr Kapadia saw, I find, that there was some prospect of his position being made redundant by ARL.

[17] With reference to his thoughts on 17 September about his employment and redundancy, in his statement of evidence Mr Kapadia also said;

I was unsure as to the status of my employment but was reluctant to leave as it may impact upon a redundancy entitlement.

Mr Kapadia would have had no redundancy entitlement from ARL unless he had first become employed by that company and unless his position with ARL was made redundant. This

evidence is some indication of his intention that the employment relationship he had had with RKF would migrate to ARL, as was the intention of those companies as well.

[18] The true nature and extent of Mr Kapadia's uncertainty about his employment by ARL is shown in his email sent to Mr Kidd on 8 September. He said;

You need to reassure them [the staff] that all current staff contracts will roll over to Axiom or the new company [ARL], which will confirm your verbal approval.

(my emphasis)

[19] I find that Mr Kapadia included himself as among "the staff" he referred to in this email, because he was in much the same situation as all the other staff who were then still employed by RKF. He wanted written confirmation to remove his doubts that he would become employed by ARL, if only briefly.

[20] The nature of Mr Kapadia's uncertainty is also evident in the memo to Mr Kidd he wrote on 14 September. He began it by referring to the advice he and the other staff had received on 8 September that ARL, as the new owner of the business in which they were employed, had accepted the assignment of all staff contracts including liability for holiday pay. He went on to say;

I have mentioned to you twice now that neither the staff nor I have received anything in writing from you as a shareholder/owner of the new Rolle Ltd [ARL], confirming our current contracts and other obligations.

(my emphasis)

[21] In his memo Mr Kapadia mentioned the fact that Mr Kidd had given verbal assurances to all staff and had spoken to him a few times, and he said;

.....but we are still faced with that 'elusive' confirmation.

(my emphasis)

[22] In the same memo Mr Kapadia also asked Mr Kidd for confirmation as to whether he planned to "do away" with the 'Auckland Manager' position in which he had previously been employed by RKF. Mr Kapadia obviously wanted to know whether the position was going to become redundant because of his natural concern to be in employment and his interest in a substantial payment of redundancy compensation if he did lose his job.

[23] The memo of 14 September finished with a request for Mr Kidd to provide the following;

.....as soon as possible, an offer letter, job description and independent agreement, which should be generally no less favourable than my current terms and conditions.

[24] It is a fact agreed between the parties that Mr Kapadia had expressed himself to Mr Phill Andrews as being "uncertain" of his employment status; see para 50 of Agreed Facts. I find that Mr Kapadia's aim was to achieve for himself a greater measure of certainty about his position. He sought this by means of confirmation given in writing, a form more reliable than the oral assurances Mr Kidd had given.

[25] I find that written confirmation was given in the letter Mr Kapadia received and read on 16 September from the appointed receivers of RKF. That letter was also legally ineffective insofar as it purported to create an employment agreement by unilateral declaration, however I view the letter as nevertheless going some way towards removing for Mr Kapadia some of the uncertainty he had about his employment with ARL. The letter expressly confirmed his employment with ARL.

[26] The receivers said in their letter with reference to the transfer of the business from RKF to ARL;

As part of the sale and purchase of the business, Axiom [ARL] assumed liability for your employment contract.

.....

We therefore confirm that you are now employed by Axiom [ARL] on the same terms and conditions that you were employed by Rolle [RKF]

[27] Of most significance is the fact that this advice was repeated in writing to all staff the following day, 17 September, by Mr Kidd who said;

To reiterate, all essential terms of your employment contracts will be carried over to the new company [ARL].

[28] Mr Kidd also mentioned “new contracts” that were to be progressively provided but it is clear to me that he was referring to the exercise of documenting rather than creating employment agreements. I find that his letter provided the final confirmation Mr Kapadia had been seeking and which he had described previously as “elusive” because only oral assurances had been given. It is notable that Mr Kapadia does not refer to Mr Kidd’s letter in his statement of evidence.

[29] Having received the written confirmation, Mr Kapadia held himself out as having become employed by ARL. He made no further requests for any “offer” of employment, he continued to attend work every day and used the company car to attend to company business. He also received his monthly pay which was direct credited on 24 September. I am satisfied that he and other staff had previously been assured by Mr Kidd that they would be receiving their normal pay on time. For that reason Mr Kapadia did not ask for confirmation of this from the payroll officer.

[30] After 17 September he also entered into discussions with Mr Kidd about the possibility of his position becoming redundant, but did so without alerting Mr Kidd to the existence of any doubt in his mind that he had become employed by ARL. I find that was because he had wanted to become an employee of ARL and because he had no doubt that he had become an employee. In this regard his mind was at one with ARL and a contract existed between the parties. I do not consider that Mr Kapadia discussed redundancy while mistakenly thinking that he could be made redundant and become entitled to a substantial payment, all without ever having become employed by ARL in the first place.

[31] Any issue as to his employment status after 17 September was only raised on 11 October 2004 when ARL applied ex parte to the Authority for an Anton Piller order against Mr Kapadia. The Authority itself raised doubts (Mr Kapadia not being heard) sufficient for it to decline the order. The Employment Court later felt satisfied from the evidence it was given that Mr

Kapadia had become employed and granted the order. Thereafter the issue was raised again when ARL purported to dismiss Mr Kapadia who claimed he could not be dismissed as he had not become employed in the first place by ARL. As an alternative argument he claimed that he had not acted in breach of his employment agreement to any extent that gave ARL grounds to dismiss him.

Determination

(1) Existence of an employment relationship

[32] I find therefore from the evidence that an employment relationship did, briefly, exist between ARL and Mr Kapadia. The parties had a meeting of minds in this regard, although in forming a common intention they both made the same mistake about a basic principle of law applying to entry into an employment agreement. That mistake was that one employer could transfer its employees into the employment of another without obtaining the consent of those employees.

[33] ARL's mistake led to an interregnum of about eight days between RKF ceasing to be the employer of Mr Kapadia and ARL becoming his employer. In that time Mr Kapadia owed no obligations under an employment agreement to ARL and was lawfully able to engage in activities which may have harmed its business interests. Had ARL appreciated the legal position, in the time between 2 and 9 September it probably would have actively sought from Mr Kapadia his consent to it becoming his new employer from the latter date, although he may have declined.

[34] I am concerned only with an employment relationship problem between ARL and Mr Kapadia and only with remedies that are available under the Employment Relations Act 2000. It is however possible that the circumstances gave rise to other causes of action involving ARL, RKF, Equity Realty Ltd, Mr Kapadia and also the receivers of RKF, but they cannot be the concern of the Authority.

(2) Date of commencement of employment with ARL

[35] I find that the employment relationship commenced on 17 September 2004. On that date Mr Kapadia received a letter from ARL confirming what he had previously been orally assured of but had remained uncertain about, that he had become employed by ARL "on the same terms and conditions" he had previously been employed under.

(3) ARL's intentions to secure Knight Frank franchise

[36] I accept that if and when it saw fit in carrying on its business, ARL was entitled to seek, or not to seek, a Knight Frank franchise. In either case it was not permissible while he was an employee for Mr Kapadia to undermine or "hi-jack" any opportunity in its line of business that his employer might wish to look for and take up. Even if ARL had let the opportunity lie dormant, Mr Kapadia was not at liberty to exploit it for himself in competition with his employer. To do so would be to breach the obligation of fidelity implied into his employment agreement.

[37] There is ample evidence from which the Authority is able to conclude that ARL at material times had an interest in the Knight Frank franchise and actively pursued that opportunity. I accept the evidence of Mr Kidd in this regard, including his letter of 28 September 2004 written to Knight Frank's solicitors. It outlined attempts he had made to

contact the franchisor, and said;

I get the impression from the tone of your letter that Knight Frank does not want to pursue discussions with me. Is that correct?

(4) Mr Kapadia's approaches to Knight Frank

[38] I find that approaches by Mr Kapadia on behalf of Equity Realty Ltd to Frank Knight were first made before he became employed by ARL on 17 September. When he did become employed he was under no obligation to ARL to voluntarily disclose this earlier involvement. Unfortunately because ARL had relied on a mistake of law for thinking Mr Kapadia's employment was secured from 9 September, it failed to proof itself against competition by him between that date and 17 September.

[39] However I also find that Mr Kapadia revived and continued his overtures to Knight Frank after he became employed by ARL on 17 September. The evidence of this is contained in two emails he sent to Knight Frank personnel on 30 September 2004. They were sent from his ARL email address and they brazenly solicited the Knight Frank franchise on behalf of Equity Realty Ltd, a company owned by Mr Kapadia and another former RKF employee. One of the emails also contained dismissive statements about ARL's market position and its credibility as a contender for the franchise.

[40] There is also the written (although unsworn) evidence of Mr Phill Andrews, director and part owner of Equity Realty Ltd, that "around the third week of September" he had asked Mr Kapadia to assist in putting together a business plan for the agency side of Knight Frank. Mr Andrews evidence, confirmed by Mr Kapadia, is that they met the managing director of Knight Frank on about 29 September and presented the plan to him. Mr Kidd's letter of only the day before, 28 September, shows that ARL had not lost interest in Knight Frank, as Mr Andrews says he was told at this meeting.

[41] I conclude that Mr Kapadia was in breach of the duty of fidelity he owed ARL, once he became employed by that company on 17 September 2004. As he well knew, ARL had purchased a real estate and valuation business and Knight Frank was a real estate brand that could enhance ARL's business if it was acquired. Whether or not ARL had its own real estate licence is irrelevant to the degree of allegiance required of Mr Kapadia to his employer. ARL was entitled to pursue business opportunities with whoever it wished and without competition from an employee.

[42] Whether Mr Kapadia's actions caused harm or loss to ARL is probably a question best answered by hearing from Knight Frank itself as to why it did not enter into negotiations and award a franchise to ARL. This line of enquiry will remain open and may be pursued if this investigation must be resumed after mediation.

[43] It seems likely that confidential information was misused by Mr Kapadia in compiling the Equity Realty Ltd business plan or proposal. A breach of his obligation of confidentiality is likely to have first occurred in early September, before he became employed by ARL. However once ARL became the owner of that information and also his employer on 17 September, Mr Kapadia could not use it again or revive its use in any new business plan prepared for Knight Frank. It will be a matter for further evidence whether that is what he did.

Suspension of investigation

[44] This investigation will now be suspended while the parties return to mediation. Counsel Mr Patterson is to advise the Authority of the outcome of mediation, particularly if a resumption of the investigation is required.

Costs

[45] Costs are reserved.

A Dumbleton
Member of Employment Relations Authority