

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN eCOM New Zealand Limited (Applicant)

AND Neil Taylor (Respondent)

REPRESENTATIVES Chris Patterson for applicant
Blair Edwards for respondent

MEMBER OF AUTHORITY Janet Scott

**CONSIDERATION OF
PAPERS**

DATE OF DETERMINATION 22 February 2006

COSTS DETERMINATION OF THE AUTHORITY

The applicant brought a claim seeking an order that the respondent comply with the applicant's lawful and reasonable instruction that he return a laptop computer belonging to the company which he had in his possession.

The applicant seeks reasonable legal costs (\$1,603.80) associated with bringing this claim and costs by way of disbursements including those associated with the forensic cloning of the computer (\$1,316.73).

The respondent makes a number of submissions challenging this costs application. Included is a submission which notes that the Authority did not make a determination in this matter and so the respondent could not be said to have been successful. It is also submitted that as the applicant did not reserve its position on costs and it is not now entitled to seek costs. Further it is submitted that the applicant did not require the forensic report to further the application but to further its own internal investigation. As such it is irrelevant to the application and it would be wrong as a matter of law to award costs for this disbursement.

It is submitted for the respondent that costs in this matter should be allowed to lie where they fall or indeed that costs incurred by the respondent should be met by the applicant. (\$1,495 plus GST).

Discussion

The applicant did reserve its position both as to legal costs (email to the Authority 12 October cc'd to respondent's counsel) and the costs associated with retrieving data from the laptop (Minute of the Authority dated 12 October).

The power to award costs is contained in the Second Schedule of the Employment Relations Act 2000. The general principles to be applied in cost applications are set out, in case law including

NZALPA v Registrar of Unions (1989) NZILR,550, *Okeby v Computer Associates (NZ) Limited* [1994] 1 ERNZ 613 and *Reid v New Zealand Fire Service Commission* [1995] 2 ERNZ 38. The criteria to be taken into account include the importance of the case to the parties, the way the case was conducted, the conduct of the parties at the hearing, the amount of time required for effective preparation over and above that which would ordinarily be inferred, whether arguments lacking in substance were advanced or whether unduly legalistic and technical points were taken and the actual costs incurred.

The applicant made two clear requests that the respondent return its laptop (10 & 11 October 2005). The reason given for requesting the return of the laptop was reasonable i.e. to further the investigation underway and in furtherance of its business operation. (See letter dated 11 October Patterson/Latimer). The applicant was entitled to ask the respondent to return its laptop and the respondent had a duty to comply with what was a lawful and reasonable direction from his employer. The respondent did not comply and the applicant was left with bringing in the police or seeking an order from the Authority. The applicant took the less drastic approach in making an application to the Authority.

However, the matter was resolved in discussion with the Authority Member albeit the applicant reserved its position relating to making a complaint to the police.

The resolution in the matter was that Mr John Thackray of Thackray Forensics would meet with Mr Taylor at his counsel's premises where he would undertake a forensic clone of the information held on the computer. That information would be burned to a DVD and delivered to the applicant.

In the circumstances of this matter, where resolution was reached in this matter by teleconference, I consider that it is appropriate that the legal costs incurred lie where they fall. However, costs were incurred by the applicant in arriving at a compromise solution on what was descending into a bitter division between these parties. It was argued for Mr Taylor that he required access to the computer to prepare his arrears claim against the respondent. He would not hand over the computer even when he was promised a copy of the information relevant to his claim. Cloning the computer and delivering its information to the applicant was essential to enabling the applicant to access its business and other information held on the computer. The circumstances required the use of a professional in the capturing of such data. That came at a cost and it seems reasonable that Mr Taylor should be asked to meet a portion of that cost. I consider that Mr Taylor should meet half of the cost incurred by the applicant in obtaining the professional services of Mr Thackray.

Determination

The respondent is directed to pay to the applicant the sum of \$623.36 disbursements in this matter.

Janet Scott
Member of Employment Relations Authority