

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Rooney Earthmoving Limited (Applicant)

AND Kelvin Douglas McTague (First Respondent)
Clarence Henry Whiting (Second Respondent)
Kerry Wayne Bartlett (Third Respondent)

REPRESENTATIVES C H Toogood QC and Roger Brown, Counsel for Applicant
Kerry Smith and Susan Rowe, Counsel for Respondents

MEMBER OF AUTHORITY Paul Montgomery

INVESTIGATION MEETING 16-19 August 2005
12-15 September 2005

DATE OF DETERMINATION 16 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Rooney Earthmoving Limited (REL) alleges that each of the respondents has breached expressed and/or implied terms of their individual employment agreements and that those breaches caused the applicant significant financial losses. It seeks damages from each applicant in the following sums:

- Mr McTague - \$1,000,000
- Mr Whiting - \$500,000
- Mr Bartlett - \$500,000

The quantum of damages was adjusted on the basis of Mr Hadlee's evidence to a total of \$1.8 million. The applicant also seeks interest on the sums and costs associated with the investigation meeting.

The parties

[2] REL is a duly incorporated company with its registered office in Timaru and carrying on the business of a specialist earthmoving company.

[3] Mr McTague is a director and shareholder of BMW Contracting Limited (BMW) who was formerly employed as the Regional Manager, Ashburton for REL.

[4] Mr Whiting is a director and employee of BMW Contracting and was formerly employed by REL at Ashburton as, according to his employment agreement, a supervisor.

[5] Mr Bartlett is an employee of BMW and was formerly employed by REL at Ashburton as, according to his employment agreement, a supervisor.

[6] BMW is a duly incorporated company, incorporated on 19 May 2004, with its registered office at Ashburton and which carries on business as a specialist earthmoving company.

[7] Each respondent denies he has breached the terms of his employment agreement with the applicant and declines to meet the applicant's demands. Attempts to resolve the issues in mediation were not successful.

The factual background

[8] In August 2003 REL purchased some of the assets of an earthmoving business then trading in Ashburton as Doug Hood Limited (Civil). Prior to the purchase Mr Whiting and Mr Bartlett were employees of Doug Hood Limited and from 1 August 2003 were employed by REL. During August and September 2003 REL undertook a restructuring of the Ashburton operation. Mr McTague was employed in September 2003 as Regional Manager of the Ashburton branch of REL and Messrs Whiting and Bartlett were employed by REL as supervisors at the Ashburton branch.

[9] To be clear, I do not accept that Whiting and Bartlett were *Assistant Managers* of the Ashburton operation. The evidence before the Authority, most notably the individual employment agreements and the ISO documentation make it clear that they were supervisors of the various contracts undertaken by REL in the Canterbury area.

[10] In a letter dated 22 April 2004 Mr McTague gave REL notice that he would terminate his employment with the company effective 31 July 2004.

[11] Mr Whiting gave notice on 14 May 2004 that he would be terminating his employment with REL effective 28 May 2004. Mr Whiting's last day at work was 25 May 2004 as he took annual leave due to him.

[12] Mr Bartlett terminated his employment by giving notice on 19 May 2004 effective from 1 June 2004. Mr Bartlett's final day at work was actually 25 May 2004 when he was dismissed summarily for what the Authority was told was serious misconduct.

[13] The applicant alleges that in breach of his employment agreement Mr McTague abandoned his employment on 13 May 2004. The applicant says Mr McTague then busied himself in establishing BMW in competition with his former employer and it alleges this was done during the period of notice given by Mr McTague and accepted by REL. It is the applicant's position that the giving of the three months notice and its acceptance by the applicant amounted to an agreed variation of the employment agreement between the parties and whereby it was agreed that Mr McTague would continue his employment with REL until its termination on 31 July 2004 and that Mr McTague would continue to owe the applicant all the duties of an employee up until that date.

[14] For the sake of completeness Mr Bartlett and Mr Whiting were engaged by REL pursuant to written and signed individual employment agreements, while Mr McTague was employed under an oral arrangement with the applicant company.

[15] In its further amended statement of matters to be resolved dated 14 September 2005 the applicant claims that the three respondents in their respective managerial capacities, had access to confidential information concerning:

- RELs marketing procedures and techniques; and
- RELs market research plans, business plans, financial projections and/or budgets, financial information, quotations provided to existing clients, health and safety systems and quality management systems; and
- Information about REL employees and clients which was not publicly available including, but not limited to, credit or personnel information derived from a credit report compiled or obtained by REL; and
- Arrangement with RELs financiers; and
- Arrangements REL had with its suppliers; and
- Arrangements REL had with existing clients including pricing arrangements.

[16] The individual employment agreements signed by Messrs Whiting and Bartlett contained a confidentiality provision which stated:

The employer shall not either, during the continuance of this agreement or after its termination (however caused) dispose or use in any manner whatsoever, except for the benefit of the company, any of the secrets, confidential knowledge or information, or any financial or trading information relating to the company.

[17] While the applicant acknowledges that Mr McTague did not have a written employment agreement, its claim is that he too was bound by such a confidentiality agreement and indeed had a heightened responsibility given his seniority in the company.

[18] The specific breaches alleged by the applicant in respect of all three respondents are:

- That they induced other members of the REL staff to breach their employment agreements with the applicant in that the three undertook solicitation of REL employees with the beneficiary intended to be the new company BMW;
- The misuse of confidential information to secure work for BMW and in particular the under quoting on work and pricing for REL and delaying work in order to afford BMW the opportunity to quote on it after the company was formed;
- Breach of the expressed and implied terms of the employment agreement and in particular the duty of fidelity and loyalty to their employer REL.

The issues

[19] The Authority is called upon to determine the following issues:

- Did the respondents as individuals breach the terms of their employment agreements?
- If so, what has been the effect of the breaches?

- What damages are due to the applicant in the event that the Authority finds the respondents in breach given the effects of such breaches?

The investigation meeting

[20] Originally scheduled for four days the investigation meeting occupied a little over seven days. Owing to the issues in question, the technical evidence in respect to assessing damages and matters involving credibility, counsel were permitted to cross examine witnesses if they chose. The extensive documentation and the need for frequent reference to it prolonged the investigation beyond the usual time frames.

[21] For the applicant the Authority heard evidence from Mr Gary Rooney, a director of REL, Andrew Rae who succeeded Mr McTague in the Ashburton branch of REL, Paul Allott, RELs accountant and from Robyn Thomson, the administration person in Ashburton. I also heard evidence from Mr Barry Hadlee, an expert witness who provided the basis and detail of the applicant's financial losses alleged to have occurred as a result of the alleged breaches.

[22] For the respondent I heard evidence from each of the respondents, and from Mrs McTague, wife of the first respondent. Expert financial evidence was provided by Mr Bruce Irvine, in particular as to the evaluation of losses suffered by the applicant if the respondents were in breach.

[23] The Authority was provided with affidavits from a considerable number of farmers who had engaged BMW to complete work for them in the company's early stages of operation. Mr Toogood sought to cross examine some of these people and the Authority travelled to Ashburton to enable this to take place.

[24] I record the Authority's appreciation to all who gave evidence in the course of the investigation and in particular Mr Hadlee and Mr Irvine for their highly professional and thorough analysis of the financial issues of this case.

The events of 13 May 2004

[25] Mr Rooney's evidence before the Authority was that he *became aware (from a discussion with Paul Allott in early May) that the branch had not generated the revenue which was expected and was well below budget for April. I arranged a meeting at the Waimate office with Paul Allott, Andrew Rae and Kelvin McTague to discuss these matters and the handover of the Ashburton business to Andrew. He then said, I brought the meeting with an insurance agent to an end and went out into the reception area and invited Kelvin into my office. I began the discussion with Kelvin*

[26] Mr McTague's evidence was that the above incident is *entirely inconsistent with the events as I know them. Paul (Allott) had told me the meeting was to discuss procedures. I did not see Andrew Rae at Waimate that day. When the meeting took place, Paul was nearby, but Gary only asked me into his office and then shut the door. During the meeting, Gary never mentioned financial issues.*

[27] What took place in the meeting is disputed by the two participants but what is clear on Mr Rooney's evidence is that the meeting did not include the April below budget performance at Ashburton nor the hand over of Ashburton to Andrew Rae.

[28] Mr McTague says that Mr Rooney said that he had been *told by Paul (Allott) that I had made a comment about him not handling my resignation in a professional manner. I confirmed that I had made that comment and that it was what I thought. I said that, in my experience, a resignation was always acknowledged and there was some attempt to understand the reason for it. Gary rejected*

that and said I had been unprofessional by telling Geoff Hayward of my resignation before he got my letter. I said he was entitled to his view just as I was to mine. I commented that like a lot of other matters, we had different points of view and different values and would probably never agree on a lot of things. I recall that I also said that if I have upset you, I apologise.

[29] Mr Teague went on in his evidence to say *Gary was deliberately silent for a few moments. Initially he was looking at the window. He then turned to look me in the eye and said very deliberately no! Fuck you Kelvin. I don't accept any of that. I was shocked by this. I told Gary that I had not come all the way down from Ashburton for an argument and if that was the way he was going to talk to me, I would pack up and leave. Gary replied if you want to leave the bloody company that's your problem. That's fine with me. I replied that I was not staying if he continued to behave in this way When I said again that I would leave if he didn't stop behaving this way, he told me I was going to stay in Ashburton until the end of July as my resignation said. I told him that we would see about that and if all he wanted to do was argue, I was leaving. He ignored me and carried on talking angrily. I got up and said I am leaving I am finished. I went to the door and started to open it. Gary said where the hell do you think you are going? I said I am going home, left the office and closed the door. As far as I was concerned it had become impossible to work for Gary any longer. He knew that I had resigned because of the offensive way he behaved but continued to behave in the same way. At the meeting on 13 May, I had told him three times that, if he carried on that way, I was leaving. He simply ignored me. There was nothing else I could do but leave.*

[30] In an attempt to resolve the issue of what occurred at this meeting and whose evidence might be preferred, I returned to the affidavit sworn by Mr Rooney in support of the application for an ex parte injunction lodged with the Authority on 25 June 2004. In that document Mr Rooney states, *I was most surprised at the decision to resign and have no idea what he means by "the very nasty tone of the discussion between you and myself on the afternoon of Wednesday 21 April". I was somewhat perturbed by the actions of Mr McTague and requested a meeting take place at the Head Offices of Rooney Earthmoving at Waimate. ... Mr McTague travelled from Ashburton to Waimate and after a brief discussion he advised me that he was not going to attend the meeting and simply up and left.*

[31] This account is clearly relating to and in the context of Mr McTague's resignation and Mr Rooney seeking an explanation for it. Mr Rooney, at the time, must have known why he had summoned Mr McTague to Waimate on 13 May 2004, and on 25 June 2004 states his reason. Yet in a statement of evidence sworn before the Authority, his reasons for calling the meeting have significantly changed and the people to attend have been increased given what he now says was the purpose of the meeting.

[32] In addition, Mr Rooney's accounts of the beginning of the meeting are thoroughly inconsistent. In his affidavit he deposes Mr McTague refused to attend the meeting and in his evidence to the Authority swears he invited Mr McTague into his office and there began a discussion with him. There was no reference to Mr Allott nor to Mr Rae; there was no reference to financial concerns nor to hand over procedures.

[33] My concern at Mr Rooney's recall of the meeting was heightened when I considered his statement of evidence in which he clearly says that *Kelvin apologised*, beside his statement in his statement of evidence in reply where he says *Kelvin's account of the meeting ... on Thursday 13 May 2004 ... is mostly correct except that in no way, shape or form did Kelvin ever apologise to me.*

[34] Put simply, Mr Rooney's accounts are inconsistent and therefore call into question his memory of this key event. I prefer the evidence of Mr McTague in this particular matter for the reasons outlined. Whether Mr Rooney's language and behaviour as related by Mr McTague are

capable of amounting to a constructive dismissal as he alleges, is a matter the Authority has also had to consider.

Legal principles

[35] It is accepted in this case that the issue of the explicit and implied terms of the respondents' employment relationship with REL are at the heart of the matter. The relevant explicit terms are set for Mr Whiting and Mr Bartlett in their employment agreements and relate to the requisite notice to be given and the confidentiality clause set out above. As the employment agreement between Mr McTague and REL was never committed to writing, there are no explicit terms in his case. However, he was bound by the common law requirements to give reasonable notice as he held a senior executive role in the company. The applicant's case therefore rests heavily on the implied terms between the parties. The terms relevant to this case are:

- (i) The obligation that the respondents', while still employed by REL, would not act in a manner so as to compete with their employer.
- (ii) That without the consent of their employer, the respondents would not;
 - use or disclose confidential information obtained in the course of their employment;
 - undermine the employer's relationships with clients with the objective of transferring such clients to themselves or some other party;
 - use to their personal advantage business opportunities which presented themselves to them in the course of their employment with REL.

Analysis and discussion

Mr McTague

[36] Mr McTague, by way of a written resignation dated 22 April 2004 and delivered by Paul Allott to Mr Rooney, gave a little over three months' notice. The letter read:

Dear Gary,

After a few sleepless nights and a week or two to ponder my future I have decided to terminate my employment with your company as of 31 July 2004.

You will no doubt be aware of some of the circumstances that brought about this decision the final straw being the very nasty tone of the discussion between you and myself on the afternoon of Wednesday 21 April.

It is interesting to note that a long time employee of yours told me not long after I started that he did not see me working long term with you because we were too much alike.

That may or may not be the case although I can assure you that modern day employment requires less of the stick theory and more of the carrot approach. Obviously on that point we have differing views and so be it. Thank you once again.

Yours faithfully,

K D McTague

[37] Given the senior position held by Mr McTague in REL, I think it was appropriate for him to have provided the three months notice of termination to his employer and that met the expectation which the applicant, through counsel, expressed as acceptable. Regrettably, matters did not end there as the events which unfolded on 13 May 2004 at the Waimate offices clearly intervened.

[38] Whether the behaviour and language of Mr Rooney justified Mr McTague leaving his employment that day is somewhat academic because in spite of Mr Rooney's assertion that Mr McTague would stay in his Ashburton role until his notice expired, he ceased paying Mr McTague from that day and thereby severed the employment relationship. Further, he had Mr Rae, Mr McTague's replacement, in Ashburton the following day. Mr Rooney appears to have made no effort to contact Mr McTague to attempt to persuade him to work out the remainder of his notice. This seems to be consistent with his evidence before the Authority, *I did not have a lot to do with Kelvin after he gave his resignation notice.*

[39] I note that although Mr Rooney said he was *somewhat perturbed* and *annoyed* at Mr McTague's resignation, it took him over three weeks to call his most senior employee to a meeting. Further, he said it was only after hearing of the resignations tendered by Whiting and Bartlett that he became *extremely suspicious ... due to the fact that Rooney Earthmoving had now lost its entire management team based at Ashburton.*

[40] As from 14 May 2004, Mr McTague was a free agent and while unimpeded by any restraint in trade, needed to observe the implied legal duties to REL.

[41] On the evidence before the Authority, Mr McTague, while having done some tentative planning for his future, did not compete with REL until BMW commenced business activity on 1 June 2004. There was no probative evidence that Mr McTague used information confidential to REL which he had obtained during his employment, nor was there evidence that he undermined REL's business relationships with a view to transferring clients of REL to BMW. Given Mr McTague's knowledge and experience in contracting in mid-Canterbury, it is evident that he had extensive knowledge of who, in the area, was likely to need earthmoving work done and therefore to be approached with cold calling to determine whether an opportunity existed for BMW.

[42] The applicant submitted that Mr McTague must have used information he could only have obtained from REL in setting up BMW's projected cashflow and pro forma balance sheet, both essential for financial support. Mr McTague spoke to his accountant on the morning of 14 May 2004 about his proposal. BMW was incorporated on 19 May 2004. The proposal was faxed to UDC Finance Limited on 21 May 2004. Effectively, the accountants had from 14 May to 21 May to prepare the documentation and while mindful of Mr Hadlee's evidence that it would have taken a few days to prepare the documents, seven days would provide sufficient time, particularly given the use of standard templates and spreadsheets. The proposal could only be put to UDC following the incorporation of BMW on 19 May 2004 and, on the evidence, that is what happened.

[43] I observe that in setting up BMW Mr McTague was simply putting his company in the marketplace to compete with all earthmoving contractors in the mid-Canterbury area, not only with REL.

Mr Whiting

[44] Mr Whiting was employed as a supervisor by REL and gave that company the 14 days' notice required under his employment agreement. That notice was to be effective on 28 May 2004. However, Mr Whiting left his employment on 25 May 2004 by agreement with Mr Rae. Mr Whiting's evidence was that once he heard of the departure of Kelvin McTague on 13 May he

thought things over that evening and decided to leave REL. The following day, Mr Rae and Mr Allott arrived at around 6.45am and following a brief discussion Mr Whiting handed Mr Rae his resignation. Mr Rae attempted to dissuade Mr Whiting but to no avail. Later that day Mr Whiting says that he discussed the situation with Mr McTague who advised that he was *going to try to start a contracting business but that this was totally conditional on getting finance to purchase the necessary equipment. Kelvin explained that he was forming a company called BMW Contracting Limited ... I said to Kelvin that, provided he could get the finance, I would join him in the business. Kelvin then suggested that I become a director of the company. I agreed and, over the weekend, I completed the forms Kelvin gave me.*

[45] Mr Whiting was quite explicit regarding his resignation. He says *As I saw it then, Kelvin's idea of starting a contracting business was just a possibility. It all depended on getting finance and that was by no means certain. I was not relying on it happening and it was not the reason I gave my resignation. It only came up after I had given my resignation. The reason I resigned was that I had finally had all I could take of Rooneys as an organisation.*

[46] It is clear that there was considerable interaction between Mr Rae and Mr Whiting prior to Mr Whiting's departure. Mr Whiting says he told Mr Rae about each of the jobs that the company had on at that time and that Mr Whiting was supervising. He also told him about the jobs that were coming up and the few quotes that he had given to prospective clients. He says that when the company employed Mr Reg Cavill to take over Mr Whiting's role, it was arranged that Mr Whiting would take Mr Cavill around the jobs and show him what was happening. This was done on Thursday, 20 May and Mr Whiting says he began by giving Mr Cavill a list of the current jobs and the prospects that he was dealing with while they were in the ute.

[47] On the evidence in front of the Authority, Mr Whiting co-operated with REL in passing on information to Mr Cavill. However, it is a matter of record that on 16 May 2004 Mr Whiting signed a form consenting to act as a director of a proposed company named BMW Contracting Limited. At this date, Mr Whiting was working out his notice period with REL and thus was still an employee of that company. While I accept that at this point there was no assurance that BMW would in fact obtain the essential financial backing it required to begin operations, it is also clear that Mr Whiting was aware that in the event that finance was forthcoming, BMW would in fact be in competition with REL. This action on the part of Mr Whiting is a breach of his implied obligation not to act in a manner as to compete with his employer while he was still employed.

[48] The applicant alleged that Mr Whiting had used confidential information obtained in the course of his employment with REL for the benefit of BMW. In considering the applicant's evidence on this matter, I have come to the view, on the balance of probabilities, that Mr Whiting did not use information confidential to REL for the benefit of his new employer. I have come to this view against the background of Mr Whiting's very extensive experience and dealings with users of earthmoving services in the region and in particular his extensive and long experience with Doug Hood prior to joining REL. I accept Mr Whiting's evidence in respect of his briefing Mr Cavill on the jobs under way at the time Mr Whiting tendered his resignation and his advising of the prospects that he had been working on in respect of REL's interests. I have also studied Mr Whiting's diary and can find little evidence that he used this diary to detail quotations to prospective clients. Rather it appears to be a day-to-day record of where men and machinery are deployed or are to be deployed in the course of completing business on behalf of REL. The evidence was that Mr Whiting, when preparing quotations, would generally work them up in rough and then hand them to Mrs Thompson for formal quotation to the prospective customer. In weighing these factors, I have come to the view that Mr Whiting did not use confidential information nor did he use to his personal advantage business opportunities which came to him in the course of his employment with REL.

