

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 98/09  
5147879  
5149652

BETWEEN                      ALISTER BROWN  
   Applicant

AND                              KATRINA DRAVITZKI  
   Applicant

AND                              ARCHITECTURE                      DM  
   (QUEENSTOWN) LIMITED  
   Respondent

Member of Authority:      Philip Cheyne

Representatives:            Alister Brown, the first applicant in person  
   Katrina Dravitzki, the second applicant in person  
   David McLeod, Advocate for the respondent

Investigation meeting:    1 July 2009 at Queenstown

Determination:              9 July 2009

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**DETERMINATION OF THE AUTHORITY**

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[1]      Alister Brown and Katrina Dravitzki lodged a statement of problem (5147879) seeking arrears of wages and expenses against David McLeod. Mr McLeod is a principal of a company called Architecture DM (Queenstown) Limited. The company previously employed Mr Brown and Ms Dravitzki as is clear from the written employment agreements. These claims can only succeed against the legal entity that was the employer so I make an order identifying the company as the respondent.

[2]      Mr McLeod responded by lodging a reply not disputing that sums were owed but saying that it would take some months to pay because of trading difficulties. Under the name *Architecture DM (Dave McLeod)* an application was also made

(5149652) in effect seeking damages against Mr Brown and Ms Dravitzki for breaches of their employment agreements by engaging in private business. On 25 June 2009 without any forewarning a further document headed up *STATEMENT OF CLAIM* was lodged with the Authority, presumably intended as an amended statement of problem for 5149652, with the *Plaintiff* identified as *Architecture DM Limited*. Again, only an employer can proceed in the Authority in the present circumstances so I make an order identifying the company as above as the applicant in 5149652. I should also note that there does not appear to be a registered company called *Architecture DM Limited*.

### **Arrears**

[3] The arrears of expenses claims are straightforward. The employment arrangements between Mr Brown, Ms Dravitzki and Architecture DM (Queenstown) Limited included agreement that the company would pay them a sum of money each month to reimburse them for the use of part of their leased house as an office, and similarly for the use of their computer, phone and internet connection. At the end of the employment, the company owed Mr Brown and Ms Dravitzki jointly the sum of \$4,578.64. None of this has been paid since so the company is ordered to pay this sum to the applicants jointly.

[4] The arrears of salary claims are a little more complicated. Mr Brown and Ms Dravitzki started work on Monday 2 June 2008. They were each entitled to a salary of \$50,000.00 per annum. Salaries were paid fortnightly into their joint bank account starting Monday 16 June 2008. That means that they were paid on a Monday for work during the previous fortnight. That pattern continued up to and including 17 November 2008. On 25 November 2008 Mr Brown sent an email to Mr McLeod giving a month's notice of resignation for himself and Ms Dravitzki. In the email he requested holidays for the last two weeks of their employment. Mr McLeod understood that to be a request by Ms Dravitzki only for holidays but Mr Brown meant both of them would take the last two weeks of their employment as holidays and that is what they did. Mr Brown and Ms Dravitzki say their employment ended on 23 December 2008 so their last day of actual work was Tuesday 9 December 2008; thereafter they must be regarded as taking annual leave in advance by agreement.

[5] Mr Brown and Ms Dravitzki should have received their normal fortnightly salary on Monday 1 December (for the period ending Sunday 30 November 2008) but

did not. Instead they received half the salary on Monday 8 December and the remaining half on 11 December. Although late, salary has therefore been paid up to Sunday 30 November 2008. They then worked a further week and two days so should have been paid .7 of the fortnightly salary for time worked. That amounts to \$1,346.14 (gross) each in arrears of salary.

[6] The applicants are both entitled to holiday pay at 8% of gross earnings to 9 December 2008. From 2 June to 9 December 2008 is 13.7 fortnights, a gross entitlement of \$26,346.20. 8% of that is \$2,107.70, which is the holiday pay entitlement for each of the applicants.

[7] The total arrears of salary and holiday pay owed to each applicant is \$3,453.84 (gross).

#### **Damages - use of the car**

[8] The 25 June 2009 *STATEMENT OF CLAIM* raised a claim by the company against Mr Brown and Ms Dravitzki for excessive use of a company vehicle that was supplied to them. Despite the late inclusion of this claim I will determine it because the outcome is clear even without the applicants having had a proper chance to respond.

[9] The employment agreements both say *The employee shall be remunerated for his/her services at the Annual salary detailed in Schedule B .... That says REMUNERATION SALARY \$50,000 P.A ...COMPANY VEHICLE.* That means that use of the vehicle was provided as part of the remuneration package. The agreements do not restrict that to business use or reasonable private use.

[10] There is an evidential conflict between Mr McLeod and Mr Brown over their discussion about private use of the vehicle. Mr McLeod says that he specifically said that there could be limited use such as *going down to the shops* or similar because the company wanted to avoid any fringe benefit tax liability. Mr Brown says that there was no mention about limited use or fringe benefit tax. Ms Dravitzki was not part of the phone call when this was discussed. Mr Brown says that there was also a discussion in a café but (on his account) it went no further than the phone conversation. It is not necessary to resolve the dispute. There is no reason to go beyond what is said in the employment agreement - Mr Brown and Ms Dravitzki were entitled to use the vehicle as part of their salary. No restrictions were agreed to as part

of the employment agreements. The claim for alleged *excessive use* cannot succeed and is dismissed.

### **Damages – the Coyles**

[11] The company entered into an agreement with Mr and Mrs Coyle to produce design drawings, resource consent drawings and working drawings for a building project. There is a two page agreement dated 3 October 2008 signed by Ms Dravitzki for the company. The builders and project managers are a company called Newco Builders Limited. Bruce Perry is a director of that company. On 21 December 2008 Mr Perry sent an email to Mr McLeod advising that Architecture DM's services were no longer required on this project. Sometime in January 2009, the company *Dravitzki Brown Limited* contracted to provide working drawings on the project.

[12] Mr Perry's evidence is to the effect that he and the Coyles together decided to terminate the agreement with the company and to use the services of Mr Brown and Ms Dravitzki to do the last part of the architectural work on the project after they learnt of the resignations. Mr Brown and Ms Dravitzki deny soliciting the work while their employment remained on foot. Mr Perry supports that evidence. There is no reason to doubt what Mr Perry says so the claim as it relates to any breach by Mr Brown and Ms Dravitzki in respect of the Coyles during the currency of the employment cannot succeed.

[13] Mr McLeod also relies on *Schedule C* to the employment agreements. It says

*Any intellectual property created by the Employee in the course of their paid employment ...shall remain the property of the Employer who shall have and maintain exclusive title, copyright...to such intellectual property.*

*This policy shall remain in force for the entire period of the employment and shall continue after employment until such time, if any, the Employer releases such information or intellectual property to the public domain for public use.*

[14] Mr McLeod says that the company owns the intellectual property being the initial work done by Mr Brown and Ms Dravitzki and that the applicants breached their employment agreement by using the initial drawings as the basis for the work done by the applicants' new business for the Coyles. However, as between the respondent and the Coyles, it is the Coyles who own the work done by the applicants during their employment. The respondent simply has no property rights to assert against the applicants.

[15] Mr McLeod makes something of the applicants' alleged negligence for failing to ensure that the Coyles signed an agreement assigning copyright in the concept drawing to the respondent. The evidence discloses a misunderstanding between Ms Dravitzki and Mr McLeod about when she should use the fuller and more complex form of agreement that included the copyright point. There is no evidence of negligence on Ms Dravitzki's part. The breach of contract claim against Mr Brown and Ms Dravitzki regarding their work for the Coyles cannot succeed.

### **Damages – the Wales**

[16] The company (or associated companies) had an arrangement with a Queenstown building firm (DRH) to provide architectural services for DRH's clients. One such client was Mr and Mrs Wales. There is apparently an agreement between DRH and the Wales under which DRH arranged for the respondent to do concept drawings. The agreement provides that any copyright in the drawings is retained by DRH.

[17] Mr Wales gave evidence. He told me that he attempted to negotiate with DRH about copyright so that they as the clients could use any drawings. DRH did not agree so the Wales decided not to further engage DRH. The evidence includes email exchanges between Mr Wales and DRH about this. Mr Wales says that in April 2009 they then decided to proceed with building a residence and contracted with Mr Brown and Ms Dravitzki (or their company) for architectural work. There is no reason to doubt the oral evidence of Mr Wales or the information conveyed in the emails.

[18] Mr McLeod alleges that Mr Brown and Ms Dravitzki procured Mr and Mrs Wales to terminate their contract with DRH so as to later engage them to provide architectural services for the building project. There are several problems with this. First, the evidence of Mr Wales makes it clear that he and his wife made the relevant decisions for their own reasons. Secondly, this all happened after the termination of Mr Brown's and Ms Dravitzki's employment. There are no post-termination restraint of trade or non-solicitation provisions in the employment agreements.

[19] Mr McLeod complains that the forms of agreement used by the applicants for the work on both the above-mentioned projects were different from the respondent's standard conditions protecting copyright and so on. As noted, there was some misunderstanding about quite when the company wanted Mr Brown and Ms Dravitzki

to use more detailed contracts and their not doing so in the dealings for these projects did not amount to any breach of the terms of their employment.

### **Breach – Wilson matter**

[20] While employed by the respondent the applicants received an opportunity to do some work for Mr Wilson. The work involved providing some renders. Mr Brown and Ms Dravitzki had appropriate hardware, software and technical skills to do this work from their joint business venture that predated their employment by the respondent. There is an email dated 18 September 2008 that shows Mr Brown responding on behalf of the respondent to an inquiry about such work. There is an earlier email which shows that the approach to Mr Brown arose from an earlier approach to Mr McLeod. These contacts resulted in the work for Mr Wilson. On 3 December 2008 Mr Brown in an email told Mr McLeod *We have the Geoff Wilson job that needs to be completed in the next week and a half. Could we please be paid by the end of the week so we can continue.* However, what happened was that Mr Brown and/or Ms Dravitzki completed the work and then invoiced Mr Wilson in the name of their own business. In other words they diverted the work to their own business, presumably because they were not paid by the respondent. That was a breach of their obligations to the respondent. They derived income of \$2,250.00 as a result of this breach. That sum must be brought to account in assessing their claims against the respondent.

### **Summary**

[21] Architecture DM (Queenstown) Limited is to pay \$3,453.84 (gross) to Mr Brown as arrears of salary and holiday pay.

[22] Architecture DM (Queenstown) Limited is to pay \$3,453.84 (gross) to Ms Dravitzki as arrears of salary and holiday pay.

[23] Architecture DM (Queenstown) Limited is to pay \$4,578.64 to Mr Brown and Ms Dravitzki as reimbursement for office expenses. However, Mr Brown and Ms Dravitzki are to pay damages of \$2,250.00 to Architecture DM (Queenstown) Limited. This may be deducted from the reimbursement order, leaving Architecture DM (Queenstown) Limited to pay \$2,328.64 to Mr Brown and Ms Dravitzki.

[24] I was not asked to order the payment of interest.

[25] Neither party was legally represented so no issue of costs arises.

Philip Cheyne  
Member of the Employment Relations Authority