

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 9/10
5155347

BETWEEN ERS NEW ZEALAND
 LIMITED t/a TRANSPACIFIC
 INDUSTRIAL SOLUTIONS
 Applicant

AND MICHAEL KNIGHT
 First Respondent

 BOB MORGAN DRAINAGE
 LIMITED
 Second Respondent

Member of Authority: G J Wood

Representatives: Marion Franks for the Applicant
 Ian Hard for the Respondents

Submissions Due: By 15 December 2009

Determination: 21 January 2010

COSTS DETERMINATION OF THE AUTHORITY

[1] In my substantive determination I found that the applicant (TIS) had failed in its claims that Mr Knight had breached its employment agreement with it, either before he left its employment, or after starting work with the second respondent, Bob Morgan Drainage. As a result I also concluded that Bob Morgan Drainage could not be found to have incited or aided and abetted any breaches of the employment agreement as alleged.

[2] In Mr Knight's case there were, as noted in the substantive determination, legitimate concerns about him sending company material home, which justified TIS considering bringing a claim against him.

[3] However, as noted in the determination:

TIS subsequently obtained full access to Mr Knight's personal computer, the contents of his email address and Bob Morgan Drainage Limited's computer. It chose, for reasons of cost, not to have that data analysed. Given this situation, it is not possible for the Authority to determine that Mr Knight is not telling the truth when he states that he downloaded that information for work purposes (particularly as it was accepted that he did a lot of work at home because of his personal family circumstances).

Furthermore, TIS has chosen not to pursue through the Authority the tender information from the contract, which may or may not have shown that Bob Morgan Drainage used TIS's confidential information to undercut it for that contract.

[4] I also found:

There is documentary evidence, which may strongly tend to prove or disprove TIS's allegations, over breaches of confidentiality, available to it. It was its choice not to incur the expense to retrieve that information from a forensic computer specialist that was engaged to clone Mr Knight's and Morgan Drainage Limited's computers. In the absence of such evidence, responsibility for which must lay with TIS, I have no reason to doubt the consistent evidence of Mr Knight and Mr Morgan.

[5] Finally, I observed:

I note here that although there was evidence of Mr Knight sending what may have appeared to be confidential information, such as price lists, to his own email address, which was of legitimate concern to TIS, there was no such evidence against Bob Morgan Drainage. The claims against it were simply brought on the basis of supposition by TIS.

[6] On behalf of the respondents, Mr Hard sought \$12,375 in legal costs, plus claims for executive time for Mr Knight of \$3,307.50 and for Mr Morgan (the principal of Bob Morgan Drainage) of \$9,450. The claims for executive time relate to time spent checking the respondents' computers, considering the claims by TIS against them and meeting with their lawyer.

[7] In addition, Mr Hard raised a claim for special damages because *a small trader and his employee [were] forced to defend themselves against a major international corporation, claiming large sums of money from both.* He also submitted that TIS made no real attempt to back up its case with any real evidence. No sum was specified for special damages.

[8] Ms Franks submitted that the application for costs should be considered on the basis of the usual principles, based on a daily tariff. She noted that Mr Morgan acknowledged that he had sent to his home email confidential material belonging to TIS and, as the Authority found, had been less than responsive and communicative when TIS raised its concerns with him. Given the fact that the investigation meeting took only half a day, it was submitted that an appropriate costs award should be \$1,250.

[9] Ms Franks noted there was no jurisdiction to award costs in respect of time spent by the respondents personally, that only a contribution towards costs should be granted, and that legal fees of \$11,000 plus GST seemed excessive, and was not supported by any specific details such as invoices. She also submitted that there was no jurisdiction for the Authority to award special damages.

[10] While the Authority may have jurisdiction to award special damages in particular cases, such damages were not claimed until the matter had been determined by the Authority and only costs were left outstanding. Even given the great flexibility provided to the Authority by the Employment Relations Act 2000, it would be contrary to principle to allow parties to raise such applications at such a stage and I therefore dismiss that claim.

[11] Costs for executive time can only be considered where the persons concerned are acting as representatives. At the substantive investigation meeting, Mr Knight and Bob Morgan Drainage were represented by Mr Hard. It therefore follows that no claim for executive time may be made in these circumstances.

[12] Despite Ms Franks' raising the fact that no invoices had been provided by Mr Hard, he did not take the opportunity given to him by the Authority to file further submissions. On that basis it is necessary for me to first determine reasonable costs, even if I were to consider Mr Hard's application for indemnity costs.

[13] This was a complicated case involving extensive claims by TIS, on which Mr Hard had to be fully briefed. On a previous case Mr Hard informed the Authority that he had charged his client \$200 per hour. Setting that as a notional hourly rate would mean that he had charged the respondents for 55 hours of his time. Even given that there were significant technological issues associated with this file, together with numerous complex claims against the respondents, I consider that, given that the

investigation meeting took only half a day and that the applicant in fact filed little evidence in support of its claim, a reasonable period for taking instructions, preparing statements and documents and attending on the day would involve no more than 36 hours work. I therefore set reasonable costs at \$7,200, plus GST, equating to \$8,100. I accept that this sum was appropriately divided equally between both respondents.

[14] In these circumstances, TIS never had any evidence that Bob Morgan Drainage had aided or abetted any of the alleged breaches of Mr Knight's duties to TIS. However, it proceeded to pursue its claim against Bob Morgan Drainage in the absence of any evidence, and despite it being in the possession of the best evidence, which it chose not to pay to collect. This is therefore one of those unusual cases where Bob Morgan Drainage should recover all of its reasonable costs, namely \$4,050.

[15] In the case of Mr Knight, there were allegations which TIS was right to investigate and consider bringing a claim against Mr Knight over. However, again it chose not to recover the evidence which would have proved or disproved many of its claims. In these circumstances, Mr Knight is entitled to recover 80% of his reasonable costs, being the sum of \$3,240.

[16] I therefore order the applicant, ERS New Zealand Limited t/a Transpacific Industrial Solutions, to pay to the first respondent, Mr Michael Knight, the sum of \$3,240 in costs. I also order the applicant, ERS New Zealand Limited t/a Transpacific Industrial Solutions, to pay to the second respondent, Bob Morgan Drainage Limited, the sum of \$4,050 in costs.

G J Wood
Member of the Employment Relations Authority