

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 167
5646301

BETWEEN GAUK MEDIA LIMITED
Applicant

A N D STEPHEN MOODY
Respondent

Member of Authority: Peter van Keulen
Representatives: Paul Tranter, Representative for Applicant
Peter McRae, Counsel for Respondent
Investigation Meeting: 24 and 25 May 2017 at Nelson
Submissions Received: 2, 6, 7 and 9 June 2017 for Applicant
9 June 2017 for Respondent
Date of Determination: 29 September 2017

DETERMINATION OF THE AUTHORITY

- A. Gauk Media Limited did not pay Stephen Moody more holiday pay or sick leave than he was entitled to.**
- B. All of Gauk Media Limited's remaining claims are dismissed either because I do not have jurisdiction to determine them or because there is no evidential basis to support them:**
- a. I only have jurisdiction to hear Gauk Media Limited's claims that are based on alleged breaches of the confidentiality provisions in Stephen Moody's employment agreement.**
 - b. There is no evidential basis to support the alleged breaches of confidentiality by Stephen Moody, as the alleged acts do not involve using confidential information belonging to Gauk Media Limited.**

C. I reserve costs with a timetable set for submissions if required.

Employment relationship problem

[1] Webdog is a system used by Gauk Media Limited to create websites for its clients. It is a website builder that Gauk Media says is unique and therefore a system that it has proprietary rights to. Gauk Media also says it has proprietary rights in the websites designed using Webdog, which it subsequently hosts for its clients.

[2] Stephen Moody worked for Gauk Media from 13 May 2014 until 28 July 2016. During his employment, he helped create Webdog and used the system to build websites for various Gauk Media clients.

[3] Shortly after Mr Moody left Gauk Media says it discovered that:

- a. there appeared to be a system operating under the name “Webify” that replicated and used the Webdog system;
- b. Gauk Media clients’ websites had been replicated and were being hosted on different servers; and
- c. one client, Uniquely Nelson, had designed and created its own online shopping mall website using the same format Gauk Media had designed for it.

[4] Gauk Media believes Mr Moody has been involved in these matters. Gauk Media alleges that Mr Moody resigned from his job, set up Webify duplicating the Webdog platform into Webify and then set about taking Gauk Media clients using Webify and source codes he had downloaded from Gauk Media to replicate websites and provide alternative hosting. Mr Moody then commenced employment with Uniquely Nelson and created its online shopping mall website using Gauk Media information and design.

[5] Gauk Media says Mr Moody’s actions breach the obligations he owes to Gauk Media relating to its proprietary rights. Gauk Media has raised various claims against Mr Moody based on these alleged breaches.

[6] Gauk Media has a number of other complaints about Mr Moody’s conduct both during and once he left employment. However, Gauk Media does not pursue

these complaints as claims against Mr Moody; rather it says they are informative of the things it does claim.

[7] Gauk Media's other complaint, which does form part of its claim against Mr Moody, is that it overpaid him holiday pay and it seeks to have this repaid.

[8] Apart from the holiday pay claim, the legal basis for Gauk Media's claims were not clearly stated. This is not a criticism of Paul Tranter, the director and a shareholder of Gauk Media, who presented its claims. It is simply a reflection of the fact that Mr Tranter expressed the claims in non-legal terms relying on his business and commercial knowledge and experience. As a result, he expressed the claims in general based on the way he perceived or wanted the law to operate, particularly as it relates to employment obligations and the protection of business interests.

[9] An example Mr Tranter often used when discussing Gauk Media's claims is that a person cannot simply copy or clone the BBC website and use it for their own purposes. His basic premise throughout has been that Mr Moody cannot replicate or clone Gauk Media's website builder nor can he replicate or clone websites of Gauk Media clients. To do this is to infringe the rights Gauk Media has in its systems and products. However, Mr Tranter did not always articulate what those rights were and how they are protected in law and most importantly therefore, how the claims are founded in the employment relationship Gauk Media had with Mr Moody.

