

NOTE: This determination contains an order at paragraphs [4]–[6] prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 573
3109232

BETWEEN KEY INDUSTRIES LIMITED
Applicant

AND CAMPBELL JAMES PERRIN
Respondent

Member of Authority: Rachel Larmer

Representatives: Nic Scampion and Lisa Lamers, counsel for the
Applicant
Simon Greening, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 9 September 2022 from the Applicant
19 September 2022 from the Applicant
4 October 2022 from the Respondent

Date of Determination: 4 November 2022

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] Key Industries Limited (Key Industries) has provided the Authority with detailed information about its legal invoices, and the specific activities its legal advisors engaged in, in support of its special damages claim. Key Industries did so without waiving legal professional privilege.

[2] Key Industries has therefore requested that the non-publication order made in paragraph [2] of the Authority's 26 August 2022 determination be extended to cover the material it filed in support of its special damages claim.¹

[3] The Authority accepted that the contents of Key Industries' legal invoices were the subject of legal professional privilege, so it is appropriate to maintain the confidentiality of that material. There is no overriding public interest that required disclosure of the content of Key Industries' legal invoices.

[4] The Authority has therefore varied the non-publication order at paragraphs [1] and [2] of its substantive determination dated 26 August 2022 to extend to prohibit publication of Key Industries Limited's legal invoices.² The information about Key Industries' legal costs that is contained in this determination may be published.

[5] Accordingly, the invoices, the contents and amount of each invoice may not be published and is subject to a non-publication order, subject to the condition that it does not apply to Key Industries (as the owner of the information), its counsel (as the persons who drafted the invoices) or to communications the parties have with the employment institutions.

[6] The legal invoice information covered by this extended non-publication order is attached to Key Industries' memorandum dated 9 September 2020 and to Mr Visser's affidavit dated 17 December 2021.

Employment Relationship Problem

[7] The Authority issued a substantive determination in this matter on 26 August 2022.³

[8] In paragraph [128] of the substantive determination the Authority held that in principle Key Industries could recover special damages for (at least some of) the actual legal fees it incurred:

- (a) from 11 May 2020 to 5 June 2020 incurred in connection with investigating Mr Perrin's breaches of his employment agreement; and

¹ *Key Industries Limited v Perrin* [2022] NZERA 416.

² *Supra*.

³ Above n1.

- (b) from 11 May 2020 to 7 October 2020 in connection with High Court proceedings it had filed to protect itself from adverse consequences associated with Mr Perrin's breaches of his employment agreement.

[9] The Authority at paragraph [133] of its substantive determination concluded that it had insufficient evidence relating to the details of the legal fees incurred during the above two periods to be able to quantify this aspect of Key Industries' special damages claim. It therefore set a timetable for the parties to file additional information.

[10] This determination now addresses Key Industries outstanding special damages claim for recovery of legal expenses incurred during the two periods identified by the Authority in paragraph [8] above.

The Authority's investigation

[11] The Authority's investigation in respect of a claim for special damages for legal costs Key Industries incurred was conducted 'on the papers'. Key Industries filed a memorandum and appendices on 9 September 2022 that provided evidence of the legal fees it had incurred within the two periods identified by the Authority in its 26 August 2022 determination.

[12] In support of its special damages claim Key Industries undertook an exercise that involved it:

- (a) Removing from its invoices any costs that did not relate to its special damages claim; and
- (b) Identifying the specific activities and associated legal costs that fell within the scope of its special damages claim, with reference to invoices provided by Clendons and by Mr Scampion.

[13] The Authority was provided with:

- (a) A full account of Clendons' attendances, prepared directly from its project reports, with a summary of Mr Scampion's attendances separately identified;
- (b) Copies of Clendons' invoices;
- (c) A schedule taken directly from Mr Scampion's time records (with any irrelevant entries redacted) that provided a full account of his attendances; and
- (d) Copies of Mr Scampion's invoices (with any irrelevant entries redacted).

[14] Key Industries noted that this evidence was provided solely in support of its claim for special damages relating to legal fees and it did not otherwise waive privilege in respect of any of the material it had provided.

[15] On 13 September 2022 the Authority made further enquiries of the parties to ascertain whether any of the activities in the August 2020 Clendons' invoice INV183607 and Mr Scampion's invoice INV1612 overlapped.

[16] The Authority wanted to determine whether there had been two lawyers at meetings or whether both legal providers had been undertaking the same activities that had been billed for in the invoices identified by the Authority.

[17] The Authority informed the parties that it wanted any duplication between Clendons' lawyer(s) and Mr Scampion of legal work or associated legal fees, that related to lawyers undertaking the same activity, separately identified.

[18] The Authority indicated that it was unlikely to award special damages to two lawyers to do the same tasks, unless there was a good reason for such duplication. If so, then the Authority asked Key Industries to explain why it believed Mr Perrin should be required to pay for two lawyers to do the same work.

[19] That resulted in a further memorandum being filed by Key Industries on 19 September 2022 that explained how in August 2020 legal work and tasks were divided between Clendons and Mr Scampion. Key Industries set out the details of how and why that had occurred.

[20] Key Industries also noted that there had been a degree of urgency in the circumstances, due to the substantial commercial damage that Key Industries was facing as a result of what it believed were the defendants' (in the High Court proceedings) plans to misuse its confidential information to take a significant amount of business from it.

[21] Key Industries therefore pointed out to the Authority that it had to prepare as quickly and expeditiously as possible to address that very real threat, in order to protect its business from imminent harm.

[22] The Authority accepted the explanation it received from Key Industries about why two legal providers had invoiced it for legal services provided in August 2020.

[23] Key Industries provided the Authority with the names and charge-out rates of the lawyers who worked on the High Court proceedings, and explained how the different seniority and skill levels of the lawyers involved had meant that Key Industries' legal fees were significantly less than what they would have been.

[24] That was due to the legal providers appropriately dividing the necessary legal work among the different skill and experience levels of the lawyers involved in the work, instead of Mr Scampion attending to all legal matters himself.

[25] Although there were two lawyers at the initial judicial conference held at the High Court, it was relatively succinct, lasting approximately 30 minutes. The Authority considered that was appropriate in the circumstances, given the complexity, urgency and the need for both legal providers to be up to speed with all developments in connection with the High Court proceeding given the serious risks to Key Industries' business and the division of legal tasks was occurring to keep costs down.

[26] Key Industries also pointed out that Mr Scampion had reduced his fee to Key Industries for the professional services he provided, meaning that as a result of that discount Mr Perrin had now got the benefit of that *ex gratia* discount, because the legal fees Key Industries sought to recover from him were less than what had originally been actually incurred.

[27] Mr Perrin advised the Authority on 4 October 2022 that he did not intend to file any information or submissions in connection with Key Industries' special damages claim.

Issues

[28] The following issues are to be determined:

- (a) Was the legal work associated with the legal fees Key Industries incurred reasonably necessary?
- (b) If so, were the actual legal fees incurred by Key Industries for the work done over those two periods identified by the Authority also reasonable and appropriate?
- (c) If so, what special damages should Mr Perrin be ordered to pay Key Industries for the legal fees it actually incurred prior to 6 June 2020?
- (d) What, if any, costs should Key Industries be awarded?

Was the legal work associated with the legal fees Key Industries incurred reasonably necessary?

[29] The Authority was satisfied that the legal fees that were the subject of this special damages inquiry were incurred directly as a result of Mr Perrin's breaches of his employment agreement. The direct causal link between the legal costs incurred and the conduct (breaches) that Mr Perrin engaged in was therefore established to the Authority's satisfaction.

[30] The initial work done during the initial period 11 May to 5 June 2020 involved Key Industries incurring the legal costs associated with investigating Mr Perrin's breaches, and taking action to address that.

[31] This action by Key Industries included seeking undertakings from Mr Perrin which were to have been provided by 5 June 2020, which aimed to have entirely avoided these Authority proceedings. Had Mr Perrin provided the appropriate undertakings, and co-operated with Key Industries' investigation into the nature and extent of his breaches, then the Authority proceedings would not have been necessary.

[32] The Authority finds that:

- (a) The legal fees incurred by Key Industries over this period were reasonably necessary; and
- (b) The actual legal fees for the legal work that was done to assist Key Industries over this period were also reasonable and appropriate.

[33] In terms of the legal fees incurred from 11 May to 7 October 2020, these were incurred in connection with the High Court proceedings. There was a clear red line drawn between those legal fees that could be recovered as special damages and the party to party costs associated with these Authority proceedings that are to be determined separately in accordance with the Authority's notional daily tariff.

