IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2014] NZERA Wellington 58
5393742

	BETWEEN	TAG OIL (NZ) LIMITED Applicant
	AND	JAMES WINSTON WATCHORN Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Julian Miles QC and Tim Clarke, Counsel for the Applicant Susan Hughes QC, Counsel for the Respondent
Investigation Meeting:	19 and 20 March 2013 at New Plymouth
Submissions Received:	Orally on 20 March 2013 Written on 5 April 2013 and 17 January 2014 for the Applicant 20 December 2013 for the Respondent
Determination:	30 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] TAG Oil (NZ) Limited (TAG Oil) is a registered company based in New Plymouth which carries on business in oil and gas exploration and mining. It employed Mr Watchorn as its Production/Facility Manager from 30 April 2011 until his resignation on 31 July 2012. TAG Oil claims Mr Watchorn breached express and implied terms of his individual employment agreement.

[2] The breaches relate to Mr Watchorn's copying a large amount of data from TAG Oil's corporate computer server, and taking that data with him when he left the company. Much of it was downloaded to an external hard drive owned by Mr Watchorn. TAG Oil says the data included highly confidential and commercially sensitive information belonging to it.

[3] TAG Oil seeks a compliance order and an injunction in relation to Mr Watchorn's breaches of his employment agreement. It also claims general, special, and exemplary damages for those breaches. TAG Oil asks the Authority to award five penalties of $10,000 for each breach of Mr Watchorn's employment agreement.

[4] Mr Watchorn admits having a substantial quantity of data stored on his personal external hard drive, some of which derived from his employment with TAG Oil. He says he used the hard drive as a backup whenever there were server issues in TAG Oil. He also used the hard drive to work remotely from home.

[5] Mr Watchorn says he has worked for a number of energy companies during his career and has developed a habit of retaining documents on his hard drive when he moves to new employment. He does this to retain templates or precedents of work undertaken by him. Mr Watchorn says the data on the hard drive was not intended for purposes other than reference to past work he had been involved in and for use as templates for future work. He denies breaching his employment agreement with TAG Oil.

[6] Mr Watchorn says at the time he left TAG Oil taking his external hard drive with him he was not aware of the scale of information he had downloaded. He says he did a "*gross data dump*" which entailed dragging files across for downloading from TAG Oil's computer server. He claims to have been unaware that all of his employer's geotechnical information was included in the download and says its inclusion was inadvertent and unintentional. He accepts he had no reason to hold that information and says he did not intend to take it.

The Authority's investigation

[7] At the conclusion of the two day investigation meeting counsel for the respondent raised an issue over evidence relating to a number of files apparently downloaded by Mr Watchorn on 8 June 2012. Leave was given to the respondent to instruct a forensic computer expert, which he subsequently did.

[8] Due to difficulties accessing any of the relevant data, which had been seized by the police in connection with related criminal charges, the timetable put in place for receiving written submissions was put on hold. Unfortunately it was not possible for the respondent's forensic computer expert, Brent Whale, to view any of the evidence held by the police and he was reliant upon a police forensic expert compiling

a report that provided information about data activity that had occurred on 8 June 2012. The police report was not supplied to the applicant or the Authority until November 2013.

[9] Mr Whale wrote a report analysing the data supplied by police. His report was forwarded to Michael Spence, the applicant's forensic computer expert and the Managing Director of deCipher, a specialist digital forensics company. While largely in agreement over the meaning of the information from police, the two experts were unable to sign off a joint report on the matter. Reports from both experts were supplied to the Authority, together with a memorandum from counsel for the applicant noting the areas of agreement and disagreement between them. Further submissions from the parties followed.

[10] The forensic consultants for both parties agreed there was evidence of activity in relation to eight directories on 8 June 2012, but were unable to ascertain its nature. I have decided it would be unhelpful to take into account evidence regarding possible events that day and I have not done so.

