IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 138/10
5308299

BETWEEN KIWIS STAT LIMITED
Applicant

A N D TANIA NICHOLS
Respondent

Member of Authority: Helen Doyle

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

Investigation Meeting: 25 June 2010

Determination: 30 June 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kiwis Stat Limited (Kiwis Stat) seeks urgent interim relief to enforce the restraint of trade provision it has in a written employment agreement dated 28 April 2006 with Tania Nichols in circumstances where she has been working with a competitor, TripleO.

[2] In support of the application for an interim injunction the Authority received an original affidavit and an affidavit in reply from the Managing Director of Kiwis Stat, John Cleary.

[3] In opposition to the application for interim relief Ms Nichols says that such relief is not justified. She says that the restraint of trade is unenforceable because it does not protect a legitimate proprietary interest, is wide as to be unreasonable and the upholding of the restraint of trade is not in the public interest and there are other less restrictive interim measures that could protect Kiwi Stat's interests.

[4] There were two affidavits lodged opposing the application for interim relief from Ms Nichols and from the General Manager of TripleO, Andrew Arps.

Background matters

[5] These are matters that are ascertained from the affidavits and are not in dispute unless noted otherwise.

[6] Kiwis Stat is a specialist medical recruitment company that arranges locum jobs for doctors and nurses in Australia and New Zealand. Ms Nichols was employed by Kiwis Stat from May 2006 as a locum co-ordinator and she was responsible for placing doctors in short term positions within hospitals in Australasia. There are only three significant medical recruitment firms in New Zealand including Kiwis Stat.

[7] Ms Nichols was paid a starting salary of $37,500 with Kiwis Stat and had the ability to earn bonuses for certain targets on top of that salary. In 2008 Ms Nichols earned about $20,000 worth of performance bonuses with hospitals in the mid and upper North Island although she deposed to her ability to earn bonuses dropping substantially when she was assigned solely Tasmanian and other Australian hospitals in or about late 2008.

[8] Ms Nichols was provided with a written employment agreement under cover of letter dated 27 April 2006 that offered her the position of locum consultant commencing 15 May 2006. The letter advised Ms Nichols that she was entitled to discuss the offer of employment with her family, a lawyer or someone else that she trusted and she was further entitled to seek clarification of anything in the offer of employment.

[9] Ms Nichols signed the employment agreement on 28 April 2006.

[10] Clause 17 of the employment agreement contained the following restraint of trade and non-solicitation provisions:

> *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 (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, either 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 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.

[11] Ms Nichols tendered her resignation on 7 May 2010 to Kiwis Stat providing the required two weeks notice set out in her employment agreement. Ms Nichols accepts in her affidavit that Mr Cleary asked her what she intended to do and that she advised him that she was going back to general recruitment. Mr Cleary deposes in his original affidavit that he would not have been particularly concerned about a role in general recruitment but he was concerned about a role in one of the other two medical

recruitment companies. Ms Nichols accepted that in her discussion with Mr Cleary she was reminded of the restraint of trade provisions in her employment agreement.

[12] In responding to Mr Cleary in the way that she did Ms Nichols deposes in her affidavit that she was relying on lawyer's advice that the restraint of trade was unenforceable and to be vague when asked about her future intentions.

[13] Ms Nichols duly commenced her employment with TripleO on 23 May 2010. Mr Cleary subsequently became aware of this through another staff member and on 24 May 2010 had his solicitor, David Stock, write to Ms Nichols and advise her that she was in breach of her employment agreement. Mr Stock asked in his letter of 24 May 2010 that Ms Nichols provide an undertaking that she would not engage in employment in breach of her obligations under her employment agreement for a period of twelve (12) months from 21 May 2010 and that if the undertaking was not received by 27 May then an interim injunction would be sought.

[14] On 27 May 2010 Ms Shakespeare responded to Mr Stock advising that she acted for TripleO Ltd and Ms Nichols and that amongst other matters it was not considered Kiwis Stat had grounds to prevent Ms Nichols working for TripleO although she advised her clients were prepared to discuss the issue in order to reach an amicable solution.

[15] A statement of problem was lodged with the Employment Relations Authority on 8 June 2010. The parties duly attended mediation following a telephone conference with the Authority but the matter was not able to be resolved.

The issues

[16] Ms Nathan and Ms Shakespeare were in agreement as to the issues for the Authority in determining whether there should be a grant of relief. The Authority is required to determine the following:

- Is there an arguable case for permanent relief?
- If so, would damages be an adequate alternative remedy?
- If not, where does the balance of convenience lie?
- What does the overall justice require?

Arguable case

[17] The starting point is that a covenant in restraint of trade is prima facie unenforceable but can be upheld if reasonably necessary to protect proprietary interests of the former employer and in the public interest – *Gallagher Group Ltd v. Walley* [1999] 1 ERNZ 490.

[18] The Authority is required to consider whether the restraint of trade was reasonably necessary to protect a proprietary interest or is it simply to limit competition, and, secondly whether the duration, geographical area and scope of the restraint of trade covenant is reasonable.

Proprietary interest

[19] The reasonableness of the restraint of trade will usually be determined in accordance with the circumstances as they existed at the time it was entered into – *Gallagher Group Limited*.

[20] The primary proprietary interests relied on by Kiwis Stat is the relationship built up by Ms Nichols with doctors and with certain staff at hospitals in being able to successfully fill the vacancy. It is common ground that the names of doctors in New Zealand are on a general database and readily available. Mr Cleary deposes in para. 7 of his first affidavit that the pool of doctors for placement though is not readily available and is limited, the key is to know who is available and reliable.

[21] Ms Nichol in her affidavit in para. 14 refers to no crossover with respect to hospitals that she was responsible for but significant crossover with other consultants in terms of doctor placements.

[22] It was recognised in *Broadcasting Corp of New Zealand v Nielsen* (1988) 2 NZELC 96,049 that the employer's interests in maintaining trade connections does not entitle protection against every employee who deals with customers but only against those who because of the nature of their employment are likely to have personal knowledge or influence over customers and hence where they place their custom to an extent that is within their power to entice them away.

[23] In *Neilsen* there was reference to a helpful passage in *Lindner v. Murdock's Garage (1950)* 83 CLR 628 per Latham CJ at pg.636:

> *Where an employee is in a position which brings him into close and personal contact with the customers of a business in such a way that 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 and the goodwill of his business, a covenant preventing him from accepting employment in the position in which he would be able to use to his own advantage and to the disadvantage 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.*

[24] Ms Shakespeare submits that if the proprietary interest that Kiwis Stat wish to protect is the relationship with doctors and the knowledge of which doctor would match particular work at specific hospitals then it is questionable whether a restraint of trade would be reasonable to protect that interest. She further submits that there can be no proprietary interest in terms of hospitals and/or particular key people within the hospitals.

[25] Mr Cleary in his second affidavit states that Ms Nichols as an estimate would have had a close relationship with approximately 100 doctors in terms of their details, qualifications and suitability for particular roles. The exact number I accept will have to be determined at the substantive investigation meeting. Mr Cleary also in the same affidavit refers to the contacts Ms Nichols has within the hospitals. He deposes to an extensive induction process that Ms Nicols undertook to learn the registration requirements for the role against which to assess suitability for placements.

[26] I conclude that there is a fairly strong arguable case at this interim stage that Kiwis Stat have a proprietary interest in terms of trade connection and goodwill with respect to Ms Nichols personal relationship with and knowledge of doctors qualifications and suitability for placement that it is entitled to protect under a restraint of trade covenant. Induction, training and marketing as described in the affidavits support this finding. There is not as strong an argument at this interim stage with respect to hospital staff and any proprietary interest.

Is the period of restraint reasonable?

[27] Ms Shakespeare referred to the three restraints in clause 17 of Ms Nichols employment agreement and says that they go further than is necessary and that they are exceptionally wide for a relatively low-level employee.

[28] One of the submissions in the event that there was a proprietary interest in terms of knowledge of and relationships formed with doctors was that it could be protected by the non solicitation clause.

[29] Ms Shakespeare correctly submits that non solicitation provisions are more readily upheld by the Court as reasonable and enforceable. I find that clause 17.2.2, the non solicitation restraint, is arguably drafted widely enough to cover both the hospitals who make the placement payment to Kiwis Stat and the doctors whose services are required. The difficulty in this case is that if the non solicitation clause was to be relied upon without modification then it is difficult to see, having regard to the wording of the clause, how Ms Nichols could in fact undertake her role with TripleO at all. At this interim stage I formed a view and expressed it to counsel that it seemed without modification this clause could only have sensible application at the current time to employment outside of a medical recruitment organisation. I am not asked to consider that situation.

[30] I accept Ms Shakespeare's submissions that the effect or scope of clause 17.2.3, the covenant in restraint of trade, is that it prevents Ms Nichols from working for one of the other two medical recruitment organisations. It does not appear to place a restriction on other placements within general recruiting although there is a dispute in the affidavits as to whether such other work is paid as well.

[31] I do have concerns about the reasonableness of the length of the covenant in restraint of trade. Mr Nathan submits, relying on the reference to a 13 week rotation for doctors in Mr Cleary's affidavit, that the period of 12 months is reasonable to protect the proprietary interest.

[32] Looking at this matter in terms of the affidavit evidence I find that a period of 12 months would be certainly at the upper limit as to what is reasonable and the term of the restraint covenant is almost inevitably one that would require modification to reflect the reasonableness of such a covenant. The Authority has power under s.8 of the Illegal Contracts Act 1970 to make modifications to a restraint of trade covenant. For present purposes I accept Mr Nathan's submission that s.8 may be evoked at the substantive stage to modify the covenant to a degree which is considered by the Authority, having heard the evidence, to be reasonable in the circumstances.

[33] In terms however of the geographic limits it is arguable that such protection is necessary and therefore reasonable to protect the proprietary interest that Kiwis Stat has given it places locum doctors throughout the whole of New Zealand although I accept consideration may need to be given to the period Ms Nicols focussed on hospitals in Australia and whether the geographical scope requires modification in light of that.

Conclusions about arguable case

[34] It will be necessary in terms of the period of the restraint of trade to consider modification to the one year period of restraint. I find with modification as to its length it is arguable that the restraint of trade is reasonable and enforceable and that Kiwis Stat has established to a sufficient degree an arguable case for substantive relief.

Is there an alternative remedy which would be adequate?

[35] Ms Shakespeare submits that the employment agreement contains a liquidated damages provision and further that Mr Arps in his affidavit has stated that TripleO will meet any damages that may be awarded.

[36] The other matter necessary to consider is whether the confidentiality provision set out in the employment agreement is sufficient enough protection and/or whether the restraint of trade is justified in addition to those confidentiality obligations. Ms Nichols in her affidavit deposes to not having taken any lists of either hospitals or doctors with her and that she understands that she cannot use any confidential information from Kiwis Stat in her time at TripleO.

[37] In terms of whether damages would be an adequate remedy, Mr Cleary deposes in his second affidavit the difficulties of assessing damage in this case where the relationship with a doctor has been used to place him/her in a locum position by TripleO.

[38] I accept that in this case there is a liquidated damages clause stating the amount of $10,000. Whilst the usual difficulties of calculating damages may be reduced by such a provision, I also think it strongly arguable that it would be difficult, if proof was necessary, to ascertain damages in this case.

[39] In terms of the provision as to confidentiality, I have considered the Employment Court judgment in *Allright v. Cannon New Zealand Ltd* (2009) 9 NZELC 93, 141, 3 December 2008, Judge Couch. In that case there was careful analysis of whether the restraint was reasonably necessary in circumstances where there was an express confidentiality provision.