[34] Key Industries settled the High Court proceeding but the settlement did not include recovery of its legal costs. That meant the only way Key Industries could recover those legal costs was if the Authority awarded it special damages for those legal fees.

[35] The Authority was satisfied the costs Key Industries directly incurred resulted from Mr Perrin's breaches of his employment agreement. Again the required causal link between

the breaches and damages caused has been established on the evidence regarding the High Court proceedings.

[36] The breaches and damage that the High Court proceeding aimed to address related to Key Industries' Australian based competitor, Agserv Pty Limited's (Agserv's) imminent use/misuse of Key Industries' confidential information.

[37] Mr Andre Visser is Key Industries Commercial Manager. Mr Visser's first affidavit dated 17 June 2020 explained how Key Industries had become aware of Agserv's registration in New Zealand of a new New Zealand based business that was initially named Agserv NZ Limited, which was subsequently renamed to Agserv GP Limited on 9 June 2020 (Agserv GP).

[38] Agserv GP had employed Mr Perrin as the Manager of the newly created Agserv GP entity that Key Industries believed had been set up specifically to compete with it.⁴ Mr Perrin was offered the role on 28 May 2020 and was due to start work in September 2020.

[39] Key Industries initially sought to deal with the matter efficiently by exchanging correspondence with Agserv (the Australian entity) regarding Agserv GP (the newly created New Zealand based competitor) and Mr Perrin's role and misuse of Key Industries' confidential information in terms of his newly created role as Agserv GP's Manager. However, these communications did not resolve Key Industries concerns about the imminent harm it believed it was facing.

[40] That left Key Industries in the position where it had to take legal action in the High Court to address the threat that Agserv GP posed in light of Mr Perrin's employment by that entity in light of his recent retention and misuse of Key Industries' confidential information. That action had to be undertaken quickly in order to prevent imminent damage to Key Industries' business.

[41] The High Court proceedings were complicated. That is evident from the memorandum that was filed and exhibited to Mr Visser's 15 October 2021 affidavit and the Statement of Claim filed in connection with the High Court proceedings.

[42] The High Court proceedings involved claims in equity, and an injunction to close down Agserv's attempt to use confidential information, breach of confidence claims, claims of

⁴ See *Key Industries v Perrin* [2022] NZERA 416 at [46] and [47].

dishonest assistance and claims of inducement of breach of contract. Claims for compensation for Agserv's breaches and its misuse of Key Industries' confidential information were also made on the basis Mr Perrin had passed on the confidential information he had taken from Key Industries to Mr Eris Hess and Jason Green of Agserv, so they could use it to benefit Mr Perrin's new employer Agserv GP.

[43] The Authority noted that the High Court action was forced on Key Industries by Mr Perrin's breaches and unsatisfactory conduct once the breaches had been discovered. It was appropriate that Mr Perrin paid Key Industries' necessary and reasonable legal costs that were entirely unconnected to these Authority proceedings.

[44] It was reasonable and necessary for Key Industries to have embarked on the High Court litigation, having attempted first to resolve its concerns by agreement with Mr Perrin and Agserv without success.

[45] Mr Perrin should have expected Key Industries would protect its business as it had specifically reminded him of his post-employment obligations and it had warned him that litigation would follow if he continued to fail to co-operate in resolving its concerns about his retention and misuse of its confidential information.

Were the legal fees Key Industries incurred for work done over the two periods identified by the Authority reasonable and appropriate?

[46] The Authority was able to assess the reasonableness of the legal fees incurred by reference to the invoices that the legal providers submitted to Key Industries. The charge out rates disclosed appeared appropriate to the Authority. Work was appropriately allocated in accordance the legal experience and expertise level that was required.

[47] The Authority examined the invoices to establish that the legal work done was necessary and directly connected to Mr Perrin's breaches, and was satisfied that Key Industries had established that to the required standard of proof.

[48] Mr Visser in his 15 October 2021 affidavit explained Agserv's background and why it having access to Key Industries' highly sensitive and current confidential information was considered such a threat to Key Industries' business.

