

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Scenario Communications Limited (Applicant)

AND Steven Bailey (Respondent)

REPRESENTATIVES Doug Alderslade for Applicant
Jervis Cleary for Respondent

MEMBER OF AUTHORITY G J Wood

**INVESTIGATION
MEETING** 20 February 2007

FURTHER SUBMISSIONS Received by 2 March 2007

**DATE OF
DETERMINATION** 12 April 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. The applicant (Scenario) claims that before leaving its employment to set up in business on his own account the respondent, Mr Steven Bailey, did work on his own behalf, misappropriated Scenario property, endeavoured to solicit employees of Scenario to work with him and did not devote his full working time and attention to Scenario, all in breach of his employment agreement. It seeks damages and penalties against him.
2. The respondent, Mr Bailey, denies breaching any terms of his employment agreement, except for taking some property which he subsequently returned, and considers that Scenario has suffered no damages as a result of any breaches that may be found.

The Facts

3. Scenario is a design company specialising in brand strategies and development. Mr Bailey commenced employment with Scenario on 1 April 2000 as its Creative Director, reporting to the two founders and company directors of Scenario, Mr Roger Bellamy and Mr John Varcoe.
4. While Scenario had offices in Auckland and Wellington, it was not a particularly large company and Mr Bailey was closely involved in much of the work of Scenario, particularly its creative work, as his job title implied.
5. Although negotiations over Mr Bailey's individual employment agreement dragged on until October 2001, I accept that these negotiations, which involved discussions on the subject of the restraint of trade clause that Scenario now relies on, were part and parcel of the setting of the foundation terms of Mr Bailey's employment.
6. The employment agreement contains a number of terms that Scenario claims Mr Bailey subsequently breached. These are:

7. Scenario Property

- 7.1 *You will not, without the written permission of a Director, use any of Scenario's property for personal use or any use other than the performance of your duties.*
- 7.2 *You will return all of Scenario's property if and when required by a Director and, in any event, before or immediately upon termination of employment (in any circumstances).*

8. Confidentiality

- 8.1 *You will not at any time or for any reason, whether during or after your employment with us, use or disclose to any person any confidential information relating to the business of Scenario or its clients except so far as may be reasonably necessary to enable you to fulfil your obligations under this contract.*
- 8.2 *For the purposes of clause 8.1, confidential information includes, but is not limited to, any information relating to:*
 - 8.2.1 *the business or financial affairs of Scenario or its customers or suppliers; and*

8.2.2 *the personal affairs of officers or employees of Scenario or of its customers or suppliers; and*

8.2.3 *the terms of employment of the employee under this contract or of any other employee of Scenario.*

9. Conflict of Interest

9.1 *You shall not, during the period of your employment with Scenario, engage in any employment with, or become involved in, the business of a competitor of Scenario. Further you will not engage in any other employment during the period of employment under this contract without our express consent.*

10. Intellectual Property

10.1 *All work produced by you in the performance of your duties under this contract, including any copyright or merchandising rights in or arising from such work, shall be the sole and exclusive property of Scenario.*

10.2 *You shall immediately disclose to us any invention, discovery or creation made by you relating to the business of Scenario during the period of this contract.*

10.3 *You shall not, without the express consent of Scenario:*

(a) *Remove any work (whether or not created by you) from Scenario's premises; or*

(b) *Transfer or in any way cause to be sent from Scenario's premises, any such work, except to an approved service supplier in the normal course of your duties or the client for whom the work has been created.*

10.4 *You shall, if required by Scenario, and at our expense, execute all instruments or join in applying for letters patent or similar such protection as Scenario may require, to give effect to the provisions of this clause.*

11. ...

12. Non-competition

12.1 *You will not for a period of one year from the termination of your employment (in whatever circumstances) whether personally, in partnership, as an employee, or through any employee or other agent, or in any other way:*

(i) *solicit, procure, direct, or otherwise be instrumental in the diversion of any business of any person or organisation; or*

(ii) *perform services for any such person or organisation for whom Scenario has provided services within the 12 months*

preceding the termination of this contract (whether or not you have personally provided services).

- 12.2 *You will inform Scenario immediately should any such person or organisation approach you within that one year period with a view to you performing work for that person or organisation.*
- 12.3 *You will not seek to or communicate with any client or new business prospect of Scenario (as identified by Scenario at or about the time of termination of your employment) for any professional or commercial reason or intent.*
- 12.4 *You acknowledge by entering into this contract that the restraint contained in clause 12 is necessary to protect and maintain the goodwill and business of Scenario and is reasonable in the circumstances.*
- 12.5 *For the purposes of the Contracts (Privity) Act 1982, your obligations under clause 12 are not only for the benefit of Scenario but also for any company which may be formed by Scenario for operating the business of Scenario and are intended to be enforceable by both Scenario and any such other company jointly and severally.*

13. Non-solicitation

13.1 You will not, at any time during the term of this contract or for a period of 12 months after termination, without the express written consent of Scenario, either on your own account or for or through any other person, firm or company, solicit endeavour to entice away from, or discourage from being employed or engaged by, Scenario, any person who shall, at any time during the term of the employee's employment with Scenario, have been an employee, or a contractor to, Scenario."

7. From at least 2005 onwards, Mr Bailey had become dissatisfied with his position at Scenario, in that he wanted a financial stake in the company and to become a director. While Mr Bellamy was sympathetic in principle to this idea, it never came to pass.
8. In 2005, Scenario was doing some work for a client of a Mr Alan Galbraith, primarily through Mr Bailey. Scenario and Mr Galbraith worked together on projects occasionally, primarily through Mr Bailey. In relation to Mr Galbraith's client, the client was concerned about Scenario's charges. Mr Bailey agreed to do some work for Mr Galbraith on the client's account in his own time as a favour to Mr Galbraith and charged him \$3,070 for this work.

9. At some point in mid 2005 Mr Bailey decided that he would look to establish his own communications company, as he felt his progress within Scenario was unsatisfactory. There were a number of discussions with Scenario's directors, particularly Mr Bellamy, about Mr Bailey's intention to resign and set up his new business.
10. In the second half of 2005, Mr Bailey approached Ms Belinda Ellis, a senior graphic designer at Scenario, to see if she was interested in going into partnership with him. He later suggested that she could work for him instead of going into partnership. When questioned by Ms Ellis about how she would be paid, Mr Bailey said that he might have six months' work available for her, as he had just sold his house. Ms Ellis rejected the suggestion and it was not raised again.
11. Mr Shane Priddle was the Production Manager at Scenario. He was similarly approached by Mr Bailey about establishing a partnership together, which Mr Priddle declined. Mr Bailey approached Mr Priddle again towards the end of 2005, once he had secured premises. Mr Bailey told him that while he knew that Mr Priddle did not have the money to come into a partnership he could come on board (presumably as an employee/contractor) and work his way into a partnership position. Mr Priddle said that he would think about it. When asked again about the proposal, as his name would be required to be on the lease, Mr Priddle declined the offer. While Mr Bailey's evidence was similar to Ms Ellis' and Mr Priddle's in many respects, I prefer their recollection that Mr Bailey suggested employment to them.
12. After a number of discussions with Mr Bellamy about whether he would leave at the end of March 2006 or not, and what would happen to Mr Bailey's commitment to take over leased premises from 1 March, Mr Bailey gave notice of his intention to resign with effect from 28 February, by letter dated 9 January. The letter, prepared by Mr Bellamy, stated, among other things, that he intended to honour all the terms, conditions and obligations as described in his employment agreement.
13. Mr Bellamy gave Mr Bailey a letter dated the same day covering off the issue of an ongoing collaborative relationship between Scenario and Mr Bailey, but also noting that he could only take with him hard copy project samples to incorporate in his

personal work portfolio. In particular, Mr Bailey was told that electronic files could not be duplicated as the intellectual property rights were held by Scenario and its clients and suppliers.

14. Mr Bailey simply relied on his memory of his employment obligations rather than referring directly to them, even though the issue had clearly been brought to his attention.
15. After giving notice of resignation Mr Bailey was absent on occasion from work in order to attend to issues relating to the establishment of his own business, but this was done with Scenario's approval in principle. I conclude that in the round Mr Bailey made up any of the time he took off. The drop off in Mr Bailey's billings was due, I find, to him having to finish off projects before he left.
16. During the last few weeks of Mr Bailey's employment, Mr Bellamy was away overseas and Mr Varcoe had more to do with Mr Bailey. While he was dissatisfied with some of Mr Bailey's absences, he did not take the matter up with him.
17. In early February Mr Bailey was approached by a representative of the Industry Training Federation (ITF), via email to his Scenario email address, about pitching for a branding exercise. This contact arose through work Scenario had done for another client. Mr Bailey told the representative from the ITF that he was leaving Scenario and that the ITF could deal with him direct, or alternatively speak to someone else in Scenario. As the ITF representative had been recommended Mr Bailey personally, he chose to pursue the matter with Mr Bailey direct. Mr Bailey sent his proposal, based on a previous proposal of a similar nature prepared by Scenario, two weeks later.
18. As part of its normal processes, the ITF would get pitches from three different organisations for this sort of work. Mr Bailey did not get the account, which went to another organisation.
19. On the weekend before his final day, in breach of the understanding that he would only take written material, Mr Bailey accessed Scenario's server from his laptop at home and downloaded a large amount of material. This material included pitches

that he was not involved with to any great degree and Scenario's font library, of which only some of the fonts were personal to Mr Bailey (as he had brought them with him to Scenario). In particular, a lot of reference material, CDs, printed samples, advertising templates and PowerPoint presentations were taken. Mr Bailey also took a lot of similar material in written form before he left.