[49] Turning to the question of whether Mr Whiting undermined REL's business relationships with its potential customers with the objective of transferring such prospective customers to BMW, I am of the view that the applicant has fallen short of establishing its allegations that Mr Whiting was engaged in *stockpiling* work which could later be uplifted by BMW. Both parties accepted that Mr Whiting had extensive and close contacts within the region and I am of the view that it was these attributes which prompted Mr Rooney to pursue Mr Whiting as a potentially valuable employee for REL following the closure of Doug Hood's operations in Ashburton. Considering this issue overall, I am strongly of the view that Mr Whiting possessed an extensive and detailed knowledge of the potential customer base in the region and had forged, over considerable years, sound relationships with the farming community.

Mr Bartlett

[50] Like Mr Whiting, Mr Bartlett had been employed for a number of years in the Doug Hood operation in Ashburton and was employed by REL at the beginning of August 2003. Mr Bartlett gave notice of termination of his employment with REL on 19 May 2004, that resignation to come into effect on 1 June 2004. There was little dispute that Mr Bartlett was regarded as a very skilled supervisor in the area of border dyke construction.

[51] The applicant alleges that during the period following Mr Bartlett's giving notice he endeavoured to persuade a fellow employee named John Galbraith to leave his employment with REL and undertake employment with BMW. Mr Rae's evidence on behalf of the applicant was that *John Galbraith told me on about 20 May that, approximately two or three weeks earlier, Kerry Bartlett had informed Ken Thompson and him that he was setting up business with Clarry Whiting and Kelvin McTague to compete with Rooney Earthmoving ... and said they were looking for men and asked if they were interested in employment with the new company. John Galbraith rang me at home on Sunday, 23 May and told me that he had been visited at his home by Kerry Bartlett on Sunday 23 May and offered employment with BMW Contracting.*

[52] In his evidence, Mr Rae also says that a Ken Thompson, a grader driver, Ricky Mann, a scraper operator, and Ricky Ruffell, a grader operator, also told him shortly after the departure of Messrs Bartlett and Whiting that they had also been approached by these two before they ceased work at REL. It was Mr Rae's evidence that these four men are *top class experienced operators. If they left Rooney Earthmoving it would place considerable economic hardship on Rooney Earthmoving and would cripple the border dyking operation.*

[53] I found Mr Rae a straightforward and open witness. However, the difficulty with this section of his evidence is that, apart from the contact by John Galbraith on Sunday, 23 May, it lacks specifics. This might have been overcome had the applicant called evidence from the other three employees.

[54] Mr Bartlett's evidence on this issue was, *John Galbraith is a mate of mine. We worked together both at Doug Hood Limited and at Rooneys. After I gave my resignation to Rooneys, Johnny asked me what I was going to do. I mentioned some of the options I was considering including the possibility of working in a new business Kelvin was working on. Johnny said he would be interested in that. On Sunday 23 May, Johnny rang me. He said that he had seen the advertisement in the paper and asked if he could see an employment contract. I got one from Kelvin and took it around to Johnny's place. I told him that, if he was interested in applying for a job, he needed to talk to Kelvin. I also suggested he talk to Andrew.*

[55] When I questioned Mr Galbraith, his evidence was that he had had a few chats with Mr Bartlett on the possibility of working for the new company but said that he did not receive any

employment agreement documentation. I found Mr Galbraith an earnest though somewhat confused witness and on this matter, I prefer to accept the evidence of Mr Bartlett who has confirmed that he did in fact take a document around to Mr Galbraith. I have also factored in Mr Rae's evidence on this issue.

[56] Nowhere in Mr Bartlett's employment agreement is there a clause forbidding solicitation of fellow employees. However, I am of the view that Mr Bartlett breached his implied obligation while he was still employed not to act on behalf of an organisation which was about to compete with his then employer.

[57] Turning now to the other obligations explicit and implicitly imposed on Mr Bartlett by his employment agreement with REL, I find there is insufficient evidence before the Authority to conclude that Mr Bartlett undermined his employer's business relationships with the view of transferring potential customers to BMW. I also find the evidence falls short of establishing that Mr Bartlett used to personal advantage business opportunities which came to him in the course of his employment.

[58] The applicant alleges that Mr Bartlett wiped clean the whiteboard he used to plan the border dyking contracts he was overseeing, as part of an overall plan to deceive REL. Further, the applicant alleges that Mr Bartlett and Mr McTague deleted information from the computers they used in the course of their work for REL as part of that plan. In considering the whiteboard issue, I have had regard to Mr Bartlett's evidence that, after telling Mr Rae he had decided to join the business Mr McTague was setting up, Mr Rae asked what jobs he was supervising for REL. He told the Authority *I told him and he wrote them down on a piece of paper. I also gave him details of two jobs which were proceeding on the basis of verbal quotes I had given. I made sure he knew what rates I had quoted per hectare so he would know what to charge at the end of the month. I recall that those two jobs were for David Letham and David Keeley. I also said to Andrew that things had been quiet for a while but there was a big earthmoving job at Oxford to look at and gave him details of who to contact. Finally, I said that if Rooneys needed any information from me to do the accounts at the end of the month, they should call me.*

[59] Mr Bartlett's evidence goes on to say, *after that, I went to my desk. I collected the few personal items I had there and put them in a box. This included my diary and some magazines. I also took a red folder containing instructions for the computer programme Delta Cad which I had downloaded from the internet. I showed the box and its contents to Andrew and Robin. They were standing at the sink. I asked Andrew if it was okay for me to take these things. He said 'no worries'. I then said to Andrew that I hoped we could work together in the future and left.*

[60] What I consider significant about this interchange is that Mr Bartlett, having cleared his desk, sought authorisation from Mr Rae, who had just dismissed him, to remove the items from the premises. Clearly, Mr Bartlett was giving Mr Rae the opportunity to examine what was in the box and whether or not Mr Rae took advantage of going through them I am uncertain. However, it is clear that he had no difficulties in allowing their removal. For the applicant to later allege that the red folder in question contained quotations made by Mr Bartlett on behalf of REL when in fact Mr Rae had the opportunity of determining in fact whether this was so, is far from convincing.

[61] Turning to the issue of the allegation that Messrs Bartlett and McTague deleted information from the computers they used, it is quite clear from the report commissioned by the applicant that some information had been deleted. The applicant's allegation is that this information was deleted to obscure information which would be beneficial to BMW. In his evidence, Mr Bartlett says *Andrew suggests that I deliberately deleted computer records which were of some use to Rooneys. That is not correct. I used an Excel spreadsheet to compile quotations. When they were done, I put the files on the desktop in the computer. When they were no longer relevant, I deleted them. I also*

deleted correspondence and other files when they were no longer needed. This was just good housekeeping. I did not expect to be dismissed on 24 May. After I was dismissed, I did not touch the computer. Everything was left exactly as it was.

[62] Later on in his evidence, Mr Bartlett says *Robin suggests that I put copies of quotes in a red quotation folder on my desk. I think Robin is confused here. When we worked for Doug Hood Limited, copies of quotes were put in a red folder. That practice did not continue at Rooneys. Copies of quotes were kept on the computers. Copies of Clarrie's quotes and some of mine were also kept in a filing cabinet in our office. Later on, additional copies of Clarrie's quotes were kept in a black folder in the storeroom. As I have said earlier, the red folder on my desk contained instructions for using a particular piece of software.*

[63] I accept Mr Bartlett's evidence in this matter. As a witness he struck me as an honest, uncomplicated and perhaps somewhat ingenuous man. I believe that view is borne out by his evidence that *on Monday 24 May, I went to see Andrew. I told him I had decided to join the new business Kelvin was setting up.* The openness he displayed in this interchange with Mr Rae was hardly that of an industrial conspirator. While I accept that the relationship needed to come to an end, I do not accept the assertion that Mr Bartlett was dismissed for serious misconduct when it is clear that the applicant had not implemented even the most rudimentary of processes for determining the issue.

Comments

[64] Certain evidence has weighed in the balance as I have considered this case. It is clear from Mrs McTague's evidence that around Christmas 2003, Mr McTague had become sufficiently disaffected with his employment to consider purchasing an engineering business. She simply stated that by Christmas 2003 her husband was of the view that he had made a mistake in joining REL.

[65] As I reflected on the evidence, I became concerned at what I see as the overreaching statements made on behalf of the applicant and in particular the overrating of the roles of Mr Whiting and Mr Bartlett in the REL operation, and the claims that the company had formal marketing procedures and techniques, market research plans, business plans and the like. In the course of the hearing, I observed the behaviour and approach taken by the applicant's witnesses and came to the view that REL is an honest, unsophisticated business which does not employ such formally set out documentation. I acknowledge that shortly before the investigation commenced, counsel for the applicant acknowledged that no such marketing documentation was formally in place.

[66] I also became concerned at the applicant's claim that individuals and farming businesses contained in a list obtained from Doug Hood were ongoing clients of REL and over whom it claims proprietary rights. There is no doubt that Doug Hood and subsequently REL had done work for some of these individuals and/or organisations, and hoped to secure further work should the opportunity arise. However, the cold reality is that, in a competitive market, a farming or any other entity can seek services wherever it chooses. It needs to be borne in mind that there are some 20 operators in the region offering similar services to the farming community.

[67] The timing of certain events in this case is significant and in particular the incorporation of BMW, the name selected and the formal resignations of the three respondents. The name of the proposed company suggests strongly that prior to incorporation Whiting and Bartlett had indicated an interest in joining McTeague in the event that he could obtain the finance. The issue is finely balanced, however, having closely considered the evidence in front of the Authority, there is nothing sinister in this series of events. It is not clear when Mr McTague applied for the name

BMW Contracting Limited. However, the evidence of Mr Whiting was that he gave notice of his resignation on 14 May 2004 and signed the directorship document on 16 May 2004. Mr Bartlett's evidence was that he and Mr McTague had spoken within a day or two of Mr McTague leaving REL and that Mr McTague asked Mr Bartlett if he was interested in being part of a proposed new business. Having considered the dates involved, I am satisfied that there was sufficient basis for Mr McTague to seek the name BMW Contracting Limited given the interest expressed by the other two and mindful that regardless of the name or registration of the company the pivotal issue was whether or not it could obtain financial support. Had that not been forthcoming it is doubtful this matter would have been before the Authority.

[68] I have also considered the losses said to have been suffered by REL and which the company alleges are due to the unlawful actions of the three respondents. As I considered the matter, I came to the view that a considerable degree of loss sustained has been due to the high impact advertising campaign carried out by BMW, the impact of the considerable past experience and performance on the ground of Mr McTague, Mr Whiting and Mr Bartlett. I have also considered the negative perception of some farmers to REL as an entity and also to the evidence I heard regarding Mr Rooney's involvement with the Fish and Game Council in the region. While much was made of this latter point by the respondents, I consider it to be a factor in the mix when a prospective client is considering approaching an organisation for work to be completed. It is by no means a factor in all decisions, but it was evident from those who had supplied affidavits to the Authority for this hearing that in the mind of some, it weighed considerably.

The determination

[69] Returning to the issues to be determined set out earlier in this determination, I find the respondent, Mr Whiting, breached his duty to REL by consenting to act as a director of BMW while still employed by REL.

[70] I find the respondent, Mr Bartlett, breached his duty to REL by attempting to persuade Mr Galbraith to leave his employment with REL and join BMW, while Mr Bartlett was still employed by REL. I am not convinced this was an inducement to Mr Galbraith to breach his agreement with REL as Mr Galbraith may well have complied with his obligations to his employer had he chosen to join BMW.

[71] I find that Mr McTague has not breached any of his obligations in respect of his former employer, REL.

[72] Having made these findings, I need to consider what damages the breaches caused REL.

[73] In respect of Mr Whiting's breach, the action itself caused no financial loss to the applicant.

[74] In respect of Mr Bartlett's breach, his action of attempting to persuade Mr Galbraith was, in fact, unsuccessful as Mr Galbraith remained employed by REL. The loss to REL is therefore not established.

[75] The breaches identified are technical in the sense that both employees failed to observe their obligations to REL while still employed by that company. However, as the applicant sought damages from the respondents, it was necessary for it to establish a causal link between the breaches and the losses allegedly sustained. It has failed to do so.

Costs

[76] Costs are reserved. I urge the parties to attempt to resolve this issue between themselves. If that is not possible, counsel are to lodge and serve their respective memoranda by 4pm on Friday, 15 December 2006.

Paul Montgomery
Member of Employment Relations Authority