[10] That does not mean that Gauk Media does not have valid claims against Mr Moody. My role is to investigate employment relationship problems and this includes understanding what claims underpin the problem even if they are not expressed clearly. However, in doing this I need to be satisfied that there is a basis in law for the claims and that I have jurisdiction to determine them.

[11] There was also an additional issue with the claims advanced by Gauk Media. Despite making directions regarding the evidence I wanted to see and despite explaining to Mr Tranter what Gauk Media was required to do to meet those directions, Gauk Media did not present all of its evidence at the investigation meeting nor did it bring witnesses along who could answer questions relating to the allegations it made. The extent of this non-compliance with my directions did not become fully apparent until the investigation meeting was underway.

[12] So, in order to progress the claims and make use of the time I did have to investigate this matter I proposed to the parties that I could deal with the claims in four parts:

- a. I will determine the holiday pay claim on the basis of the evidence I considered in the investigation meeting;
- b. I will identify the legal basis for the other claims so that I can determine if I have jurisdiction and/or there is a factual basis to sustain these claims, based on the evidence I considered in the investigation meeting and the submissions made after the investigation meeting;
- c. If there remains any claims for me to investigate then I will hold a further investigation meeting to consider evidence on liability, which will necessarily involve issuing summonses for relevant witnesses to attend; and
- d. I will then consider remedies, which may involve further investigation into losses suffered by Gauk Media (assuming Mr Moody is liable for some or all of the Gauk Media claims).

[13] The parties agreed with this proposal.

[14] This determination deals with the first two steps of my proposal.

Did Gauk Media overpay Mr Moody holiday pay and if so, should Mr Moody repay it?

[15] Gauk Media's claim against Mr Moody for repayment of holiday pay arises because it says the holidays that Mr Moody took during his employment were not recorded correctly. Mr Tranter first noticed this in February 2016 and he told Mr Moody then that there might need to be some adjustment.

[16] Mr Moody heard nothing further on this and thought it had been resolved without any adjustment, as he believed he had not taken extra holidays and any review must have shown that.

[17] When Mr Moody resigned there was a holiday pay balance recorded as owing to him. However, Gauk Media stated it would retain his final pay in order to offset

any overpayment of holidays. After some discussion, Gauk Media conceded that it would pay Mr Moody his final pay and it did so.

[18] Notwithstanding that Gauk Media made this final payment, it continues to allege that Mr Moody took more days holiday than his entitlement. It also suggests that Mr Moody took extra sick days, receiving payment as sick leave when he did not have sufficient sick leave accrued.

[19] Gauk Media did not produce accurate holiday and leave records that showed that Mr Moody had taken more holidays or sick leave than he was entitled to. I accept Gauk Media may have some concerns over the amount of leave taken against what was recorded but it has not meet the burden of proof required and therefore has not established that there was any overpayment of leave to Mr Moody.

What are Gauk Media's claims and what is the legal basis for them?

[20] Gauk Media's other claims involve three sets of complaints:

- a. That Mr Moody set up Webify and duplicated the Webdog platform into its operating system;
- b. That Mr Moody replicated Gauk Media clients' websites by using source code that he downloaded from Gauk Media and then he set the cloned websites up to be hosted by Webify;
- c. That Mr Moody built Uniquely Nelson's online shopping mall using Gauk Media information.

[21] Putting aside the question of whether, in fact, Mr Moody did do these things my first consideration is what obligation in law does Mr Moody owe to Gauk Media not to do these things? Or what is the legal basis for Gauk Media to say these actions are a breach of its rights?

[22] Mr Tranter conceded that Gauk Media was not pursuing Mr Moody for any alleged breaches of non-compete or non-solicitation covenants.

[23] That leaves two broad areas that Gauk Media relies on, confidential information and other intellectual property rights, particularly copyright. Gauk Media is claiming that each of the events set out is a breach of confidentiality, as

Mr Moody used Gauk Media confidential information to do what he did, and a breach of its intellectual property rights as Mr Moody infringed copyright protection when he did what he did.

[24] There is a basis in law for these claims. The obligations owed by Mr Moody or protection afforded to Gauk Media arise out of obligations set out in Mr Moody's employment agreement with Gauk Media, the common law relating to duties of confidentiality and other intellectual property and the statutory rights relating to intellectual property such as copyright.

Do I have jurisdiction to determine Gauk Media's claims?

[25] There is no doubt I have jurisdiction to determine matters relating to an employment agreement¹.

[26] In this case the relevant provisions in the employment agreement are:

16. CONFIDENTIALITY

- a. Due to the nature of your employment, you will have access to personal, trade, professional, client lists and other like information of a confidential nature relating to our operation and our customers.
- b. In signing this agreement you agree not to pass on, disclose or use this information, either during your employment or after your employment has terminated, without prior written permission from us.
- c. You acknowledge that unauthorised use of confidential information is serious misconduct for which you may be dismissed from your employment, regardless of whether you are using the information for monetary gain.

...

18. INTELLECTUAL PROPERTY

- a. Any patent, design, copyright or other form of intellectual property or proprietary interest in any matter or thing discovered, concerned or developed by you during your employment with us and in any way relating to your duties or our business or affairs shall be our absolute property unless formally declared otherwise in writing by us.

¹ Section 161 of the Employment Relations Act 2000.

[27] Clause 16 creates an obligation on Mr Moody not to use confidential information and this is an enforceable right for Gauk Media. So there is a legal basis for breach of confidentiality and I do have jurisdiction to investigate it.

[28] In contrast, clause 18 does not create an obligation on Mr Moody, it simply states the position that Mr Moody acknowledges that there may be intellectual property rights created in work he did for Gauk Media and if so, ownership of these rights rests with Gauk Media. The clause does not have an operative part that prohibits use of that work or any part of it. So there is no enforceable intellectual property right or obligation in the employment agreement.

[29] That leaves intellectual property under New Zealand statute or common law. I will assess this by reference to Mr Tranter's often-used example. It may well be that creating a replica of a website, such as the BBC website, is a breach of copyright or passing off or some other intellectual property rights or obligations. However, breaches of such rights or obligations, particularly alleged breaches that occur after the employment has ended, are not an employment relationship problem². And, I do not have jurisdiction to deal with intellectual property claims that are not an employment relationship problem.

Is there a factual basis to sustain Gauk Media's claims?

[30] So, the only basis on which I can determine the claims advanced by Gauk Media is to consider whether Mr Moody has breached the confidentiality provision in his employment agreement. Putting aside the question of whether Mr Moody has, in fact, acted as alleged³, I need to consider whether the actions as alleged could amount to a breach of the confidentiality obligation.

[31] This question turns on whether there is confidential information in the Webdog system, the various Gauk Media client websites and hosting arrangements and the work that Gauk Media did for Uniquely Nelson for its online shopping website.

² *Ecostores Company Limited v Gillian Helen Worth* [2017] NZHC 1480

³ I note that in his evidence, Mr Moody consistently (and with some credibility) denied any involvement in the creation of the Webify website builder and he strenuously denied copying Webdog.

Webdog

[32] Webdog is a system used to design and create websites – a system that uses free open source software from WordPress, which is the website management system that runs a website.

[33] To build a website open source software is downloaded, a theme is purchased which provides the layout or style of the website, then plug-ins can be purchased which add features to the website. Then content is added to the website, this content often coming from the client. Finally the website needs to be hosted on a server such as the one provided by Webdog.

[34] Gauk Media accepts that Webdog operates this basic system. Nevertheless, it says Webdog has additional features providing administration, a library of templates, mapping and other aspects, which makes it a unique system. Webdog provides a new way to create and run a website.

[35] In contrast, Mr Moody says Webdog is not unique. It is based on using open source software and various building blocks that can be purchased such as a theme and add-ons or plug-ins. It is not unique, it simply does what hundreds or thousands of other website builders do.

[36] Mr Moody also says Webdog is of no benefit to him for any web design and development he might do – he can do all of the things it does without it.

[37] On the basis of the evidence I heard in my investigation meeting Gauk Media failed to prove to me that the Webdog website builder was unique and in particular that there was anything confidential about what it did or how it did it. In short, I am not satisfied that there is any confidential information in Webdog relating to the way it operates.

[38] This means that even if Mr Moody did copy the Webdog website builder and installed that system into Webify, doing so did not breach the confidential information provision of his employment agreement.

[39] Or put another way, if Mr Moody did create a website builder for Webify then he did not copy Webdog. Rather, he installed a basic, or even comprehensive, website builder that anyone with some industry knowledge or IT expertise could

design and install. He would have created a website builder that uses free software and readily available themes, add-ons and plug-ins that may have some additional functionality without using any confidential information belonging to Gauk Media.

[40] For these reasons I am not satisfied that Gauk Media does have a factual basis for its claim against Mr Moody relating to Webdog and the claim must fail.

Client Websites

[41] Based on how Gauk Media clients' websites are designed and created I am not satisfied that there is any confidential information in these websites that is protected by the obligations in Mr Moody's employment agreement.

[42] The particular amalgamation of the open source software, theme and add-ons or plug-ins is evident from the website itself for someone with some industry knowledge or IT expertise or the source code, which is publically available through the website itself.

[43] And the content of the website cannot be confidential as it is on display on a public forum.

[44] However, Gauk Media says that accessing the publically available information to create a clone of a website is too time consuming and the reality is Mr Moody must have downloaded the relevant source codes from Webdog into Webify to create cloned sites that Webify then hosted.

[45] This does not change the nature of the information used and this action, if Mr Moody did do this, cannot be a breach of the confidentiality obligations in the employment agreement. And therefore, this claim must fail.

[46] It may be, if this did happen, that it is a breach of some other right for Gauk Media or a breach of some other obligation Mr Moody owes, such as a possible breach of copyright in the code or theft of property. But, I do not have jurisdiction to consider claims based on these alleged breaches⁴.

⁴ *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255

Uniquely Nelson

[47] Mr Moody is now employed by Uniquely Nelson. As part of his employment he created a website, LoveNelson, which is on-line shopping mall. Gauk Media says that when Mr Moody was employed by it he helped create a prototype site of LoveNelson and this took a lot of work and development. Gauk Media says Mr Moody cannot replicate that work for Uniquely Nelson.

[48] Mr Moody says on-line shopping malls are simply variations of websites, which follow a similar theme and format. There is nothing unique or confidential in the LoveNelson on-line shopping mall website.

[49] Again, as with other websites created by Gauk Media using Webdog there may be some rights vesting in Gauk Media that protects its work but I do not have jurisdiction to determine claims based on those alleged rights. I can only determine a claim based on breach of confidential information obligations in the employment agreement and based on the evidence I heard I am not satisfied that there is any confidential information in the LoveNelson website. This claim must also fail.

Conclusion

[50] There is no factual basis for Gauk Media's claims as there is no confidential information in the Webdog website builder, Gauk Media clients' websites or the Uniquely Nelson on-line shopping mall website, LoveNelson.

Determination

[51] This determination, reserved at the conclusion of a two day Investigation Meeting, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Employment Relations Act 2000 to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Employment Relations Act.

[52] Gauk Media did not pay Mr Moody more holiday pay or sick leave than he was entitled to.

[53] All of Gauk Media's remaining claims are dismissed either because I do not have jurisdiction to determine them or because there is no evidential basis to support them:

- a. I only have jurisdiction to hear Gauk Media's claims that are based on alleged breaches of the confidentiality provisions in Mr Moody's employment agreement.
- b. There is no evidential basis to support the alleged breaches of confidentiality by Mr Moody, as the alleged acts do not involve using confidential information belonging to Gauk Media.

Costs

[54] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[55] If they are not able to do so and a determination on costs is needed, either party may lodge and serve a memorandum seeking costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority