

Attention is drawn to the interim non-publication order at paragraph 15.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2018] NZERA Wellington 22
3026314

BETWEEN J J NIVEN ENGINEERING
 LIMITED
 Applicant

AND KEITH DARYLL HOLDAWAY
 Respondent

Member of Authority: Trish MacKinnon
Representatives: Alistair Hall, Counsel for Applicant
Investigation Meeting: On the papers and by telephone
Determination: 21 March 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] JJ Niven Engineering Limited (Nivens) seeks, on an ex parte and urgent basis, interim orders relating to the preservation, production and return of confidential information and intellectual property it alleges to be in the possession of Mr Holdaway.

[2] It also seeks a witness summons requiring Mr Holdaway to attend before the Authority and deliver up to it various information and devices containing proprietary or confidential information or intellectual property belonging to Nivens. Nivens further seeks the appointment of a suitably qualified and certified computer forensic expert to analyse those documents, electronic devices and electronic storage devices delivered up to the Authority by Mr Holdaway in accordance with the witness summons.

[3] Mr Holdaway is a former owner and managing director of Nivens who resigned as a director in May 2017 after selling his shares to his fellow directors. He remained employed by Nivens until his resignation on 1 February 2018, effective immediately. He handed back his company laptop at the time of delivering his letter of resignation. It is as a result of a forensic computer analysis of that laptop that the Applicant has made its current application to the Authority.

[4] Nivens alleges Mr Holdaway has deliberately obtained confidential, commercially sensitive and proprietary information belonging to it for his own benefit in contravention of his employment agreement and in breach of his implied obligations. The information he obtained includes supplier and client details, pricing details, design calculation spreadsheets, technical information, design standards, and designs and drawing.

[5] Mr Holdaway's employment agreement dates from 1996. Although it was reviewed in 2017 following his change of role, the parties had been unable to agree on updated terms and the terms of the 1996 agreement remain. It contains no restraint of trade provisions, but does have provisions relating to the protection of confidential information and to non-solicitation of clients.

[6] Nivens has provided affidavits from Bradley Pearpoint, the computer forensic specialist who undertook the forensic analysis of the laptop, and Michael Taylor who is a director of Nivens. The information in Mr Pearpoint's affidavit is that a significant amount of data was copied from Nivens' server to the laptop over the previous 12 months. This included entire directories of files. The files were later deleted from the laptop.

[7] Mr Pearpoint was able to identify that the files had been copied or duplicated and that, during the same 12 month period, 9 USB storage devices had been connected to the laptop. He was able to determine the details of those storage devices and the last times each of them had been connected to the laptop.

[8] Mr Taylor's concern is that Mr Holdaway will use the confidential and proprietary information he has taken for his own benefit or for the benefit of a third party. He referred to events in early December 2017 in which he and another director of Nivens had asked Mr Holdaway for access to emails on the laptop and had been met with a refusal.

[9] While it is not necessary to go into the details of that discussion or the events that followed, it is clear that they formed the basis for the decision to have the laptop forensically analysed when Mr Holdaway returned it on his resignation.

[10] After considering the documentation and affidavits provided, I am satisfied it is appropriate to issue the witness summons and the orders detailed below. The orders are to remain in place until further notice.

Orders

- I.** Mr Holdaway shall not destroy, use, copy, transmit, transfer, alter, delete or deface any of Nivens' confidential information and intellectual property;
- II.** Mr Holdaway shall immediately comply with the "*disclosure of confidential information*" and "*non-solicitation of clients*" clauses of his employment agreement with Nivens;
- III.** Mr Holdaway shall immediately return all property belonging to Nivens, including confidential information and intellectual property, to Nivens.

[11] Mr Holdaway is to attend the Authority in accordance with the witness summons that is to be served on him and to deliver up to the Authority the material, information, storage devices and other things specified in that summons.

[12] Advantage Computers Limited, the company of which Mr Pearpoint is managing director, is to be appointed to analyse the contents of the material Mr Holdaway delivers up to the Authority, including mobile and storage devices and his computer or computers. Should Mr Holdaway wish, he may also appoint a computer forensic specialist of his choosing to work with Advantage to ensure any personal documents or personal material not related to matters subject to this application are not disclosed to Nivens.

[13] At this stage the Applicant is to arrange and bear the cost of Advantage's engagement, and Mr Holdaway is to bear the cost of any computer forensic specialist he appoints. These matters may be revisited at a later time as part of a wider costs discussion.

[14] A copy of the Statement of Problem, the affidavits of Mr Taylor and Mr Pearpoint and other documentation lodged in the Authority on 16 March 2018 are to be served on Mr Holdaway at the same time as the witness summons and a Notice of Investigation Meeting for 28 March 2018. Further progression of Nivens' application will be determined at, or shortly after, that investigation meeting.

[15] This determination is not to be published other than to the parties, their representatives, and the computer forensic specialist(s) until 6 April 2018.

Costs

[16] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority