

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 174
5372298

BETWEEN DARROCH LIMITED
 Applicant

A N D ALLAN CHISNALL
 Respondent

Member of Authority: M B Loftus

Representatives: Jane Traynor and Emma Coburn, Counsel for Applicant
 Jarrod Lovely, Counsel for Respondent

Investigation meeting: 25 July 2012 at Timaru

Submissions Received At the investigation meeting

Date of Determination: 21 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Darroch Limited, claims the respondent, Mr Allan Chisnall, has breached the terms of his employment agreement, the statutory duty of good faith and his fiduciary duties to Darroch. Darroch seeks damages and penalties.

[2] Mr Chisnall accepts he performed the acts which give rise to Darroch's claim but contends his actions have been misconstrued and warrant neither an award of damages nor the imposition of a penalty.

Background

[3] Mr Chisnall commenced employment with Darroch in December 2009 when he transferred from its parent company, Quotable Value Limited (QV). At the time he had some 29 years' experience with QV and predecessor organisations. He was

employed as a rural valuer. The terms and conditions of employment applicable to Mr Chisnall at QV also transferred.

[4] Pertinent for the purposes of this dispute are the provisions relating to restraint of trade, confidentiality and one entitled *Leaving Quotable Value*.

[5] The restraint applied for a period of three months but was not automatically enforced. The clause ends with a provision reading:

If the Company elects to enforce paragraph (b) of this clause, which it may do at its sole discretion, it will pay you your base salary for a period of three months from the date of termination.

[6] Paragraph (b) precludes an ex-employee from engaging in a business which competes with that of QV (now read Darroch) for three months following cessation.

[7] The other applicable provisions, *Confidentiality* and *Leaving Quotable Value*, read:

Confidentiality.

You are responsible for the security of any confidential and commercially sensitive information under your control or to which you have access. You shall not disclose or discuss this information with other people except in the proper performance of your duties and responsibilities.

The requirement for confidentiality continues after your employment with Quotable Value ceases until such time as the information comes into the public domain through some other legitimate way.

Leaving Quotable Value.

If you leave the company, for any reason, you are expected to continue to protect any of Quotable Value's proprietary information, which you still know of. You must also return any file or document, including electronic media, which contains proprietary information.

[8] Mr Chisnall had various personal commitments which prompted a desire to liquidate assets. One of those assets was a superannuation scheme. He says:

It came to my attention ... that experienced valuers like myself could simply resign and then be reappointed the next day. This allowed them to free up their Government Superannuation to get down debts...

When I investigated this, I was told by Head Office that I could not do it.

I told them in effect that I did not want to leave, but I wanted to cash my Superannuation Policy in.

Unfortunately, I was left in the position where, in order to cash out my super, at the earliest opportunity, I had to hand in my resignation, which I did

[9] The resignation was tendered on 27 July 2011 with a cessation date of 24 August. Mr Chisnall claims attitudes toward him then changed and communication with his manager effectively ceased.

[10] Mr Chisnall states he contacted clients who had work in progress and advised them of the situation during his notice period. He says all asked that he finish the valuations he had been doing for them. Work performed prior to cessation was billed by Darroch but Mr Chisnall invoiced privately for any work performed on these tasks after 24 August.

[11] Mr Chisnall was also concerned about the state of his files. During 2009 the Timaru office relinquished its on site administrative support and since then Mr Chisnall's filing and archiving had *piled up*. He had tried interim measures such as using his wife and son to assist but these endeavours (particularly the employment of his son) had been frowned upon by Darroch.

[12] Mr Chisnall concluded he had to rectify the issue and leave the files in a tidy state for those who would perform his work after his departure. He tried to do so during his notice period but failed. He therefore chose to take a number of files home and continued to work on them after the cessation of his employment.

[13] Mr Chisnall states he originally intended taking time from valuing until the new year but, as events transpired, that did not occur. Mr Chisnall says clients he previously serviced for Darroch continued to seek his assistance. He registered a new valuation company on 5 September 2011 but Darroch appears to have been unaware of this and accepts it did not activate the restraint by paying the required salary.

[14] In early December, Darroch concluded something was amiss. On 5 December Mr Chisnall's previous manager, Mr Mark Dow, phoned. He asked if Mr Chisnall knew anything about files apparently missing from the Timaru office and whether or not he had any. Mr Chisnall replied no.

[15] As is already obvious, that response was incorrect. At 11.37pm Mr Chisnall sent an email to Mr Dow. It opens with advice that:

Further to our phone conversation today I was incorrect in saying I didn't have any records and will explain the situation to you...

[16] Mr Chisnall goes on to say:

When I finished up at work I struggled to get my existing jobs finished and also tidy up all the files, most of which were in folders and many with field slips in them also. I did stay on a number of extra days (unpaid) as you know but found it a difficult situation with Ian basically implying I shouldn't be there at work after my finish date (I couldn't be bothered getting into a debate with him about this given our less than favourable working relationship).

I wished to leave things all neat and tidy and didn't appreciate the enormity of the job in tidying up all the files so in the end bundled all the files into some large warehouse bins and took them home and have spent considerable time gradually working through them and returning the fieldslips to the Timaru office and filing the jobs in order into boxes for return to the office which I hoped to have finished by Christmas. I am rather embarrassed to find myself in the position I was but without any admin staff over recent times to do filing and found that I spent most of my time from advice that I was leaving to finish up working on existing valuations...

After our discussion this afternoon I returned the files in boxes to the office, I didn't get the job finished as neat as I would like ...

[17] The assertion the files had been returned was also inaccurate with another two bins of files being returned a short time later along with some office equipment such as a binding machine. There were two other files Mr Chisnall admits having destroyed. He states they were not valuation files but contained obsolete correspondence. He says he assumed destruction was acceptable as he was aware of files having previously been destroyed though he accepts he was not aware of the details thereof.

[18] Darroch's position is that occurred while Mr Chisnall was still employed by another company, QV. In any event, it was done in preparation for the office shifting location and was carefully overseen with managers specifying the documents to be destroyed and supervising the way the instructions were carried out.

The parties' positions

[19] In essence Darroch's position is there were multiple breaches, all of which have been admitted. It is of the view Mr Chisnall resigned because he had too. He was not happy about the situation and, as a result, gathered up a large number of documents without advising or seeking approval from his managers. He then failed to return those documents for some three months and even then only when approached by Darroch. In the interim, and having established his own business, he used them for his own purposes and advantage.

[20] Mr Chisnall's position is he was simply trying to assist Darroch and rectify administrative shortfalls he had created while still employed. He emphasises his claim he returned all the files (or almost all) and that Darroch is incapable of establishing a loss warranting damages. With respect to the destroyed files, he relies on events at the time of the shift as providing a precedent.

Determination

[21] As already said, Darroch is concerned that Mr Chisnall retained its files after cessation and that he destroyed some of those. That he did so is undeniable - he admits it.

[22] Darroch claims Mr Chisnall's actions were in breach of his employment agreement. The terms and conditions there-of include a provision that requires an employee secure any confidential or commercially sensitive information and specifies that the duty continues after cessation. Also contained therein is a provision under which Mr Chisnall agreed to comply with all rules, policies and procedures. Contained within one such document, namely the code of conduct, is a requirement that in the event Mr Chisnall leave he continue to protect any proprietary information and return any file or document which contains such information.

[23] It is suggested on Mr Chisnall's behalf that the files did not contain proprietary or commercially sensitive information and he could not therefore have breached the agreement. I do not agree. Evidence proffered on behalf of Darroch is that the files may contain information about a property which is not, or can not, be retained electronically. There was also evidence that had Darroch (or a predecessor organisation) previously valued a property, the files can contain historic information which can give Darroch a commercial advantage in terms of the time needed to

complete the next valuation. Also contained therein is information about how previous valuations were performed and how various issues influenced the outcome. That is proprietary information.

[24] While Mr Chisnall still expresses disagreement with Darroch's position regarding the retention of commercial and/or proprietary information in the files he did, when questioned, concede various points of detail which underpin the claim.

[25] The conclusion the files could contain commercially sensitive or proprietary information means Mr Chisnall was in breach of his employment agreement. Clearly those that were destroyed were not returned and the breach is obvious. While others were returned, I consider it fair to suggest that immediacy is implied in respect to the requirement they be returned. There could not have been an expectation that Mr Chisnall deprive Darroch of them for months and possibly put them to some unknown use.

[26] Here, and as an aside, I note Mr Chisnall's admission he billed Darroch clients privately for work completed after 24 August when arguably that work should have remained with Darroch and been performed by another employee. This could undoubtedly have given rise to another claim but that has not been pursued and will not be considered further. Neither is there a claim in respect to the operation of a competing business, though that is not surprising as Darroch accepts it did not activate the restraint by paying the required three months wages.

[27] The next question is whether or not these breaches justify an award of damages and/or the imposition of a penalty.

[28] The damages claim is monetary. The loss calculation is based on an estimate of time required to perform work that would not have been necessary if the valuation files and the information they contained had remained available. The claim, and the computational approach, both face a significant impediment.

[29] It is well established an award of damages is to restore a wronged party to the position they would have been in had the breach not occurred. When an award is monetary the quantum required for restitution must be measurable.

[30] Mr Chisnall claims the files he destroyed contained administrative material and he returned all valuation files. Darroch is unable to prove otherwise and there is

no evidence any of the missing files were worked on, or that additional work was required in respect of them, while they were absent.

[31] If there was one comment I heard repeatedly from Darroch's witnesses it was the admission *we do not know what we do not know*. Darroch is incapable of proving Mr Chisnall's claim he returned the files to be false. They are unable to identify, let alone calculate, a loss especially one that relates to the methodology they have used to quantify their claim. There is no evidence any valuation files are missing and no suggestion that those Mr Chisnall temporarily retained required any work causing additional cost in their absence.

[32] Turning to the claim for a penalty. As said earlier, there can be no doubt there has been a breach. Similarly there can be no doubt the breach was deliberate. Whilst he claims his actions to have been well intentioned, Mr Chisnall accepts they were deliberate. Mr Chisnall should have known his actions were inappropriate given an admission he was told soon after cessation that he should not be on Darroch's premises handling Darroch's files but in any event there is the destruction of some files. I can not accept the argument Mr Chisnall thought that appropriate given something similar had occurred when the office had shifted. That is because he accepts he was not au-fait with exactly what occurred then and why. There is simply no excuse for the destruction of another party's property in circumstances such as this. Finally I note Mr Chisnall now accepts, albeit with the benefit of hindsight, that his actions were inappropriate.

[33] In the circumstances I conclude this is a situation in which a penalty is appropriate. Having considered the evidence, I consider the amount of \$3,000 to be appropriate.

[34] Normally a penalty is payable to the Crown but section 136(2) allows payment to an injured party. If only because of the destruction of some of their files it is clear Darroch have suffered a loss, albeit unquantifiable. Their loss can be addressed by directing the penalty be paid to Darroch and having again considered the evidence and the circumstances, I consider that appropriate.

Orders

[35] The respondent, Mr Chisnall, is to pay a penalty of \$3,000 (three thousand dollars). Payment is to be made to the applicant, Darroch Limited.

[36] Costs are reserved.

Mike Loftus
Member of the Employment Relations Authority