

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 340
3043853

BETWEEN SMART EXPRESS LIMITED
Applicant

AND AARON KUMAR
First Respondent

AND MAYANK SINGH
Second Respondent

Member of Authority: Vicki Campbell

Representatives: Stephen Langton for Applicant
Craig Andrews for First and Second Respondents

Investigation Meeting: 3 November 2018

Oral Determination: 3 November 2018

Record of Oral
Determination: 5 November 2018

**RECORD OF ORAL PRELIMINARY DETERMINATION OF THE
AUTHORITY**

Employment relationship problem

[1] Smart Express Limited provides private and commercial moving and delivery services, predominantly throughout the Auckland Region, but also nationwide. It relies extensively on technology to support its business and competes for work with everyone from individual van/truck operators through to large corporate delivery firms.

[2] Mr Kumar is currently employed as the Finance and Commercial Manager for Smart Express and Mr Singh is its Marketing and Communications Manager. Mr Kumar is one of four members of the senior management team while Mr Singh participates in management team meetings on an as required basis for matters relating to his role. Mr Kumar and Mr Singh have both resigned from their employment and will be leaving on 15 and 30 November respectively.

[3] On 31 August a new company called Prime Transport and Logistics Limited was registered on the companies register. Mr Kumar is the only director of the company and holds 50% of the shareholding with Mr Singh holding the remaining 50%. On 19 August Mr Singh registered the domain name www.primetransport.co.nz. Both Mr Kumar and Mr Singh have email addresses attached to the Prime Transport website.

[4] Prime Transport has purchased an Isuzu Truck and that truck has been observed undertaking moving and delivery services.

[5] On 1 November 2018 Smart Express lodged an urgent application for orders against Mr Kumar and Mr Singh. I granted urgency and have convened this investigation meeting to address preliminary matters only. I appreciate the parties giving up time on their weekend to address matters urgently.

Issues

[6] Smart Express has asked the Authority to address the following preliminary matters:

- a) Make orders that property under the custody, possession and control of the two respondents be made available to Smart Express for inspection and forensic examination;
- b) Make orders to require the two respondents to comply with their employment obligations including their duty of fidelity;

[7] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Application for inspection and forensic examination of the respondent's property

[8] Smart Express is considerably dependent on technology to manage and to operate its business. It has developed a number of software programs, "apps" and utilises online systems for this purpose.

[9] Through their work at Smart Express Mr Kumar and Mr Singh have been involved in and have a detailed understanding of the software and apps used by Smart Express.

[10] In addition to its own systems Smart Express utilises an online system called "Smartmove" to bid for work. Smartmove is an online website that provides its customers with quotes from various moving companies within New Zealand. Smart Express is one of a number of moving companies that register with Smartmove to obtain leads for and then compete for moving jobs.

[11] When a new enquiry is made through Smartmove an email is sent to Smart Express with general information about the job. Smart Express then has the option to accept the lead and quote on it. If the lead is accepted more details are provided about the job. Smart Express has a partially automated template system for preparing quotes taking into account the specific requirements of the job. Smart Express's pricing strategy includes some general guidelines used as a starting point.

[12] Both Mr Kumar and Mr Singh are familiar with the preparation of these quotes, the pricing strategy and are able to prepare quotes. The final quote is emailed to the customer. Mr Kumar and Mr Singh are able to access the email account and see what Smart Express has quoted for Smartmove jobs.

[13] Smart Express became aware on 23 October that Mr Kumar had approached Smartmove and Prime Transport had signed up to Smartmove using its online form. Mr Singh was named as the contact person for Prime Transport. Smart Express has provided information to the Authority which shows that between 14 September and 20 October Prime Transport has purchased 65 leads. 45 of those leads were also provided to Smart Express. Purchasing a lead gave Prime Transport the right to quote on the job.

[14] A job is “won” once the work quoted on has been completed. To date Prime has won five of the leads. Of those five, Smart Express quoted on four them. Information about when leads were purchased indicates Mr Singh and/or Mr Kumar purchased leads at times when they were supposed to be working.

