

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 140/09
5128393

BETWEEN CH COMMERCIAL
CLEANING LIMITED
Applicant

AND DARREN BROWN
First Respondent

AND KERRY ANNE BROWN
Second Respondent

Member of Authority: Paul Montgomery

Representatives: Jeff Goldstein, Counsel for Applicant
Amy Shakespeare, Counsel for Respondents

Investigation Meeting: 27 and 28 August 2008 at Christchurch

Submissions received: 8 September 2008 for both parties

Determination: 31 August 2009

DETERMINATION OF THE AUTHORITY

[1] This matter arises from an employment relationship in which the first respondent was employed by the applicant in the role of sales manager. Prior to being employed by the applicant company, Mr Brown was employed by the previous owner of the Green Acres franchise purchased by the applicant effective, for the purposes of this case, on 1 November 2005.

[2] Mr Brown joined the applicant on this date. However, no employment agreement was ever sought in the early years by either party. It was in November 2007 that the applicant proposed an agreement to formalise the arrangement. Negotiations endured through to April 2008.

[3] The long and short of this matter was no final agreement was ever reached let alone signed.

[4] The applicant relies on what it says is the first respondent's alleged breach of:

- His implied duty of good faith;
- His statutory good faith obligations; and
- His breach of the terms of settlement.

[5] Further, it is alleged Mrs Kelly Brown aided and abetted her husband in all these alleged breaches.

[6] On or about 23 May 2008, the first respondent resigned his position with the applicant and established a business which competes with the applicant company and which has allegedly taken cleaning work from the applicant.

[7] The applicant seeks a permanent order restraining the first respondent from approaching any customers or sub-franchisees of the applicant company and from divulging any information relating to the applicant's business; an order for compliance with the settlement agreement; an order for the first respondent to return to the applicant all its property and information including any copies of information; a finding the first respondent has breached his statutory and implied duty of good faith and the terms of settlement; an order for damages arising from these breaches; a penalty of \$5,000 payable to the applicant for each breach of the employment agreement and the Act; an order that the first respondent pay exemplary damages of \$20,000 to the applicant, full indemnity costs and finally, an order that the second respondent, Mrs Brown, pay a penalty to the applicant of \$5,000 for a breach involving aiding and abetting the breach of the employment agreement by her husband.

[8] The respondents deny the breaches alleged, averring that the first respondent was a loyal and hard working employee who introduced new clients to his employer's business while he was employed.

[9] Further, the respondents say in November 2007 a dispute arose regarding Mr Brown's entitlement to a bonus. In the course of the dispute Mr Brown's then solicitor suggested an employment agreement needed to be positioned. A draft was produced, then later an amended draft was constructed. Further adjustments

to the draft were made. However, in the last analysis, no agreement was ever signed between the parties including the element of the proposed restraint of trade.

[10] The first respondent resigned his position on 19 May 2008 and on 23 May Mr Brown returned all work-related equipment and documentation. Mr Brown believed his employment with the applicant was at an end at that time, but the bonus payment issue remained in contention. However, in a letter from the applicant's solicitor to the first respondent's solicitor, the applicant claimed Mr Brown was to observe a period of notice. That letter was dated 26 May 2008. From that letter, Mr Brown understood he was to stay employed by the applicant beyond 23 May 2008.

[11] That letter also proposed a full and final settlement of all matters between the parties and suggested a liquidated damages proposal of \$7,000. The following day, the first respondent's solicitor rejected the proposition that Mr Brown pay damages in the event the applicant's customers approached him should he decide to go into business on his own account.

The issues

[12] To resolve this employment relationship problem, the Authority needs to make findings on the following issues:

- Was there a formally agreed individual employment agreement (*a meeting of minds*) between the parties; and
- If so, was the first respondent in breach of the explicit or implicit terms of that agreement; and
- When did the employment relationship between the company and the first respondent end; and
- Did the second respondent aid and abet the first respondent's alleged breach of the terms of a lawfully established employment agreement; and
- Did the first respondent, in setting up his new business, use information confidential to the applicant; and

- In the event the respondents have breached explicit or implied obligations under such an agreement, what remedies are due to the applicant?

The investigation meeting

[13] At the investigation meeting, the Authority heard evidence from Mr Michael Im, a director of the applicant company, Mr Jerome Williamson, the company's solicitor, Mr Manish Brahmhatt, a sub-franchisee of the applicant company, and from Mr Martin Veitch, a chartered accountant, who provided evidence on the applicant's loss.

[14] For the respondents, the Authority heard from Mr and Mrs Brown in person and, by way of a telephone conference, received evidence from Miss Jacqueline Pretious, the administration manager for Queensland Maintenance Services (New Zealand) Limited, the company responsible for overseeing cleaning contracts in the ABC Learning Centres. Ms Pretious has provided the Authority with a written statement of evidence and both the Authority and Mr Goldstein questioned her on the basis of that evidence. Financial information regarding the extent of loss sustained by the company was provided by Mr Stephen Watson.

[15] The Authority had no reason to doubt the evidence given by the applicant's witnesses nor that given by witnesses for the respondents.

[16] The questioning by Mr Goldstein of Mr Brown was at times over-robust with frequent allegations that the witness was *making it up* as he went along. I have considered this matter and do not consider this to be the case. The first respondent is a relatively straightforward man who has a somewhat nervous disposition and who is unfamiliar with the processes employed by the Authority. Under pressure from counsel, he responded hesitantly to some questions. That hesitation does not connote dishonest answers. That said however, Mr Brown did appear to the Authority to have poor recall on some aspects of his evidence.

[17] A person missing from the investigation meeting was Mr Phil Michel. Mr Michel owned Preschool Maintenance Services Limited (PMS) which, on 1 July 2008, merged with Queensland Maintenance Services (New Zealand)

Limited. Mr Michel is not involved in the merged business. The Authority may have found his evidence significant in clarifying some of the conflict of evidence between the parties, and in particular, whether the first respondent had spoken with him in any more than general terms about establishing a business. The Authority has attempted to contact Mr Michel but those attempts have been unsuccessful and the Authority must therefore rely on the evidence before it without the benefit of clarification.

[18] The applicant alleged Mr Michel had assisted the respondents in setting up their business and in particular was responsible for ensuring the respondents secured ABC Learning Centre (ABC) contracts at the expense of the applicant's business.

Analysis and discussion

[19] A critical issue in this matter is not that the respondents set themselves up in competition with Mr Brown's former employer, but whether he, aided by Mrs Brown, used confidential information acquired in the course of that employment to wrest the contracts held by the applicant company.

[20] A second critical issue relates to the question of whether Mr Brown was still employed by the applicant at the time arrangements were made with QMS for the newly formed company to take over the ABC work.

[21] The third matter relates to whether or not the respondents breached an agreement in respect of advertising the new company's services.

Breach of duty of good faith and implied conditions

[22] It is axiomatic that the duty of good faith and adherence to implied terms of an employment relationship between the parties does not survive the termination of that relationship unless specific, formal agreements are in place, such as restraints in trade, non-solicitation of customers or staff, and the like.

[23] The applicant points to its persistent efforts to secure an employment agreement encompassing such provisions. However, on the face of the evidence, no such agreement was ever reached. Further, it points to the payment of \$7,000

to Mr Brown which it says was inconsideration of the restraint agreed to by both parties.

[24] The difficulties confronting the applicant are that this sum is claimed by Mr Brown as being his performance bonus, a bonus paid each year. What is unclear is whether, in the confusion occasioned by Mr Brown's resignation, the solicitors then acting for each party had secured agreement in respect of restraints prior to the termination of Mr Brown's employment and with his approval.

[25] The correspondence between Ms Bonifacio, Mr Brown's then solicitor, and Mr Williamson for the applicant makes it plain negotiations had been in train over several issues, the restraint being one such issue. Again, on the evidence before the Authority, no one can point to any form of written agreement between the parties that can be relied on as definitive of this particular issue. In the absence of such an agreement, I have considered closely whether there was any evidence of a *meeting of minds* which, on the balance of probability, could convince the Authority that such a *meeting* had occurred. Regrettably, I remain unconvinced. I think it highly improbable Mr Im would have parted with \$7,000 before he had a signed agreement in his hand.

[26] The other aspect of the alleged breaches of Mr Brown's duty of good faith towards the applicant involves whether he used confidential information gained in the course of his employment with the applicant company for his own and his wife's benefit. There is no doubt the first respondent was aware of rates quoted by the applicant company, and in particular in relation to the ABC Learning Centres which formed a strong anchor to the company's business. It is equally clear Mr Brown was familiar with the rates being paid to cleaners who undertook the cleaning work in those centres.

[27] The company says this was its private information, was confidential and specific to it and Mr Brown, under his good faith obligations, was not entitled to divulge it to others nor to use it for his own benefit.

[28] A key question arises as to whether the information held by the first respondent falls into the categories of specialist commercial knowledge or trade secret. See *Schilling v. Kidd Garrett Ltd* [1977] 1 NZLR 243. The applicant says

it is the former and that the knowledge was its intellectual property and is thus caught by the obligations of good faith.

[29] The respondents deny it falls under either of the above categories. Mr Brown's position was that of a sales professional in the market and he is able to gain information on rates being paid by customers of competing cleaning businesses simply by asking those customers what they are paying. Further, he says he is thoroughly conversant with the *going rate* for cleaning staff. From that, he decides whether the applicant company could provide cleaning services to that prospective customer at a more advantageous rate.

[30] This is scarcely stunning research, but effective enough in identifying prospective customers.

Date of termination of employment

[31] The issue of the date on which the first respondent's employment with CCCL ended is an issue between the parties.

[32] The applicant says the first respondent, aided by his wife, set up in business and competed with it *while working for it as an employee*. In that situation, if established on the evidence, the respondents face serious sanctions.

[33] The applicant's position is that Mr Brown gave one month's notice on 19 May 2008. It also confirms it paid the first respondent his wages from 19 May 2008 until 19 June 2008 in lieu of notice. It further says the first respondent remained employed by the applicant until 20 May 2008, and in that period he was involved in activities inimical to the interests of CCCL. The extent of the loss to the applicant company is said to be \$284,000 per year.

[34] The respondents disagree as to when the employment ended. They say Mr Im made it clear to Mr Brown that he was not required to work after 23 May 2008. Mr Im told the Authority he suggested to Mr Brown he might want to use his untaken leave. However, it seems Mr Brown was paid for his notice period and for his outstanding leave entitlements.

[35] In spite of the respondents' position on this issue, Mr Brown said he agreed to remain available to Mr Im if the latter had any queries relating to any of the contracts held by CCCL.

[36] The evidence of Ms Pretious is of some assistance in determining when the employment relationship ended, coming as it does from QMS which was responsible for organising cleaning arrangements at the ABC Learning Centres. She told the Authority:

I am not precisely sure of when Darren told Phil that he was leaving Greenacres. However, on the morning of 26 May 2008, Phil came through and told me Darren was no longer working at Greenacres. He asked me to type up a letter to Greenacres cancelling their contract. Phil said to me that he was sick of Michael Im, and he wanted Darren. This was the first that I knew that Darren was leaving or had left Greenacres.

We were not required to give notice to Greenacres (we do not have written contracts with any of our cleaning companies), but we decided in business fairness that we would give them one month.

At the time that we sent the letter to Greenacres cancelling our cleaning contract with them, we had not yet confirmed an alternative arrangement with Darren. However, we knew that it was our preference to work with him, and that we probably would be able to get him to do our cleaning. This was our hope.

Phil asked me to send Darren a list of the centre addresses and the prices that we were presently paying for them. Darren then provided a quote. If I look at the prices we are paying now, some are slightly more expensive and some are slightly cheaper. I think the cost roughly works out about the same as we were paying with Greenacres.

I was not involved in the negotiation phase. However, on 9 June 2008, I sent an email to Kelly Brown asking her for business particulars. My understanding was that at this stage, an agreement that A & O would do our cleaning was not yet concluded, but it was very close to being so.

Since Alpha and Omega Cleaning Limited (the Browns' company) commenced cleaning our premises on 30 June 2008, we have had no complaints.

[37] The absence of agreed terms in respect of notice from either party is problematic. Ms Pretious' evidence is QMS had given CCCL one month's notice of termination of the ABC contracts on 28 May 2008. Also, she confirmed that at that date no alternative arrangements on the ABC contracts had been made with

the Browns. Finally, Ms Pretious confirmed the Browns' company began cleaning under these contracts on 30 June 2008.

[38] Given Mr Brown tended one month's notice on 19 May 2008 and the notice period was not challenged by Mr Im, the relationship would usually have ended on 19 June 2008. However, Mr Im told Mr Brown he was not required to work out the notice period. The claim the arrangement was placing Mr Brown on *garden leave* is difficult to sustain given there is no agreed provision in any documentation before the Authority.

[39] The evidence was Mr Brown returned all company equipment and documents to the company on 23 May 2008. Mr Williamson told the Authority:

In the days immediately following 19 May, I had telephone conversations with Mr Im in which he explained to me that he had been speaking to the first respondent and had told him that he (the first respondent) would not be required to undertake all the duties he had been undertaking during his notice period if he did not want to. On that basis, he could return the company car and certain other equipment. Mr Im explained to me that would be on the understanding that the first respondent would be available to him for any assistance by telephone Mr Im required, but that otherwise the first respondent would be largely free of his duties.

[40] Later, at para.22 of his evidence, Mr Williamson said:

On 29 May 2008, the second respondent telephoned me to ask if settlement could proceed. I confirmed that I had received the email from Upper Riccarton Law Office and therefore settlement could proceed. The first and second respondents subsequently visited my office and delivered the company vehicle and certain other items. I gave the respondents a cheque for \$9,372.00 being the balance owed to him. In my view, the arrangements between the parties were clear. The first respondent was still employed and nothing was resolved until he returned the company vehicle and collected his cheque on 29 May 2008.

[41] And further:

I do not understand that there is any basis upon which the first respondent could claim that he was entitled to retain the company property without being employed by the company. He had no right to do so, and until he had returned the applicant's property and the applicant had made a payment to him the employment relationship was ongoing.

[42] The settlement referred to by Mr Williamson relates to a dispute over the annual bonus payable to the first respondent and I am satisfied that until that

particular issue was settled between the parties, rightly or wrongly, Mr Brown retained the applicant's company vehicle as a bargaining chip until its return on 29 May 2008.

[43] Standing back and reviewing the evidence particular to this case, I am satisfied Mr Brown's final day of work was 23 May 2008 and am confirmed in this view by Mr Im's evidence of his cancelling Mr Brown's automatic wage payment shortly before 26 May 2008. Having considered Mr Williamson's evidence in particular, the Authority accepts there was significant negotiation around the issue of the bonus. However, those negotiations, though part of the factual matrix, are not directly related to the date of resignation.

[44] Mr Brown was paid in lieu of notice, forfeiting the use of the company vehicle and other equipment, but agreeing to assist his former employer by telephone if Mr Im required that.

[45] In *Marshal v. Market Gardeners Ltd* (AC6/01, 14 February 2001, Travis J), the Court cited a statement by Lord Browne-Wilkinson from *Delaney v. Staples* [1992] 1 All ER 944:

The phrase "payment in lieu of notice" is not a term of art. It is commonly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list the following are the principal categories ... (3) at the end of the employment, the employer and the employee agree that the employment is to terminate forthwith on payment of a sum in lieu of notice. Again, the employer is not in breach of contract by dismissing summarily and the payment in lieu is not strictly wages since it is not remuneration for work done during the continuance of the employment.

[46] There is no suggestion that Mr Brown was dismissed by the applicant company. What is clear from the evidence is that, upon receiving Mr Brown's resignation, Mr Im, as confirmed by Mr Williamson, told Mr Brown he would not be required to undertake further duties for the company. It is also clear that at the time the two men, namely Mr Brown and Mr Im, discussed the matter, the parting was by way of mutual termination. I find there was no agreement that Mr Brown take garden leave and the actual date on which the employment relationship came to an end was when Mr Brown returned all company property to the applicant with the exception of the company vehicle which was returned on 29 May 2008.

[47] I decline the applicant's submission that this latter date was the appropriate one for the Authority to consider the date of termination. However, it was clear from Mr Brown's evidence in front of the Authority and from Mr Williamson's advising the first respondent he had no entitlement to remain with the use of the car on 26 May 2008, that the employment had in fact ended some days earlier.

Restraints

[48] The public policy position, as simply stated, is that an employee of a company, unless constrained by formally agreed terms as a condition of his/her employment, is not prevented from competing with a former employer after fulfilling his or her duties to that employer. That is, provided no confidential or trade secret information is used in the course of such post-employment competition.

[49] The recent decision of Travis J in *Rooney Earthmoving Ltd v. McTague, Whiting & Bartlett* (CC10/09, 24 August 2009), confirms the Court's view of such matters:

[142] As to the extent of that duty in the particular circumstances of this case, I am not persuaded that the law has reached a point that the duty includes disclosing either one's own or one's fellow employee's intention to simply leave and compete. To so hold would be to undermine the freedom of movement of employees and be contrary to the authorities which allow preparatory competitive steps to be taken, provided these are not in breach of the obligation not to compete or to damage the employer, whilst the employee is still under the duty of fidelity, trust and confidence. The position of employees who are also directors may well be different. ...

[144] As I have stated I am not persuaded by the English authorities cited that there is a duty to disclose the intention to compete after termination of the employment and the lawful acts taken in preparation.

[50] The Authority is satisfied in this particular case that Mr Brown held certain information in his head regarding the ABC Learning Centre cleaning contracts. As noted above, I am of the view that this information falls outside the classification of a proprietary interest based on trade secrets or specialised techniques.

Implied duty

[51] Even in the absence of a written employment agreement, Mr Brown was bound by the implied duty of fidelity and an obligation to act in good faith in respect of his employer during the period of his employment.

[52] The evidence of Mr Brahmhatt clearly establishes the first respondent spoke to him in mid-April 2008 and as well as criticising his employer and giving his views of the company's financial situation, the witness (a sub-franchisee of the applicant company), was invited to join him when he began his own cleaning company. While accepting this discussion was in the context of an unhappy sub-franchisee of the applicant, I do not doubt this occurred and the event establishes a significant breach of Mr Brown's obligations to his employer.

[53] Given that Mr Brahmhatt was the only witness called by the applicant to establish the breach I have found, the Authority is unwilling to infer that Mr Brown was conducting a wider campaign to recruit workers for his intended business.

Advertising

[54] The applicant complains that the first respondent breached his agreement not to advertise for work from the applicant's customer base in the event he went into business on his own account. Again, the onus is on the applicant to establish such an agreement was made. The advertisement put before the Authority was from the Christchurch Press of 2 July 2008 and is generic rather than targeted at CCCL customers. The agreement put in place following mediation ensured the Browns were prevented from targeting CCCL customers until December 2008.

The initial advertisement is not a breach of good faith and was posted after A & O began work for QMS on 30 June 2008.

Aiding and abetting

[55] The applicant alleges Mrs Brown aided and abetted Mr Brown in breaching the obligations her husband owed to his employer during the period of his employment by the applicant. There was no evidence of probative value before the Authority to establish this claim. The allegation appeared to assume guilt by association and

perhaps rested solely on a telephone call from Ms Pretious to Mrs Brown seeking contact details.

[56] The Authority has found for the applicant in respect of Mr Brown's approach to Mr Brahmbhatt. There is no evidence to establish that Mrs Brown knew of and supported her husband in the attempts to recruit Mr Brahmbhatt to a company yet to be formed at the time that attempt was made.

Determination

[57] Returning to the issues set out above in this determination, I find:

- No written employment agreement was ever signed by the parties despite belated efforts to negotiate such an agreement; and
- The first respondent is in breach of his implied obligation of fidelity and good faith to his employer during the period of his employment, specifically, in respect of his attempt to recruit Mr Brahmbhatt; and
- Given it was at the initiative of the applicant that Mr Brown was not required to work out his notice, the employment relationship ended on 23 May 2008; and
- There was no agreement between the parties that Mr Brown was to be on *garden leave* and hence the relationship did not endure beyond 23 May 2008; and
- The second respondent did not aid nor abet the breach established by the applicant nor in any other way; and
- The preparatory actions taken by the respondents to register the company was not in breach of the first respondents' obligations to his employer.

Conclusions

[58] The applicant has established a breach of duty by the first respondent. A question of penalty arises. Counsel are to confer and attempt to resolve this issue and the issue of costs between themselves.

[59] Leave is reserved to return to the Authority if agreement is not reached on either matter.

[60] I regret the delay in issuing this determination and any inconvenience caused to the parties. The matter is complex given poor documentation and the breadth of the allegations made. Further, leave requirements, surgery issues and unsuccessful attempts to contact Mr Michel did not assist a more prompt determination.

Paul Montgomery
Member of the Employment Relations Authority