

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 58
5604585

BETWEEN

NEIL BOSMAN
Applicant

AND

TOTAL ACCESS LIMITED
Respondent

Member of Authority: Andrew Dallas

Representatives: Dean Organ, Advocate for the Applicant
Anthony Drake, Counsel for the Respondent

Investigation Meeting: On the papers

Date of Determination 29 February 2016

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This preliminary determination resolves an issue over whether Mr Bosman has confidential information belonging to Total Access Limited (Total Access), in advance of the Authority's substantive investigation of a personal grievance claim by Mr Bosman and a counterclaim by Total Access that he has breached a term of his employment agreement.

[2] Mr Bosman was employed by Total Access as a branch manager and subsequently a business development manager between 20 January 2014 and 19 October 2015. Total Access is a construction hire business.

[3] Mr Bosman's individual employment agreement with Total Access dated 21 February 2014 contained the following clause:

11.1 Confidential information

The Employee shall not, whether during the currency of this agreement or after its termination for whatever reason, use, disclose or distribute to any person or entity, otherwise than as necessary for the proper performance of their duties and responsibilities under this agreement, or as required by law, any confidential information, messages, data or trade secrets acquired by the Employee in the course of performing their services under this

agreement. This includes, but is not limited to, information about the Employer's business.

[4] Mr Bosman resigned on 19 October 2015, alleging constructive dismissal.

[5] Mr Bosman subsequently advised director of Total Access, Vicki Chambers that he had taken up a new position with Hirepool, one of its competitors. In an email dated 6 November 2015, Mr Bosman stated:

I have today accepted a role with Hirepool in their sales team. This role will mainly be focussing on general hire and events, and I want to stress again that you have my complete word that I will keep all Total Access matters and information to myself. With how great you have been to me, the last thing I would ever want to do is betray your trust.

[6] In an email response dated 9 November 2015, Ms Chambers stated:

As with all companies there are policies and procedures in place. As discussed with you, all intellectual property and customer information, the use of or transferring of this data is a breach of your contract at Total Access. I didn't bring the issue up previously pending the outcome of your employment decision, with regards to the deletion of files on your laptop or the resetting of data on your mobile phone, which were both returned with many files deleted relating to Total Access contacts, customer communications and various documentation.

As you are not returning to Total Access and have left to begin employment with Hirepool, I will require the immediate return of all files and backups made by way of USB (both mobile backup and missing laptop documents). If you have saved these elsewhere within Total Access please advise.

Items to be returned immediately

- Mobile phone data (emails, contacts, texts)
- Laptop files, including computer price lists, letters, proposals, latest sales spreadsheets

[7] In a subsequent email exchange with Ms Chambers, Mr Bosman again denied having any of this material.

[8] A personal grievance was raised for Mr Bosman by his representative with Total Access on 30 November 2015.

[9] Solicitors for Total Access wrote to Mr Bosman's representative on 11 December 2015 and, among other things, advised:

The company has raised with us a serious concern. It is concerned Mr Bosman may have taken or copied its confidential information (pricing lists and documents) and may use those at Hirepool. We seek Mr Bosman's confirmation and undertaking that he has not taken our clients information. Please take Mr Bosman's instructions and revert to us without delay. Our client is presently considering its options and before it embarks on a costly exercise of forensic audits (which costs can be avoided) if Mr Bosman cooperates.

[10] Mr Bosman provided neither a response to this allegation nor the undertaking sought by Total Access.

[11] Mr Bosman lodged a statement of problem in the Authority on 21 January 2016.

[12] Solicitors for Total Access wrote to Mr Bosman's new employer, Hirepool on 3 February 2016 alleging a breach of post-employment obligations by Mr Bosman. This letter stated:

1 We act for Total Access Limited (Total). We are writing to bring to your attention a matter involving a former employee of Total, Neil Bosman, and his misuse of Total's confidential information.

...

3 Total is concerned that prior to Mr Bosman leaving Total, he copied and took with him confidential information in breach of his employment with Total and his obligation to maintain a duty of confidentiality to Total, which survives past the ending of his employment with Total.

4 Total has conducted a forensic audit of Mr Bosman's laptop computer and discovered that he had collated information and copied files which are considered to be Total's confidential information. The information includes (but is not limited to):

- a. Customer lists with who Total does business;
- b. Total's templates including quotation and pricing templates;
- c. Total's product and customer pricing quotes; and
- d. Total's client contact details.

5 Total has instructed us to pursue Mr Bosman for the immediate surrender of all Total's confidential information in his possession, power or under his control....

...

7 Total brings this matter to your attention in good faith and requests that Hirepool cooperate with Total's efforts to recover its confidential information where possible.

[13] Total Access filed a statement in reply on 5 February 2015, which included a counterclaim for alleged breach of an employment agreement and an application for interim directions on the use and return of confidential information.

[14] In support of its application for directions, Total Access lodged an affidavit of forensic computer analyst Michael Spence sworn on 5 February 2015 and a report prepared by Mr Spence about a laptop computer used by Mr Bosman during his employment with Total Access (First Spence Report).

The Authority's preliminary investigation

[15] A case management conference was convened to discuss Total Access' application for directions with representatives of the parties on 15 February 2016.

[16] Total Access had sought the following directions of the Authority:

- a. Requiring the Applicant to surrender to the Authority forthwith and in any event no later than 2 working days of the date of its direction any document (whether electronic or physical) within the Applicant's power, possession or control which are documents belonging to the Respondent; which are derived from documents belonging to the Respondent; which contain confidential information belonging to the Respondent; or which have any relevance to the work carried out by the Applicant while he was employed by the Respondent including but not limited to documents set out above.
- b. Requiring the Applicant to provide to the Respondent forthwith and in any event within 2 working days of the date of the Authority's direction, copies of any documents surrendered to the Authority in accordance with paragraph (a) above.
- c. Requiring the Applicant to file and serve on the Respondent forthwith and in event no later than 5 working days of the date of the Authority's direction an affidavit providing details of all of the Respondent's confidential information (whether electronic or physical):
 - i. Which is currently within the power, possession or control of the Applicant; and

- ii. Which has been, but is no longer within the power, possession or control of the Applicant (including copies of any of the Respondent's confidential information which the Applicant has provided to Hirepool or any other person).
- d. That the Applicant (whether as an individual or by his agents or otherwise howsoever) is restrained from destroying, using, copying, transmitting, transferring, altering, deleting or defacing any of the Respondent's confidential information (other than to surrender the documents as provided for in paragraph (a) above in order to comply with paragraph (b) above.

[17] Upon review of these directions, the reference to "Hirepool" in c (ii) above seemed uncertain. A review of the Companies Office website disclosed a number of current (and former) companies with the name, Hirepool. If made, the directions needed to be capable of being complied with by Mr Bosman. Total Access was asked to clarify its position. It subsequently advised that the reference to Hirepool should be taken to mean "Hirepool Limited".

[18] Due to an identified issue with the service of the statement in reply, Mr Bosman was granted 2 days to provide an affidavit and any other material in response to Total Access' application for directions.

[19] The Member's Minute issued after the conference contained directions for the provision of Mr Bosman's material and reserved the right of Total Access to reply.

[20] Ms Bosman lodged and served his affidavit on 17 February 2016 (First Bosman Affidavit). This affidavit attached the letter from solicitors for Total Access to Hirepool referred to above. Mr Organ also provided some brief submissions on behalf of Mr Bosman.

[21] By way of memorandum dated 18 February 2016, Counsel for Total Access sought, on the basis of some new information contained in Mr Bosman's affidavit, an opportunity to provide a further report from Mr Spence. This was granted. The Second Spence Report was lodged with the Authority on 22 February 2016. Mr Bosman was given an opportunity to comment on this report and his affidavit was lodged on 25 February 2016 (Second Bosman Affidavit).

[22] The matter was determined on the papers under s 174D of the Employment Relations Act 2000 (the Act). As it proceeded in the Authority on the basis of the affidavit evidence, the appropriate evidentiary standard was for Total Access to establish an arguable case that the directions sought were warranted.

First Spence Report

[23] Mr Spence was engaged by Total Access to examine the computer used by Mr Bosman during his employment. The purpose of his examination according to the report was:

To review an HP laptop computer. To identify the actions that took place on or about 19 October 2015. To identify any other items of interest regarding the laptop's user Neil Bosman.

[24] The report set out Mr Spence's findings. The key findings were the creation of a folder on the computer's desktop and interactions between the computer and two mobile phones. In addition, the appendices to the report identified various emails and file references of interest, a contact list from a mobile phone that was backed-up using the laptop computer, several versions of Mr Bosman's curriculum vitae, and his resignation letter which were found in computer's recycling bin.

[25] Section four of the report contained Mr Spence's concluded opinion, which was:

4. Concluded Opinion

- 4.1 Based on the information I have, I believe that the following course of actions occurred on 19 October 2015 in relation to this laptop.
- 4.2 When logged in under the user Neil, a folder was created on the laptop called *Neil's Work Emails*. This occurred at 11.45:42am. (Emphasis added).
- 4.3 This folder was then populated with emails extracted from an email database and other files.
- 4.4 The folder and its contents were then deleted.
- 4.5 As I can see no other reason for these actions just prior to the completion of Mr Bosman's resignation letter, I would conclude that this was for the purpose of extracting a copy of this folder and its contents from the laptop.
- 4.6 At 15.08:07 Mr Bosman's resignation letter is created.

[26] Clause 4.5 of Mr Spence's concluded opinion is important because his report was unable to determine if the folder was removed from the laptop. The report acknowledged this in the following terms:

- 3.8 I have not been able to identify if [Neil's Work Email] folder and its contents were copied from the laptop computer. There is no indication that this folder was copied to a USB drive. I note that use is made of the internet storage application DropBox and also Microsoft's online storage facility Skydrive/onedrive.

First Bosman Affidavit

[27] Mr Bosman strongly denied the findings of the First Spence Report:

1. I have not copied, saved, uploaded or taken any of the documents which were in the folder 'Neil's work emails' when I left Total Access. I do not, and have never operated either a Dropbox, Skydrive or Onedrive account. I have not given any documents belonging to Total Access to Hirepool Ltd or any other person. I do not possess any documents belonging to Total Access in any form.
2. ... I did not make any copies, upload any files to online storage systems or storage devices, nor did I take any of Total Access' commercially sensitive or private information with me. The company was well aware of my position in relation to the allegation of breach of confidentiality but chose to ignore it.

[28] In his affidavit, Mr Bosman explained the reason for creating the folder "Neil's Work Emails", which was, in summary, at the time of its creation, he was still considering staying on and laying a bully complaint against his manager but he changed his mind about staying and deleted the folder.

[29] Mr Bosman also explained that he reset his work mobile phone because he had full personal use of the phone and he needed to delete personal information such as family photos, internet banking details and social media accounts.

[30] On behalf of Mr Bosman, Mr Organ submitted that Total Access' application for directions was "without foundation" and "vexatious". He also made a further and important submission which was, as identified above, the First Spence Report did not identify if the folder "Neil's Work Emails" was ever copied from the computer.

Second Spence Report

[31] In his affidavit lodged support of his second report, Mr Spence observed, “[t]he forensic examination of the laptop used by Mr Bosman has proven to be extremely challenging...”. He then went on to explain the technical reasons for this, which were further elaborated on in his report.

[32] It was apparent from Mr Spence’s affidavit that further inquiries had been conducted about Mr Bosman’s activities on 19 October 2015. He referred to being provided with further information by solicitors for Total Access that indicated Mr Bosman had contacted an external IT specialist on that day.

[33] In his report, Mr Spence observed that during his initial examination he reviewed the “Microsoft Registry files” of Mr Bosman’s computer (evidently these files contain a register of USB use) and there was no record of USB use for 19 October 2015. However, USB use is also recorded elsewhere on a computer in an “Event Log”, which assists technicians in the event of operating system failure. Upon review of the Event Log, Mr Spence discovered that a USB had been connected to the computer on 19 October 2015 at 11.44:55am.

[34] Mr Spence observed that he had never come across a situation where an Event Log entry does not a corresponding entry in the Microsoft Registry files. Mr Spence said he conducted a test of the computer to ensure it was working correctly and he found that it was. Mr Spence noted that Microsoft Registry files can be cleared manually, but this requires a higher level of skill than the ordinary computer user.

[35] Mr Spence’s concluded opinion to this report was:

Concluded Opinion

- 3.9 That on 19 October 2015, following the connection of a USB drive at the time 11.44:55, the USB storage portion of the Windows Registry file was cleared.
- 3.10 That was done to try and prevent the detection of connection of a LEXAR USB drive on that day.
- 3.11 That a reasonable level of technical expertise or instruction would have been required to accomplish this.
- 3.12 That some form of special delete or wiping was used to remove the folder ‘Neil’s Work Emails’ and the files it contained from the laptop on 19 October 2015.

Second Bosman Affidavit

[36] In his second affidavit, Mr Bosman stated:

Due to the immense stress, emotion and pressure of my final day at Total Access (due to the bullying and harassment of Nick Krann), I could not recall whether I had copied files onto a USB drive I connected. I created the folder so that if Nick decided to seize my laptop and do a dump of information; I would still have copies to protect myself.

[37] He then stated, reflecting on the findings of the Second Spence Report, that he could not recall whether he had plugged a USB into the computer. He said a search of his house did not disclose a USB matching the description in the report but that, subsequently, his wife suggested she might have a USB at her work which may match the description.

[38] Evidently there was and a review of this USB disclosed that it contained a folder named "Neil's Work Emails". Mr Bosman said that the folder contained emails. He further said he did not know he had successfully copied these until he received the Second Spence Report and decided to check. Mr Bosman volunteered to provide the USB to the Authority.

[39] Upon reviewing Mr Bosman's Second Affidavit, an interim direction was issued on 25 February 2016 for the USB referred to therein to be lodged with the Authority as soon as possible but by no later than 9.00am on 26 February 2016. Mr Bosman complied with this direction.

[40] Mr Bosman did not address in his affidavit the issues relating to the deletion of the registry file recorded USB usage from his computer or Mr Spence's suggestion that some form of special delete or wiping was used to remove the folder 'Neil's Work Emails' from the computer.

Conclusion

[41] The First Spence Report found evidence, at its highest, of suspicious computer activity by Mr Bosman on the last day of his employment. That is, he created and populated a folder called "Neil's work emails" on his computer's desktop. However, the report was unable to conclude if the folder had been copied from the computer. Mr Bosman denied, at that time, he had copied or saved any of the documents in the folder. As a consequence of this denial, together with a plausible explanation for his

conduct and, in the absence of evidence that the file had been copied from the computer, Total Access did not, in my view, have an arguable case.

[42] However, the Second Spence Report provided a much more detailed picture of what happened in respect of Mr Bosman's computer on 19 October 2015. Aspects of Mr Bosman's second affidavit did not sit comfortably with his first and he conceded in his second affidavit that he had removed file "Neil's work emails" from the computer, which cured the earlier difficulty posed for Total Access.

[43] Through the two reports prepared by Mr Spence, Total Express established an arguable case that the directions sought were warranted as an early and interim measure because of the very real doubt created by Mr Bosman's own affidavit evidence. Whether there was, in fact, a breach by him of his obligations still needs to be resolved once the evidence is thoroughly tested in the substantive investigation of his personal grievance and the counterclaim. Meanwhile if he has the information or documents referred to in the following directions, he must return it.

Directions

[44] The following interim directions are made under s 160(i)(a) and s 221(d) of the Act:

- a. Mr Bosman must surrender to the Authority within two working days of the date of this determination any document (whether electronic or physical) within his power, possession or control which are documents belonging to Total Access; which are derived from documents belonging to Total Access; which contain confidential information belonging to Total Access; or which have any relevance to the work carried out by the Mr Bosman while he was employed by Total Access including but not limited to documents set out above.
- b. Mr Bosman must serve on Total Access within two working days of the date of this determination, copies of any documents surrendered to the Authority in accordance with paragraph (a) above.
- c. Mr Bosman must lodge with the Authority and serve on Total Access within five working days of the date of the Authority's determination an affidavit providing details of all of Total Access's confidential information (whether electronic or physical):

- (i). Which is currently within the power, possession or control of Mr Bosman; and
 - (ii). Which has been, but is no longer within the power, possession or control of Mr Bosman (including copies of any of Total Access' confidential information which Mr Bosman has provided to Hirepool or any other person).
- d. Mr Bosman (whether as an individual or by his agents or otherwise howsoever) is restrained from destroying, using, copying, transmitting, transferring, altering, deleting or defacing any of Total Access's confidential information (other than to surrender the documents as provided for in paragraph (a) above in order to comply with paragraph (b) above.
- e. For the purposes of these directions, "Hirepool" means Hirepool Limited.

Costs

[45] I reserve the issue of costs until after the substantive investigation and final determination.

Further steps

[46] Due to the evolving nature of this employment relationship problem, the parties are directed to attend mediation. An Authority Officer will make contact with the parties to ensure this occurs as soon as possible.

Andrew Dallas
Member of the Employment Relations Authority