[40] I find as Judge Couch did in *Allright* that a breach of confidentiality of this nature would be difficult to detect and impossible to prove usually. I find that this is a case where there is a real risk of Ms Nichols inadvertently or innocently disclosing confidential information in terms of doctors and preferences and/or availability.

[41] I accept Mr Nathan's submission that it is strongly arguable that it would be very difficult for Ms Nichols to adhere to her obligations in terms of confidential information whilst carrying out her duties to the best of her ability. This concern was also deposed to in the reply of John Cleary in para.18 where he states:

> *I genuinely consider it would not be possible for Tania to properly carry out her role without disclosing the names of those people even if it is in an innocent or inadvertent way. I believe it would be not possible for Tania to adhere to her obligations of confidentiality. This is why the restraint of trade is important.*

[42] In conclusion therefore I do not find that an alternative remedy or alternative protection by way of the express confidentiality provision is adequate protection in this case

Balance of convenience

[43] Ms Shakespeare submits that the balance of convenience favours Ms Nichols because she would be forced into a situation where she could not work. Ms Nichols is the higher salary earner in her family and the financial affect on her would be very significant. Although Ms Shakespeare also referred to the inconvenience to TripleO that is not a matter I consider I should bring into the balance in terms of making an assessment as to who the balance of convenience favours.

[44] I accept that there would be significant inconvenience to Ms Nichols. However, Ms Nichols made a decision to at least commit a prima facie breach of the restraint provisions of her employment agreement by taking up employment with TripleO. If by virtue of that decision she deliberately or inadvertently or innocently

uses the knowledge she has gained and relationship she has developed whilst employed by Kiwis Stat, it would be difficult to remedy the damage to that business.

[45] Kiwis Stat has provided an undertaking as to damages and there is no reason to conclude that it would be unable to pay if necessary in terms of its undertaking.

[46] In this case I find the balance of convenience is evenly balanced.

What is the overall justice of the case?

[47] Ms Shakespeare accepted under this test that Ms Nichols restraints were clear and that she was reminded before she commenced employment with TripleO of her obligations. She does not accept however that this is a case of a flagrant breach because that decision was taken on advice in light of the wide wording of the relevant clauses in clause 17 of the employment agreement.

[48] Ms Shakespeare submits there is no evidence of damage to Kiwis Stat nor malice which may tip the considerations of justice.

[49] The two emails that Mr Cleary refers to in his affidavit I accept could be seen as showing Ms Nichols' integrity with regard to dealing with doctors and hospitals in handing over and leaving Kiwis Stat.

[50] Against that however must be weighed the fact that there is no evidence that Ms Nichols entered into the employment agreement with Kiwis Stat containing the covenant in restraint of trade with any undue influence. She was given an opportunity to take the employment agreement away and seek advice. Judge Couch in *Allright* endorsed the observation of the Court of Appeal in *Fuel Expresso Ltd v. Heitch* (2007) 8 NZCLC 101, 931 that *agreements were made to be kept.* He did this against the background where Mr Allright had freely entered into his agreement and then set out to deliberately breach it.

[51] I think it is likely the restraint of trade provision will require some modification as to its duration but have found it is arguable if modified the restraint is reasonable and enforceable. Another member of the Authority has very kindly indicated that he will be able to deal with the substantive matter on 20 July 2010 some three weeks away given my other commitments and a support officer will shortly organize a telephone conference.

[52] Standing back therefore as I am required to do and looking at the matter as a whole, I am of the view that the overall justice supports an interim injunction enforcing the restraint of trade provision in clause 17.2.3 for what will be a relatively short period until the matter can be finally determined.

[53] It is therefore the order of the Authority that in terms of clause 17.2.3 of the employment agreement and until the substantive investigation meeting and final determination, Ms Nichol is not to be employed by TripleO.

Costs

[54] I reserve the issue of costs until after the substantive matter has been determined.

Helen Doyle
Member of the Employment Relations Authority