[15] At the investigation meeting Mr Kumar and Mr Singh consented to provide their electronic devices being their laptops and mobile phones for inspection and forensic examination. By consent the devices will be put in the hands of Mr Langton who will deliver them without accessing them to a forensic expert Mr Brent Whale. The Laptops and mobile phones will be cloned and returned to each of the respondents.

[16] At the investigation meeting Mr Kumar and Mr Singh provided Smart Express with a list of web based platforms which they have agreed can also be forensically examined. Mr Kumar and Mr Singh have agreed to cooperate in the examination of the web based platforms and will attend with Mr Whale to assist in that process.

[17] The investigation and examination of the devices and the web based platforms must be completed as swiftly as possible and in any event no later than end of business on Tuesday 6 November 2018.

[18] I have reserved leave to allow Smart Express to return to the Authority if the timeframes present any difficulties.

Compliance orders

[19] Smart Express says both Mr Kumar and Mr Singh have breached the express and implied terms of their employment agreements.

[20] The employment agreements signed by both Mr Kumar and Mr Singh are of a similar form and both include specific obligations to conduct their duties and themselves in the best interests of Smart Express, to act in good faith and to do nothing to breach trust and confidence.

[21] By signing the employment agreement Mr Kumar and Mr Singh have also agreed:

- a) To keep confidential all information including information about turnover, products and services, messages, company data, trade secrets, client lists and client information;
- b) All work produced, ideas, concepts, copyright, inventions and patents, trademarks or other processes developed or created by them for Smart Express belongs to Smart Express.
- c) If they became aware of any conflict between their interests to those of Smart Express they would disclose it in writing at the earliest opportunity;
- d) That they would not be engaged or concerned in the conduct of any business that competes directly or indirectly with Smart Express;
- e) That their use of the internet and email facilities would not be contrary to Smart Express's best interests;
- f) The use of their personal email would not be contrary to their duties to Smart Express;
- g) That for three months after their employment ends they will not seek to solicit or carry out any work of the same nature for any client or customer of Smart Express, if they had dealings with that client during their employment;
- h) That for three months after their employment ends, they will not solicit or engage any employee of Smart Express with whom they had dealings during their employment.

[22] In addition to those duties Mr Kumar and Mr Singh also have implied duties of fidelity and a statutory duty to act in good faith.

[23] On or about 19 October a major commercial client advised Smart Express that Mr Kumar had underquoted for work with the company. The client provided a copy of an email sent by Mr Kumar on Prime Transport letterhead (including contact telephone numbers) dated 10 October and addressed to the client. The email advised the client that Mr Kumar and Mr Singh had started their own transport business and

had already started doing work. Mr Kumar invited the client to consider Prime Transport's rates and if they wished to proceed, to complete an account application form.

[24] Smart Express has provided evidence of losses encountered by the business during August, September and October 2018 from other client work. This is in addition to the competition when quoting through the Smartmove website for work.

[25] I am satisfied Mr Kumar and Mr Singh by their conduct of competing directly with their employer while still employed are in serious breach of their duties and obligations as employees.

[26] Mr Kumar and Mr Singh are ordered to immediately comply with all of the express and implied terms of their employment agreement.

[27] If Mr Kumar and/or Mr Singh are in possession or control of any hard copies of documents containing information belonging to Smart Express and/or containing information obtained from Smart Express they are ordered to return these documents by end of business Monday 5 November 2018.

[28] If Mr Kumar and/or Mr Singh are in possession or control of any documents and emails (and attachments) created and/or received by them in the course of their employment with Smart Express they are ordered to return these documents by end of business Monday 5 November 2018.

[29] If Mr Kumar and/or Mr Singh are in possession or control of any documents, emails (and attachments), information or correspondence sent or received, or downloaded including to any external device they are ordered to return these documents by end of business Monday 5 November 2018.

[30] For the avoidance of doubt "information", "documents", "emails" and "correspondence" includes all information and documents whether in hard copy or electronic copy and whether situated on local hard-drives, servers, cellphones, online storage platforms, or any other media storage device within the custody, possession, or control and Mr Kumar and/or Mr Singh.

Costs

[31] Costs are reserved.

Vicki Campbell
Member of the Employment Relations Authority