[49] Mr Visser also set out Key Industries' initial actions in relation to its concerns about Agserv's actions regarding the misuse of its competitor's confidential information. Mr Visser also summarised the steps Key Industries had taken in relation to the High Court proceedings.⁵

[50] In his affidavit dated 17 December 2021 Mr Visser confirmed the nature of the legal work that was done in connection with the High Court proceedings.⁶ He pointed out that investigating misconduct and preventing the damage caused by Mr Perrin's breaches had taken more time than would have been expected because Mr Perrin failed to properly co-operate with Key Industries' investigation.

[51] Mr Perrin's failure to co-operate meant that Key Industries had to take legal action to "*properly protect its commercial interests by preventing [Mr Perrin] and Agserv [the Australian entity in the persons of Mr Hess and Mr Jason Green] from using its confidential information to set up a competing business*".

[52] Mr Visser pointed out to the Authority the resources that had to be expended by Key Industries in investigating and stopping Agserv and Agserv GP from misusing its confidential information.

[53] Mr Visser's evidence condensed the significant work that was necessary in connection with the High Court proceeding, that included:

- (a) Initial discussions and correspondence with Agserv (through its lawyers), unsuccessfully attempting to deal with the matter by consent;
- (b) When that failed, and in light of Key Industries' view that Agserv had "*clearly misled it, would not cooperate, and appeared set to take advantage of Key Industries' confidential information*", applying to the High Court for an injunction to prevent damage, for which it was necessary to prepare:
 - (i) a statement of claim;
 - (ii) an application for an injunction to stem the losses;
 - (iii) a memorandum for the High Court;

⁵ See paragraphs 18-33 and 34 and 35 of Mr Visser's 15 October 2021 affidavit.

⁶ See paragraphs 63-129 of Mr Visser's 17 December 2021 affidavit.

- (iv) the affidavit in support (which was necessary in High Court injunction proceedings);
- (v) an undertaking (which was necessary in High Court injunction proceedings);
- (c) attendance at the High Court first call hearing;
- (d) dealing with the respondents' initial defence of the application (by notice of opposition);
- (e) attendance at subsequent hearings;
- (f) negotiation with the respondents in relation to their offered undertakings to remove the urgency (but which would not have resolved the issues that Key Industries was very concerned about);
- (g) discussions with the respondents between 1 September and 7 October 2020 regarding the precise terms of settlement, which the Authority accepted had to be carefully negotiated including in relation to schedules of 'protected' clients and interests and territories, with those discussions taking a number of weeks; and
- (h) preparation of a settlement agreement (a copy of which has been provided to the Authority).

[54] Although a settlement of the High Court proceeding was achieved, that did not include a separate or specific reimbursement of Key Industries' legal costs.

[55] When assessing this special damages claim the Authority has kept in mind that Key Industries was reasonably and legitimately concerned that Agserv would set up in New Zealand, causing it significant damage by using its confidential information.

[56] As far as Key Industries was concerned, Mr Perrin and Mr Green appeared to have planned on taking 30% of Key Industries' business within a relatively short period of time and significantly more business after that "*reasonably quickly*".⁷

⁷ Above n1, at [39] – [47].

[57] If that had occurred then Key Industries' ability to keep operating could have been seriously undermined. The High Court proceeding was therefore urgently necessary and the legal costs associated with that were reasonable and appropriate in the circumstances.

[58] The Authority noted that the High Court proceedings could have been entirely avoided if Mr Perrin had been co-operative or open and honest about the nature and extent of his misuse of Key Industries' confidential information.

What special damages should Mr Perrin be ordered to pay Key Industries for legal fees it incurred prior to 6 June 2020?

[59] As a general rule, Mr Perrin's actions only had to be part of the cause of the legal fees for such legal fees to be recoverable as special damages.

[60] Key Industries is entitled to recover the damages it sustained as a result of Mr Perrin's breaches. The Court of Appeal in *Binnie v Pacific Health Limited* held:⁸

As special damages, the [legal fees] in question would be recoverable in full as opposed to party and party costs that would be recoverable only to the extent of a reasonable contribution.

[61] The Authority orders Mr Perrin to pay special damages, consisting of legal costs actually, reasonably and appropriately incurred by Key Industries over the period 11 May 2020 (when the breaches were first discovered) to 7 October 2020, when the High Court proceedings were settled of:

- (a) \$37,875.25 GST inclusive, as the total portion of the Clendons' fees that were claimed; and
- (b) \$55,245.72 GST inclusive, as the total portion of Mr Scampion's fees that were claimed.

[62] Accordingly, the total amount of special damages that Mr Perrin is ordered to pay Key Industries is \$93,120.97 inclusive of GST. Mr Perrin is ordered to pay that amount within 28 days of the date of this determination.

⁸ [2002] 1 ERNZ 438 at [18] (CA).

Interest

[63] Mr Perrin's breaches resulted in Key Industries being out of pocket. It had to outlay legal and other fees at the time they were incurred, meaning it has not had those funds available to it to use for other purposes.

[64] It is therefore appropriate that Mr Perrin pays interest on the special damages he has been ordered to pay to reflect that Key Industries has been deprived of the use of this money as a result of Mr Perrin's wrongdoing.

[65] Key Industries is awarded interest under the Interest on Money Claims Act 2016 Interest that is to run on the amount of \$93,120.97 from 1 November 2020 until the full amount of special damages awarded has been paid to Key Industries.

[66] The 1 November 2020 date represents the month following the recoverable legal fees associated with the legal work that had been completed by 7 October 2020. Key Industries had to pay these legal invoices as they became due, so it has outlaid those funds already, so is entitled to interest on the amounts it has already paid to reflect Mr Perrin's breaches have left Key Industries out of pocket.

[67] In paragraph [119] of the substantive determination dated 26 August 2022 the Authority awarded Key Industries special damages of \$2,804.10 for the LawFlow costs it incurred.⁹

[68] The interest on the award of special damages award of \$2,804.10 for the costs incurred by Key Industries regarding LawFlow invoices it paid will run from 14 December 2021 (being the date the last LawFlow invoice had to be paid) until this amount has been repaid in full. Key Industries outlaid that amount (\$2,804.10) to LawFlow prior to 14 December 2021, so it was appropriate that Mr Perrin paid interest from that date.

[69] Interest is to be calculated using the Civil Debt Interest Calculator on the New Zealand Ministry of Justice website.

[70] No interest is awarded on the penalties that have been imposed on Mr Perrin.

⁹ Above n1.

What, if any, costs should be awarded?

[71] Key Industries as the successful party is entitled to a contribution towards its actual legal costs.

[72] The Authority is likely to adopt its usual notional daily tariff based approach to assessing costs. That is currently \$4,500 for the first day of an investigation meeting and then \$3,500 for each subsequent day. This notional starting tariff will then be adjusted to reflect the particular circumstance of this matter.

[73] The Authority will treat this matter as having involved a six day investigation meeting, due to the amount of work that was required, meaning the notional starting tariff will be \$22,000 to reflect the complexity of this matter.¹⁰

[74] Key Industries is directed to file a costs memorandum within 14 days of the date of this determination. It is invited to specifically identify conduct by Mr Perrin that it says has unnecessarily and unreasonably increased its actual legal costs. This should identify as far as is possible the nature and amount of the extra costs that Key Industries submits should result in adjustments being made to the notional starting tariff.

[75] The Authority will award Key Industries the costs associated with the forensic analysis of Mr Perrin's devices as a disbursement, so that should be included in the costs application. Key Industries may also identify any other disbursements (to be supported by a GST invoice) that it seeks reimbursement of in addition to its filing fee.

[76] Mr Perrin may elect to file a costs memorandum and any further evidence he wants the Authority to consider when assessing costs within 14 days of receipt of Key Industries' costs application.

[77] If Mr Perrin wants to put his ability to pay an award of costs in issue, then he must specifically address the evidence that Key Industries has previously filed with the Authority regarding his apparent assets. Mr Perrin must also provide an affidavit that fully and clearly sets out his financial circumstances and ability to pay costs.

¹⁰ The reference to complexity is to the significant difficulties Key Industries experienced in getting visibility on the full extent of Mr Perrin's breaches, which the Authority notes was not able to be fully ascertained due to the obstructive approach Mr Perrin elected to adopt.

[78] The Authority acknowledges that preparing costs submissions in this matter may be a more lengthy and complex exercise than usual so either party may apply to extend the 14 day deadline for submitting their costs memorandum if need be provided all costs submissions will still be filed before 22 December 2022.

Rachel Larmer
Member of the Employment Relations Authority