Evidence of the Parties

[11] In reaching my decision I have carefully reviewed the oral and written evidence of all witnesses, the relevant background documents and the parties' submissions. In accordance with s. 174 of the Employment Relations Act 2000 (the Act), however, I have not recorded all such information in this determination.

[12] Andrew Cadenhead, the Chief Operating Officer of TAG Oil, gave evidence of the fiercely competitive nature of the oil and gas business. He said NZEC, the company Mr Watchorn joined after resigning from TAG Oil, was a direct competitor of TAG Oil, and its closest competitor in bidding for land block acquisitions and drilling rights through a sealed bid competitive offer process. The two companies also competed against each other directly as permit holders for oil and gas production across adjacent land blocks.

[13] He said TAG Oil had a small workforce in New Zealand comprising some 20 staff, 15 of whom were located in New Plymouth. The employees were hand-picked and the company also used consultants and field staff as required. Until this matter arose with Mr Watchorn, TAG Oil had operated as a very trusting organisation that believed implicitly in the integrity and honesty of its employees.

[14] TAG Oil was not aware, until after Mr Watchorn's resignation, that he had downloaded any of its data onto his personal hard drive. He had not sought permission from the company to do so or to take that information with him when he resigned from his employment.

[15] The company disputes Mr Watchorn's claim not to have known that all the company's geotechnical data, including its most confidential and commercially sensitive information, was stored on the server. Mr Cadenhead said the geophysical data on TAG Oil's server that was downloaded and taken by Mr Watchorn would be of incalculable value to a competitor such as Mr Watchorn's new employer, NZEC, an oil and gas exploration company.

[16] He explained that when TAG Oil commissioned seismic surveys it included data from adjoining land. The 3D seismic survey data was the most important information to the company. How that information was interpreted by its geophysicist was the critical part. Mr Cadenhead referred to this as TAG Oil's "*secret recipe*".

[17] Mr Cadenhead said TAG Oil had been extremely successful in its drilling, achieving an unprecedented strike rate in the exploration wells it had drilled in the last two years. NZEC, a relative newcomer to the oil exploration market in New Zealand, had not, to date, enjoyed the same success. Mr Cadenhead believed NZEC purposely acquired land options adjacent to TAG Oil's land options in both Taranaki and on the East Coast because of the success experienced by TAG Oil.

[18] It was Mr Cadenhead's evidence that he implicitly trusted Mr Watchorn throughout his employment and up to the time of his resignation. He discovered only after Mr Watchorn's resignation that he had removed what was described as the heart of the company's intellectual property.

[19] TAG Oil employed senior, experienced staff whom Mr Cadenhead expected would know about the confidentiality of the information they handled and treat it accordingly. He said the company's individual employment agreements made clear its expectations of confidentiality.

[20] Mr Cadenhead also referred to the Guideline for Ethical Practice for professional engineers that applied to Mr Watchorn and himself. This stemmed from their membership of the Association of Professional Engineers, Geologists and Geophysicists of Alberta (APEGGA), which imposed specific obligations of

confidentiality upon its members. Mr Cadenhead said that, because he knew Mr Watchorn was a member of that organisation, he did not ever suspect he would take information to which he had no entitlement.

[21] When asked about damage caused to TAG Oil by the copying and removal of its information by Mr Watchorn, Mr Cadenhead acknowledged that to date there had been no evidence of damage. He said the effect on the business could take years to become apparent if Mr Watchorn had disclosed TAG Oil's confidential technical information to a competitor.

[22] Technical evidence from TAG Oil, which was not disputed by Mr Watchorn, was that the information he downloaded to his personal hard drive and took with him when he left TAG Oil would, if printed out and stacked up, reach the height of 40 Auckland Sky Towers.

[23] Blair Johnson is the Chief Financial Officer for TAG Oil. He said he was alerted by Carey Davis, the company's Exploration and New Venture Manager, on Friday 27 July 2012 that Mr Watchorn intended to resign. Mr Johnson said he needed to ensure TAG Oil's data was protected, as was usual when an employee resigned. Mr Johnson, who was working from his home in Auckland that day, contacted the company's IT consultant in New Plymouth, Craig Knowles, and asked him to make a mirror copy of the laptop used by Mr Watchorn.

[24] When Mr Knowles examined Mr Watchorn's laptop he said he found an external hard drive plugged into it. Mr Watchorn was out of the office at the time. Mr Knowles examined the external hard drive and found it contained a large amount of data that would take approximately four hours to copy electronically. He took a clone of the laptop and, after a telephone discussion with Mr Johnson, made a copy of the directory structure of the external hard drive. This provided a list of the files contained on it.

[25] Mr Johnson said that, when Mr Knowles told him how much information was stored on the external hard drive, he assumed the hard drive belonged to TAG Oil. He asked Mr Knowles to go back to the company's offices over the weekend to make a full copy of the external hard drive. When Mr Knowles went back to the office in the weekend neither the external hard drive nor the laptop were in Mr Watchorn's office.

[26] It was Mr Johnson's evidence that he did not look at the copy Mr Knowles had made of the directory structure on Mr Watchorn's external hard drive until after Mr Watchorn resigned on 31 July 2012. He had emailed it to the Chief Executive Officer of TAG Oil, Garth Johnson[1], who is based in Vancouver, Canada, but had not examined it himself. The file directory provided details of every file on the hard drive without containing the contents of those files. It was a very long document which, when printed, was approximately 10,500 pages long.

[27] As Mr Johnson assumed the external hard drive belonged to TAG Oil, he said he did not ask Mr Watchorn to leave it with his employer after his resignation. He simply expected Mr Watchorn would do that. When he and Messrs Davis and Cadenhead reviewed the file directory information after Mr Watchorn's resignation, they realised the significance and seriousness of what Mr Watchorn had downloaded.

[28] Mr Davis' role with the applicant entailed interpreting geosciences information to help TAG Oil decide where to drill, and how far down to go. He said his entire two years' worth of work with TAG Oil was included in the download. The information included 3D seismic survey information commissioned for TAG Oil by Mr Davis at a significant cost. The geosciences information was critical to TAG Oil's successful drilling of wells because it revealed what to look for in seismic data. This was the information referred to by Mr Cadenhead as TAG Oil's "*secret recipe*". Mr Davis said if it was made available to NZEC, it would be of immense assistance to that company in its own exploration activity.

[29] Mr Spence forensically cloned and analysed the laptop computer supplied to Mr Watchorn during his employment. He did this on 6 August 2012, a week after Mr Watchorn's resignation. In evidence he observed that the laptop had a very large capacity of 2 gigabytes. This compared with a typical laptop capacity of between 250 and 500 megabytes of disk capacity.

[30] Included in the digital forensic investigation report compiled for TAG Oil by Mr Spence was evidence that a removable drive, and two USB memory sticks, had been connected to the laptop on 31 July 2012, the date of Mr Watchorn's resignation. Mr Spence reviewed the names and creation dates of folders and files supplied by Mr

[1] Mr Garth Johnson did not give evidence in the Authority. The "Mr Johnson" referred to in this determination is Mr Blair Johnson.

Knowles. He said these clearly indicated that the removable drive taken by Mr contained many thousands of recently copied TAG Oil company files.

[31] Mr Watchorn gave evidence of being a professional engineer with experience of working for more than 10 oil and gas companies over his nearly 20 year career. He had rarely had to undergo a formal interview process for a position, but had been "*shoulder tapped*" many times. He had come to New Zealand from Canada in 2010 to take up a position in the oil and gas industry and within a year had been approached by TAG Oil to gauge his interest in working as their Production Manager.

[32] He said he had identified the need for TAG Oil to have a central database for all technical and operational information and had set up a specific drive on the company's computer system for this purpose, the "Z" drive. Mr Watchorn said it was common for him to back up this drive on his personal external hard drive, because he often referred to the data outside the office, at home or when on holidays, and when in Canada.

[33] Mr Watchorn said he had always used an external hard drive for work purposes, and that it also contained family photographs and other personal items. During his employment with TAG Oil he would use his external hard drive to download data from his employer's computer "*at least weekly if not daily*". He said he worked in an open plan office and never disguised the fact that he was downloading data onto his hard drive.

[34] He said he thought his habit of retaining documents he had created during each of his periods of employment for use as templates was typical within the oil and gas industry. He had not questioned the practice until TAG Oil had instituted proceedings against him for doing so. When questioned over the large amount of data he had taken from TAG Oil, and the difference between most of that data and "*templates*" Mr Watchorn described many of the documents as "*reference*" material.

[35] Mr Watchorn acknowledged he had downloaded a large amount of TAG Oil data to his personal hard drive on 7 June 2012, the day before he had flown to Canada for a family holiday. He said he had downloaded the data specifically for taking to Canada in case he needed to access it for work purposes while on leave.

[36] However, his evidence was confused as to whether he had in fact taken the hard drive to Canada with him. Mr Watchorn also could not recall whether he had

downloaded more data to his external hard drive on 8 June 2012, before flying out to Canada. He recalled going to work that morning but was unsure what he had been doing there.

[37] Some weeks before going to Canada on leave, Mr Watchorn said he "*happened to bump into"* Cliff Butchko, the General Manager Upstream for NZEC. Mr Watchorn said he "*cheekily*" said to Mr Butchko that if there was a job going with NZEC he could well be interested. Mr Watchorn said he was disappointed TAG Oil had failed to procure the Waihapa Assets, which NZEC had recently successfully acquired. He said a director of NZEC contacted him while he was holidaying in Canada about the possibility of working for that company. He met that director the day before returning to New Zealand.

[38] On his return from Canada Mr Watchorn told Mr Davis he was contemplating a job with NZEC. Mr Cadenhead was overseas at the time and Mr Watchorn waited for his return to hand in his resignation. He said that in the meantime:

> *Typically and consistent with my other exiting from various organisations, I had set my hard drive to download files which I thought would be useful templates for further work. ….I did this in plain sight in my open door office during daylight hours. In short I made no secret of what I was doing. It is also correct, that I took what I consider to be "*a gross dump of files*" simply dragging files across for downloading. I did not spend any time refining my download anticipating, that I would in the fullness of time go through what I had downloaded and delete anything unneeded.*

[39] When Mr Cadenhead returned to New Plymouth on 31 July 2012, Mr Watchorn handed in his resignation on two weeks' notice. By agreement with Mr Cadenhead, he left his employment that day and was paid out his notice period. In a subsequent email exchange with Mr Cadenhead over the external hard drive, Mr Watchorn noted that the hard drive was his own.

[40] Mr Watchorn denies breaching the confidentiality provisions of his employment agreement, asserting he did not divulge the information he took from TAG Oil to anyone. He also denies breaching the termination provision that required him to return all property to his employer at the time his employment ended. He said he had returned property to TAG Oil, but did not appreciate that the files he worked on during his employment were the company's property.

[41] Mr Watchorn received a letter from TAG Oil's lawyers dated 1 August 2012, although by his evidence received on 6 August. The letter, which was headed

"*Confidentiality Obligations to TAG Oil (NZ) Limited*" noted his confidentiality obligations under his employment agreement and reminded him that his duty of confidence survived the termination of his employment with TAG Oil.

[42] As well as informing him he must not disclose any confidential information he had acquired while an employee of TAG Oil, the letter noted he was required:

> "*to return immediately all property belonging to TAG Oil (clause 15.5). This property includes, but is not limited to, any keys and clothing belonging to TAG Oil, as well as any information, documents, computer software, reports or other electronic records produced or arising from the performance of your employment with TAG Oil and which is electronically recorded or stored on your laptop computer or any other device*."

[43] The letter also required him to:

> "*deliver up to it the external hard drive in your possession, as well as your computer and any USB memory sticks or other storage devices, so that any relevant confidential information or intellectual property belonging to TAG Oil can be removed from your computer*."

[44] In his written evidence Mr Watchorn said the letter did not identify the seriousness of the matter or the potential consequences of failing to respond. He responded to Mr Cadenhead with the following text message:

> "*Hi drew, saw the bell gully letter this morning, the only stuff I had on my personal hard drive was related to some of the things I helped put in place as well as technical data and work from previous employment. It seems a bit asinine to bring this up now so how do you want to deal with this??If you want to meet and discuss this let me know."*

[45] In oral evidence Mr Watchorn acknowledged he had not treated the Bell Gully letter seriously enough. He thought the concerns should have been brought to his attention before he left TAG Oil, and also said he did not realise at that time that he had taken hundreds of thousands of TAG Oil's documents when he had carried out his "*gross dump of files*". He also said he did not know at the time that he had captured TAG Oil's geosciences files.

[46] Mr Watchorn said he received no response to his text from Mr Cadenhead and assumed the matter was not being pursued. He heard nothing further until the Police arrived at his NZEC workplace and seized all of the company's computers. Mr Watchorn was interviewed by Police and subsequently charged with accessing a computer for a dishonest purpose.

[47] Mr Butchko, in his written evidence, referred to the background to Mr Watchorn's employment by NZEC. He confirmed Mr Watchorn's evidence of jokingly asking if there was a job going at NZEC. This occurred shortly after the announcement of that company's successful bid for Waihapa. Mr Butchko had recommended Mr Watchorn to catch up with one of the NZEC directors the next time he was in Canada.

[48] Mr Butchko described the suggestion that Mr Watchorn's employment was "*linked to the provision of information regarding TAG activity*" as "*so ludicrous that it does not merit a response*". He said Mr Watchorn's employment by NZEC was due to his merit as an engineer.

[49] In oral evidence Mr Butchko told the Authority he had taken information from one employer to another over the 32 years of his engineering career. This included what he described as "*standard documents, templates, spreadsheets for calculation purposes*". He was a member of APEGGA. In his view the Code of Ethics of that organisation was "*a rule for each employee to interpret and apply*". He asserted that it was up to each employee to determine what was, and what was not, confidential information although the employer should have some say.

Issues

[50] The issues for determination are:

a. whether Mr Watchorn breached express and implied terms of his employment agreement with TAG Oil in taking the company's information at the termination of his employment; and, if so:

b. what remedies should be awarded; and

c. whether a penalty or penalties should be awarded against Mr Watchorn.

The employment agreement

[51] The individual employment agreement Mr Watchorn and TAG Oil signed in April 2011 contained the following provisions of particular relevance to this matter:

Clause 6 General Duties

> *6.2 The employee shall carry out their employment responsibilities honestly and diligently and to the best of the employee's abilities. In particular the employee shall:*
>
> *6.2.2 not disclose to any person any information obtained in the course of this employment, or to use or attempt to use such information to the employee's own benefit or the benefit of an other person or organisation, unless this is appropriate and necessary for the performance of the employee's responsibilities;*
>
> *6.2.3 not make any statements or take any actions at any time which are intended or likely to adversely affect the business or reputation of the employer*
>
> *Clause 15 Termination*
>
> *15.5 At the time of termination of employment the employee shall return forthwith to the employee all keys, clothing and any other property belonging to the employer*
>
> *Clause 18 Confidentiality*
>
> *18.1 Any trade, professional or other information relating to the employer's business, practice methods or procedures or technical information or client/customer lists or any private affairs acquired by the employee during the course of employment is absolutely confidential and shall not be disclosed or divulged to any person during or at any time after cessation of the employee's employment.*

[52] TAG Oil claims Mr Watchorn breached these express provisions of his employment agreement in copying its confidential information to his personal external hard drive; removing that hard drive containing its information from its offices; and failing to return it on his resignation. He also breached the implied term of fidelity and acting in the best interests of his employer and the implied term of trust and confidence.

The positions of the parties

[53] TAG Oil describes Mr Watchorn's explanations for the breach of confidence in taking its information as both fatuous and dishonest. The applicant notes the vast amount of information taken and the fact that Mr Watchorn had no need to use a personal hard drive as he had access to the company's server, and a company-provided laptop for use out of the office.

[54] Counsel for TAG Oil also refers to the extent of the company's data downloaded by Mr Watchorn immediately before his holiday in Canada in June 2012 at a time when he was considering employment with NZEC. In its submission submits this supports the inference that Mr Watchorn intended to make the information available to NZEC, or inform NZEC that he had access to the information, when he met with one of that company's directors in Canada.

[55] Counsel for the company highlights the quality of the information taken, including TAG Oil's entire geoscience data, which would be of immense value to a competitor. He notes the opportunities Mr Watchorn had to return the information to his employer, and to allow his employer to review the material on his external hard drive before he left TAG Oil on 31 July 2012. Counsel further notes the attempt Mr Watchorn made to mislead TAG Oil about the amount and type of data on the external hard drive when he texted Mr Cadenhead on 6 August 2012 after receiving the letter from the company's lawyers reminding him of his obligations.

[56] Mr Watchorn acknowledges copying to his personal hard drive a large amount of data from TAG Oil's server, including all the company's geotechnical information. He also acknowledges removing that information from TAG Oil when he resigned his employment on 31 July 2012.

[57] Counsel for Mr Watchorn accepts he took information from TAG Oil that he should not have taken. However, she submits this was not a breach of his employment agreement, the relevant provisions of which probihit disclosure. TAG Oil had failed to establish that Mr Watchorn had disclosed any of company's information.

[58] TAG Oil notes its claim is that Mr Watchorn copied, took and retained the company's confidential information without its consent, and it is not necessary for TAG Oil to establish that Mr Watchorn disclosed or used the information for his own benefit.

[59] TAG Oil questions Mr Watchorn's description of the information he had taken as "*templates*", which was no explanation for "*the hundreds of thousands of documents and complex seismic data*" he downloaded and took with him when he left the company.

[60] Counsel for Mr Watchorn submits he did not breach his duty of fidelity and to act in the best interests of his employer. Nor did he breach his duty of trust and confidence. His breach of clause 15.5 of his employment agreement was a "*technical breach*" because he did not understand ownership was asserted by his employer and he took records for reference purposes only. Mr Watchorn was unaware he was not permitted to take files with him when he left his employment. TAG Oil had no policies about the treatment of its files by exiting employees and there was no warning that the company would assert ownership of all files.

[61] Counsel for Mr Watchorn suggest that, if the company had conducted an exit interview, which it did not, such issues could have been addressed. She also submitted the respondent failed to confront Mr Watchorn about its concerns. Additionally, its lawyer's letter of 1 August 2012 failed to specify potential consequences if Mr Watchorn did not comply with its requirements; and Mr Cadenhead failed to respond to Mr Watchorn's text seeking a meeting to sort out the matter.

[62] Counsel also queries the damages TAG Oil claims to have suffered and says the situation could have been avoided if TAG Oil had taken up Mr Watchorn's texted offer of 6 August 2012 to Mr Cadenhead to discuss the matter.

Findings

[63] I am not persuaded by Mr Watchorn's explanations. I consider his assertion not to have known the TAG Oil files he worked on during his employment were his employer's property to be unconvincing. It is not credible that someone who had spent nearly 20 years working in a competitive industry could have the level of ignorance Mr Watchorn professed over ownership and confidentiality matters.

[64] His claim to have believed he was entitled to take "*templates*", and to have routinely taken such information from previous employers does not explain why he executed a "*gross data dump*" Mr Watchorn from TAG Oil's server to his personal hard drive. Approximately 350,000 documents were captured in the dump of which, by Mr Watchorn's own estimate only 1,000 would have been templates. Even if he genuinely believed he had an entitlement to templates, that left 349,000 documents to which he had no entitlement. I find it implausible Mr Watchorn thought he was entitled to take that data "*for reference purposes*" as he claimed.

[65] I also find Mr Watchorn's assertion that he did not know the geoscience data was included in the gross data dump to be unlikely as, by his own evidence, he had set up the "Z" drive on which that data was located. His text response to Mr Cadenhead, after receiving a letter from TAG Oil's lawyers on 6 August 2012, that the only things on his personal hard drive related "*to some of the things I helped put in place as well as technical data and work from previous employment"* was not the simple understatement he conceded it to be: I find it was deceptive. Mr Watchorn's subsequent acknowledgement of having carried out a "*gross data dump*" is incompatible with his text message to Mr Cadenhead.

[66] I accept that, amongst the information taken, was much highly confidential and commercially sensitive information that extended far beyond the work Mr Watchorn had been involved in, and that some of the information was at the very heart of the company's success. I find it more likely than not that the inclusion of the geosciences data was deliberate rather than inadvertent.

[67] In addition to the matters I have already referred to, I find the reason Mr Watchorn gave for downloading TAG Oil's "Z" drive in its entirety to his external hard drive on 7 June 2012 to lack credibility. He said he did it in case he was required to answer questions from his employer while on holiday in Canada. That was at odds with his written evidence that he had not taken the external hard drive to Canada. Under questioning in the investigation meeting Mr Wathcorn's answers were inconsistent. It was "*highly doubtful*" that he took it; it was "*probable*" he remembered to take it; and he "*could not recall*" if he took it. I find Mr Watchorn's inconsistency undermined the credibility of his evidence.

[68] I reject counsel for Mr Watchorn's submissions that TAG Oil failed to ask Mr Watchorn about the information on his external hard drive when he resigned. At that time the company had no reason to believe Mr Watchorn had downloaded its data to a personal hard drive.

[69] Mr Watchorn claims that the 1 August 2012 Bell Gully letter failed to alert him to the seriousness of the matter. It should have warned him of the consequences of failing to comply with its requirement to deliver up to TAG Oil immediately the external hard drive, his computer and any other storage devices.

[70] I reject that claim. The letter was a reminder to Mr Watchorn of his obligations to TAG Oil and an instruction regarding compliance with those obligations. His texted response to Mr Cadenhead was to provide untruthful information about the contents of the external hard drive and to dismiss as "*asinine*" the raising of the matter. That suggests to me he took the letter sufficiently seriously to deflect the focus from his obligations to TAG Oil by downplaying the quantity and content of the data he had taken.

[71] I find Mr Watchorn breached the general duty in clause 6.2 of his employment agreement to carry out his employment responsibilities "*honestly and diligently*". He breached the specific duty in subclause 6.2.3 not to take "*any actions at any time which are intended or likely to adversely affect the business or reputation of the employer*". He also breached clause 15.5. and his implied duties of fidelity and of trust and confidence to TAG Oil.

[72] These breaches occurred when he copied his employer's confidential information to his personal external hard drive on eight separate occasions, and took that information with him without his employer's authority when he resigned. Mr Watchorn acknowledged in his oral evidence that the geosciences data he claimed to have taken inadvertently was "*very key*" information.

[73] There was no evidence that Mr Watchorn had disclosed any of the information he took from TAG Oil and I therefore cannot find he breached clause 18.1 of the employment agreement or subclause 6.2.2, both of which relate to disclosure of information.

Remedies

[74] TAG Oil seeks compensatory damages but accepts it faces difficulty in establishing it has suffered loss. It says it may take years for the company to know whether its confidential information has been shared with, or used by, a third party. In the circumstances I decline to award damages under this head.

[75] TAG Oil also seeks special damages to cover the costs of investigation into Mr Watchorn's actions. In total it seeks $75,285. It has provided evidence from Mr Spence of the cost of his computer forensic investigation and analyses between 2 and 23 August 2012. It has also provided evidence of legal fees it incurred in conducting its investigation into Mr Watchorn's actions. TAG Oil's lawyers submitted an invoice

dated 31 August 2012, from which it substracted $10,765, being the costs regarding the preparation of documents directly related to its application to the Authority. A detailed breakdown of time spent on legal matters was provided after the investigation meeting.

[76] After examining the invoices I am satisfied it is reasonable for Mr Watchorn to pay special damages in the sum of $65,567. This consists of Mr Spence's invoice of $11,050 and $54,517 in legal costs. I note my calculation differs from that of the applicant, but it results from a careful examination of the time records provided. Interest is not awarded on this sum.

[77] TAG Oil seeks general damages of $10,000 in respect of the inconvenience and disruption to its business caused by Mr Watchorn's breaches. The applicant did not estimate the amount of time it spent investigating Mr Watchorn's conduct but seeks a modest amount to recompense for executive time lost and inconvenience caused as a result of the respondent's breaches of contract. I have considered counsel's submissions and decline to make an award under this head on the basis of the paucity of evidence to support the claim.

[78] An award of exemplary damages of between $20,000 and $30,000 is sought to reflect the gravity of Mr Watchorn's conduct. Counsel for TAG Oil submits the award of exemplary damages is an equitable remedy available for breach of confidence. Counsel for Mr Watchorn questions the Authority's jurisdiction in such matters, and denies the respondent's conduct merits such an award.

[79] I decline to make an award of exemplary damages and note TAG Oil is also seeking penalties against Mr Watchorn for breaches of his employment agreement. It is unnecessary for me to consider the jurisdictional issues concerning the Authority's ability to award exemplary damages, because penalties and exemplary damages are essentially being sought for the same punitive purpose.

[80] I consider Mr Watchorn's actions do merit the imposition of penalties and it would be inequitable to impose two separate punitive remedies for the same behaviour. Penalties are warranted because of the seriousness of Mr Watchorn's breaches and for as a deterrent to such practices in the future.

[81] TAG Oil seeks penalties to the maximum permissible under the Act for nine breaches of contract by Mr Watchorn. These relate to nine instances when the

forensic evidence establishes he accessed and copied his employer's confidential information. One of the nine instances relates to the downloading of confidential information on 8 June 2012. As I have already noted, the forensic consultants for both parties were unable to agree on the nature of the activity that day, leading me to disregard evidence about its possible nature. Accordingly, no penalty is warranted for that day.

[82] I am not persuaded that separate penalties should be imposed for each of the remaining eight breaches which, as established by the forensic evidence, occurred on four different days. These were 7 June 2012, 18 July 2012, 24 July 2012 and 31 July 2012.

[83] I find it appropriate to award a penalty of $3,000 for Mr Watchorn's actions on each of those days, totalling $12,000. I reject counsel for TAG Oil's submission for the full amount of penalties imposed to be awarded to the applicant in view of the harm it suffered from Mr Watchorn's actions.

[84] As the Employment Court observed in *Prins v Tirohanga Group*, a penalty is prima facie payable to the State, and is intended to be "*both a punishment for unlawful behaviour and a deterrent (both particular and general) rather than to restore loss suffered*"[2]. I find it appropriate in the circumstances that TAG Oil receive half of each penalty. There is no award of interest.

[85] I make no orders currently for compliance and injunctions in light of the seizure by Police of all relevant computers and external drives. If there are outstanding matters in relation to those applications, leave is granted to the parties to revert to the Authority.

Orders

[86] James Watchorn is ordered to pay:

a. Special damages to TAG Oil in the sum of $65,567 nett;

b. Penalties in the sum of $12,000, comprising four penalties of $3,000 each, half of which is to be paid to the Crown and half to TAG Oil.

[2] [2006] ERNZ 321 at 339

Costs

[87] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority