



VPro Lawyers Newsletter
NOVEMBER 2006



Mike Lyons
VPro Lawyers
mike@vprolawyers.com.au

Please visit us at:
<http://www.vprolawyers.com.au>

WHEN YOUR SENIOR EMPLOYEE LEAVES - PROTECTING YOUR BUSINESS

The Story

When Sam Green decided to leave his top job at Dawsons, to set up his own business, his Managing Director (Jack Dawson, the owner of Dawsons) was understanding. He'd had 8 years of excellent service from Sam. What more could he ask for. One month later, Dawsons was dismayed to discover that:

- Sam had poached two other members of Dawsons team;
- Sam had taken a copy of Dawson's Customers List and their Business Plan;
- Dawsons' biggest customer who had cancelled a major order only 4 weeks before Sam left, had actually gone ahead with this order. But the order had gone to Sam's new business. It soon became clear that Sam had approached this customer whilst he was still working for Dawsons and had asked him to hold back the order until Sam had his new business underway. In other words, Sam had diverted this customer's business from Dawsons to himself.

What could Dawsons do?

Looking at Sam's letter of employment – rather casually written at the time, Jack Dawson realised how naive he had been, in failing to protect the business with a proper contract. This is what Dawsons' lawyers advised:

Restraint of Trade

There was no restraint of trade contract to prevent Sam going into direct competition with Dawsons. In fact, the law supports competition, and will usually permit a former employee to earn a living, without restriction.

Dawsons could have protected its legitimate business interests (such as its trade connection and trade secrets), if it had a contract with reasonable restrictions (describing the activity, area and period of the restraint). But this was not the case here.

Poaching Employees

There was nothing to prevent Sam poaching Dawsons employees (as long as they gave proper notice).

Dawsons could have contractually restricted Sam from poaching its staff, but an anti-poaching clause needs to be carefully drafted because:

- employees usually have the right to work for anyone they choose;
- an anti-poaching provision would only be valid if the clause only protected Dawsons trade connection or trade secrets;
- the right to prevent poaching of staff would only stop

Sam taking advantage of confidential information (gained during his employment with Dawsons) about the qualifications, relationships, skills and remuneration of those Dawsons employees with whom Sam had a connection – not just anyone;

The anti-poaching provision would have to be limited to those employees who themselves were senior enough to have relevant confidential information.

Confidential Information/Trade Secrets

An employee owes a duty of good faith and fidelity to his employer, even if this is not expressed in the employment contract. This requires an employee to act solely in the employer's interests, and not to allow his own interests to conflict with those of his employer.

Although Sam was free to compete with Dawsons, to use his own knowledge in doing so, and even to solicit business from customers of Dawsons – Sam could not use Dawsons' confidential information (such as its Business Plan or Customer Lists) because this belonged to Dawsons. Dawsons would be entitled to compensation for any loss or damage suffered as a result of Sam's unlawful appropriation to himself of this confidential information. In some cases Dawsons may be able to obtain an injunction to prevent Sam's continued use of this confidential information.

Diverting Customers

By diverting customer business to himself whilst still working for Dawsons, Sam had taken for himself an opportunity which belonged to Dawsons. He had allowed his personal interests to conflict with Dawson's business interests. This was in breach of Sam's duty of good faith and loyalty. Dawsons would be entitled to damages, and an account from Sam of any profits made by Sam.

Conclusions

An employer is entitled to prevent an employee acting in breach of the duty of loyalty, good faith and fidelity (such as stealing confidential information or diverting customer business). An employer is entitled to impose limited contractual restrictions on a former employee to protect the goodwill, trade connection and trade secrets of the business. However, without a suitable contract, an employer cannot prevent a former employee from competing, soliciting and seeking to win business from the employer's customers, or from poaching the employer's staff. The restraint provisions must be reasonable having regard to the particular position of the employee, the nature of the interests to be protected and the scope of the restrictions imposed.

The information in our newsletter is intended to draw your attention to legal developments. Our newsletter does not constitute legal advice. If you do not wish to receive our newsletter, please unsubscribe by notifying us by return email.

