

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN The Callista Group Limited (Applicant)

AND John Zhang (Respondent)

REPRESENTATIVES Chris Patterson, Counsel for Applicant
John Zhang, in person for Respondent

MEMBER OF AUTHORITY R A Monaghan

DATE OF DETERMINATION 26 July 2005

DETERMINATION OF THE AUTHORITY

[1] In a determination of the above matter dated 1 December 2004 I found, among other things, that Mr Zhang was in breach of his employment agreement in a number of respects. I reserved the quantification of any damages for the reasons set out in the determination, and referred to my apprehension that the evidence of loss presented to the Authority would be also presented in concurrent proceedings in the High Court involving Mr Zhang and Callista.

[2] The High Court has now issued its decision in **The Callista Group Limited v Zhang & Ors**, 11 July 2005, Laurenson J, CIV 2003-404-5127. On the basis of evidence that was apparently all but identical to the evidence relied on in the Authority - and certainly involved precisely the same factual matrix - the High Court found Mr Zhang breached copyright in Callista's software products and awarded damages.

[3] It was obvious that, in respect of the quantification of damages, the High Court was asked to address virtually identical evidence to the evidence before the Authority on that point. Justice Laurenson followed the brief of evidence of Callista's forensic accountant quite closely in his decision, so that I did not have any difficulty in comparing the relevant passages in the decision with the brief of evidence filed in the Authority. Every figure but one was identical. The only difference was that a claim for lost profits was quantified as \$47,245 in the High Court and \$51,665 in the Authority. Every head of claim was the same. Nothing was left out and nothing was added.

[4] The High Court addressed and determined all of those matters.

[5] Despite this, counsel for Callista asked me to determine the outstanding claims for damages in the Authority. I asked him on what basis, in the light of the High Court decision. In reply he stated the obvious points that the causes of action in the High Court and the Authority respectively were different, and that the Authority has exclusive jurisdiction in employment matters. There was no other analysis and no reference to legal authority in support of the position that, in effect, I should revisit evidence already heard and the subject of the High Court decision.

[6] In response to my request for a better indication of exactly what the Authority needs to decide and why, counsel asked that the Authority determine:

- (a) the amount of damages it would have awarded in respect of Mr Zhang's breaches of his obligations of fidelity and confidentiality, but for the decision of the High Court; and
- (b) an award of exemplary damages.

[7] As was also pointed out, there is an outstanding claim before the Authority for penalties for Mr Zhang's breaches of the employment agreement.

Damages

[8] Further to the claims for damages, all of the losses said to have flowed from Mr Zhang's actions have been addressed by the High Court as it considered appropriate. The High Court addressed the evidence, dismissed some of the claims, accepted some of the others and made a global award which took into account all of the matters before it in support of the claim for damages. Not only have I not been given any sound reason why the Authority should revisit any of those matters, but it seems to me to fly in the face of principle to ask it to do so.

[9] Accordingly I decline to make any award of damages. The matter has been decided. I see no point in stating an amount I would have awarded but for the High Court's decision.

Penalties

[10] It remains open for the Authority to consider orders for penalties, since that was not a matter before the High Court.

[11] However bearing in mind the size of the award of damages which the High Court made against Mr Zhang, and the comments as to Mr Zhang's financial status, I do not consider it appropriate to impose any further financial penalty on him. There will be no order for the payment of penalties.

Costs

[12] It is appropriate that costs in the Authority be considered. The parties may file and serve memoranda setting out their positions on the matter by the close of business on 9 August 2004.

R A Monaghan
Member of Employment Relations Authority