20. On Mr Bailey's last day of work, Mr Varcoe accused him of deleting a great number of company emails and documents. In the absence of specific evidence to the contrary, I accept Mr Bailey's evidence that what he was deleting was personal correspondence, although it is possible that this extended to work he had done preparing for the establishment of his own business.
21. After Mr Bailey left, Scenario became concerned, following its discovery of the ITF pitch and the removal of materials, that Mr Bailey had acted in breach of his employment agreement and further that Mr Bailey intended to breach the restraint of trade provision by working with Mr Galbraith. As a result of Scenario's concerns, Mr Bailey gave an undertaking dated 31 March agreeing to abide by the terms of his employment agreement and to return all materials of Scenario in his possession. While Scenario has concerns about later activities undertaken by Mr Bailey, these are not within the scope of my investigation and I draw no conclusions or inferences from these nebulous allegations, which were not pursued.
22. The employment relationship problem went to mediation but unfortunately the parties have been unable to resolve the issues between them. It therefore falls to the Authority to make a determination.

Determination

23. Mr Bailey was clearly in breach of his duty of fidelity to Scenario by attempting to take the opportunity for work presented to him by the ITF as an employee of Scenario, particularly as he did not inform Scenario of the business opportunity that the ITF proposal provided. It was also clear that in preparing his own pitch, Mr Bailey breached clause 7.1 of his employment agreement, by using Scenario's property for personal use without written permission.

24. I do not accept, however, that Scenario suffered any damage as a result. The work went to another party and there was no real likelihood that Scenario would get the job, particularly without Mr Bailey, who was the individual who it had been suggested to the ITF that it should approach. Mr Bailey's breaches of his employment agreement over the ITF pitch clearly lay him open to claims for penalties, however.
25. In doing the work for Mr Galbraith's client's Mr Bailey, as he himself acknowledged through his representative in a letter dated 17 March 2006, made a mistake. The work was clearly done in breach of clause 9 of his employment agreement, prohibiting him from engaging in any other employment without Scenario's express consent. Mr Bailey charged Mr Galbraith \$3,070 for this work. The work should have been done and charged for by Scenario. I therefore find that damages in the sum of \$3,070 should be awarded to Scenario. Again, Mr Bailey's breach in this regard exposes him to the risk of penalty. Given that Scenario will be reimbursed for this loss and the fact that Mr Bailey will be subject to penalties under various other heads, I find that no particular penalty needs to be applied in respect of this matter, however.
26. In taking both electronic and physical property of Scenario with him, Mr Bailey was clearly in breach of clause 7 of his employment agreement. There was no evidence that Scenario suffered any direct loss and therefore no claim for damages can succeed. Once again, this breach of the employment agreement does, however, expose Mr Bailey to a claim for a penalty.
27. For the reasons given above, I dismiss the claim relating to Mr Bailey allegedly using Scenario's time to set up his own operation.
28. Mr Bailey's actions in relation to Ms Ellis and Mr Priddle clearly constituted endeavours to entice them away from Scenario. The Collins English Dictionary defines "entice" as "*to attract or draw towards oneself by exciting hope or desire; tempt; lure*". Clearly Mr Bailey was endeavouring to tempt or lure Ms Ellis and Mr Priddle into coming to work with him and subsequently for him and thus leaving Scenario, otherwise he would not have approached them. He therefore breached his

employment agreement, albeit that it was not a particularly serious breach, given that his efforts were unsuccessful and as he did not pursue them once his approaches were rejected. Scenario suffered no damage accordingly, but again Mr Bailey's actions expose him to a penalty claim.

29. I intend to look at the matter of penalties in the round. Mr Bailey took a very cavalier approach to his obligations under his employment agreement. The fact that he did not even refer back to them when they were specifically brought to his attention on at least two occasions, means that he must take responsibility for his own recklessness. In any event, he knew that he was not to take material away other than with Scenario's agreement and that he was not to do work on his own account. Furthermore, he must have known that using a Scenario pitch to organise his own pitch for work with the ITF was wrong.
30. Mr Bailey is liable for substantial penalties, given the multiple breaches of his employment agreement. Taking into account the points in the above paragraph, the damages awarded to Scenario for the Galbraith client account issue and the lack of direct damage to Scenario on all the other issues, I find that a penalty in the sum of \$5,000 is appropriate.
31. As a matter of public policy, penalties are normally payable to the Crown, as s.136 implies. There is no need for the penalties or any part of them to be paid to Scenario for the penalty to act as a punishment to Mr Bailey and a deterrent to him and others.
32. I therefore order the respondent, Mr Steven Bailey, to pay the sum of \$3,070 damages to the applicant, Scenario Communications Limited, and a penalty of \$5,000 to the Crown.

Costs

33. Costs are reserved.