

- (a) \$9,000 in respect of the value of the invoices;
- (b) \$28,000 in respect of the costs of its investigation into the matter; and
- (c) \$3,000 as general damages for inconvenience and interruption to business.

[4] The ARC also seeks two penalties of \$5,000 each against Mr Tilialo - one in relation to each invoice. The claim for penalties is founded on alleged breaches of his duties: of fidelity; of trust and confidence; and to take reasonable skill and care in respect of the use of the funds. The claim for penalties also relies on breaches of express terms of the ARC's policies in respect of his: use of the funds; abuse of his authority to authorise expenditure; failure to disclose a material conflict of interest arising out of his relationship with X; and fraudulent activity in respect of the funds.

[5] The ARC seeks a further order that the penalties be paid to it.

Background

[6] At the material time Mr Tilialo was employed as the programme manager in the ARC's Regulatory Services Department ("RSD"). He was responsible for the business processes which supported the department. In 2007 he reported directly to the general manager RSD, Janine Bell.

[7] Because of the level of management associated with his position, Mr Tilialo had authority to authorise expenditure on ARC's behalf of up to \$50,000 on any single contract or transaction.

1. The need for a customer service strategy

[8] Following discussion during an RSD management team strategic planning workshop held in April 2007, Mr Tilialo was to co-ordinate action on customer service management. The RSD had been created from an amalgamation of several departments in 2005, and there was no customer service strategy applying across the RSD. During a subsequent weekly catchup meeting with Ms Bell, Mr Tilialo indicated that he may require assistance with co-ordinating the customer service

strategy as this was not an area of strength for him. Ms Bell indicated the ARC may be able to arrange assistance, but no details were discussed either at the time or later.

[9] Mr Tilialo presented a document titled 'Draft for Discussion: Customer Service in Regulatory Services Department of the ARC' during a further catch up with Ms Bell on 24 July 2007, and at an RSD group managers' meeting on 25 July. The document was a little under four typed pages long and was principally concerned with identifying methods of responding to and communicating with customers, as well as the timeframes for doing so. The ARC later found that it bore a strong similarity to one obtainable from the website of an organisation based in Oregon, USA.

[10] Another team - the consents and compliance process and procedures review team - had also prepared a customer service charter for discussion at the 25 July meeting. The document was 5 pages long, and included 5 appendices comprising an additional 13 pages. By email message dated 26 July its author copied it to several staff members including Mr Tilialo, and sought comments.

[11] Ms Bell decided someone should edit the two documents and merge them into one. She recorded her view in an email message to Mr Tilialo dated 23 August 2007. When Ms Bell discussed her proposal with Mr Tilialo, he indicated he knew someone who could do the job. Ms Bell agreed in principle that a third party be engaged to carry out the task of editing and merging the documents. She anticipated, although she did not say so, that it would cost some \$400-500.

2. The engagement of X

[12] When Mr Tilialo told Ms Bell he knew someone who could do the job he did not give any names, but had in mind X and another person.

[13] The other person had experience in customer service, and Mr Tilialo had limited general exchanges with that person in or about May 2007 although no invoice was ever submitted. X had an unrelated qualification and at the time was employed full-time in an unrelated position at another local body. She had no expertise in regulatory services, although in her previous employment she had prepared policies

and procedures for implementing community projects. According to Mr Tilialo, this included processes for engaging the community, objectives regarding customer information and participation, and methods of obtaining feedback to and from the community. Mr Tilialo purported to engage X to provide him both with general assistance as mentioned to Ms Bell after the April workshop, and in editing and merging the two documents discussed at the 25 July meeting.

[14] At the same time Mr Tilialo was conducting an extra-marital relationship with X. Mr Tilialo did not disclose to Ms Bell the nature of the relationship. Also from about early 2007 Mr Tilialo and X were planning a trip to the USA together, intending to pay half each of the total cost.

[15] Ms Bell said in evidence that, on several occasions, she told the regulatory services managers they were to engage contractors using a letter of engagement and a written contract. Mr Tilialo did not send a letter of engagement or prepare a contract when he engaged X. The only paperwork available took the form of the two invoices, repayment of which is now sought. Mr Tilialo was aware of the requirements regarding letters of engagement and the preparation of contracts.

3. The invoices

[16] The invoices on which payment was made were dated 28 August 2007 and 1 October respectively, both in the sum of \$4,500 plus GST (being \$5062.50).

[17] X forwarded certain invoices to Mr Tilialo by email. However the first invoice she forwarded on the morning of 29 August was in the name of a registered company of which she is the director and a shareholder. It provided a bank account number for payment and gave her own name as a contact person. Later that day she forwarded a replacement invoice in the name of 'Matukutureia Charitable Trust', removing her name and providing a different bank account number.

[18] X is a trustee of the registered 'Matukutureia Charitable Trust'. According to its trust deed the trust promotes and supports initiatives to assist the economic advancement of Maori, fosters a sense of community in South Auckland in particular, promotes healthy living and participation in sports and recreation programmes,

encourages Maori and Pacific culture and arts in the community and organises opportunities catering to the spiritual wellbeing of youth. It is not involved in providing regulatory services or customer service advice or anything similar.

[19] By email to Mr Tilialo dated 2 October 2007 X again forwarded an invoice in the name of her company and containing her own name. There was no record that she sent any other invoice to Mr Tilialo.

[20] Both of the invoices Mr Tilialo approved and caused to be processed for payment were in the name of 'Matukutureia Trust'. Neither included X's name for contact purposes. When he was asked to explain how and why the name of the payee on the invoices had been changed, Mr Tilialo was unable to do so. The ARC believes the change from Matukutureia Charitable Trust to Matukutureia Trust was deliberate, because a payment to a charitable trust would be seen as out of the ordinary. Similarly it believes the deletion of reference in the invoices to X and her company was an attempt to obscure the identity of the payee.

[21] Both the August and October invoices were expressed to cover work done in:

“Completion of contract services for Regulatory Services Department including:

Drafting of the Customer Services Charter

- . Development of a customer services policy and strategy
- . Drafting of an action plan
- . Compilation of templates and survey results.”

[22] The information contained in the invoices did not include details even Mr Tilialo expected to see in contractor invoices. In an email message dated 23 August 2007 he had provided a 'guide on the level of information expected on consultant/contractor invoices to enable the authorising officer to process your payment more efficiently.' The guide included a requirement for the provision of itemised detail of the work being invoiced. The necessary detail included the date(s) on which work was done, a description of the activity in question, and the amount of time spent on it. The invoices from X did not contain itemised detail of the work done. Nor did they include other requirements in the guideline, such as a purchase order number, or the period covered by the invoice.

[23] Mr Tilialo did not query the invoices and payment was duly made to the nominated account.

4. The justification for the amounts invoiced

[24] In addition to the invoicing procedure just discussed there were questions about the value of the work done in comparison with the quantum of the payments, and about who had done the work referred to in the invoices in any event.

[25] During the ARC's investigation and the Authority's, Mr Tilialo said that X prepared the four-page document he had discussed with Ms Bell as well as during the 25 July meeting. He said X sent him information from other websites to use as examples, and he instructed her to use the material as the basis for the document.

[26] Mr Tilialo posited that X sent the document to his home email address and he transferred it to his work address. He also said there was other email traffic between himself and X, which may have been conducted from his home address. He may have transferred material from his home to his work computer by memory stick. However although Mr Tilialo had an opportunity to provide supporting material at the time of the ARC's investigation into the matter, he did not do so. He has told the Authority that his own computer is no longer available as it was stolen.

[27] The ARC says a forensic IT examination conducted in association with its investigation indicated Mr Tilialo created the four-page document. It also says the forensic investigation did not identify any email traffic of the kind Mr Tilialo said occurred.

[28] The forensic examination indicated Mr Tilialo emailed the document, as originally drafted, from his work address to his home address on 24 May 2007. The document was sent as an attachment to the message. No other relevant material was produced. This means I accept the emailed message was created and sent as described, but there was no evidence of when or how the document itself (as distinct from the message to which it was attached) was created. While it was plain from the contents that relatively little work was involved in preparing the document, I can say

no more than that and am unable to make a finding about who is more likely to be the creator of the document.

[29] In an email message dated 28 August 2007 Mr Tilialo sent X copies of a document which was the same as the four-page document with minor editorial amendments, together with a second document. The second document was a marked up and edited version of the second customer service document discussed on 25 July and circulated the next day, with an additional melange of pages which appear to be copies or versions of the pages in the main document. One of these pages contains an appendix obtained from elsewhere and apparently amended for inclusion in the ARC document.

[30] In an attachment to an email message to Mr Tilialo dated 30 August 2007, X provided a single draft Customer Services Charter. That document is a merged and supplemented version of the other two documents. It retains the appendices from the second document, adds an 'operations and training manual' which contains much of the four-page document, and adds 10-pages of text expanding on customer services standards and listing a set of customer service themes. The ARC says parts of the document include extracts from material found on a Sydney website and from the Hutt City Council site.

[31] In an attachment to an email message to Mr Tilialo dated 2 October 2007, X provided a final version of this document.

5. The use to which the invoiced payments were put

[32] The ARC later obtained from X copies of bank statements in the name of the 'Matukutureia Charitable Trust' for the account number nominated in the invoices, and for the period July – October 2007. The statements show that deposits in amounts corresponding with the amounts on the invoices were made on 5 September and 3 October 2007. On both 6 September and 9 October the same amounts were withdrawn. Aside from bank-related transactions, no other transactions were recorded in the statements for the period 16 July – 19 November 2007.

[33] The ARC also obtained copies of X's credit card statements for the same period. These show deposits of \$5,000 into the card on 6 September, and \$4,065 on 11 October. The credit card statements also record a number of transactions in the USA. Mr Tilialo and X travelled to Los Angeles, New York and Las Vegas in September 2007.

6. The matter comes to the attention of the ARC

[34] In early 2008 the ARC received a report from a third party that X had told the third party of a recent trip to New York with her 'boyfriend'. The trip was allegedly paid for by the ARC for whom the boyfriend worked. The ARC began a search for relevant invoices, in an attempt to identify whether the report had substance. I do not regard matters associated with the report as any more than evidence of the trigger for the ARC's investigation.

[35] Meanwhile the final Customer Services Charter was not presented to anyone until March 2008, when Mr Tilialo's new manager, Philippa Wilson, sought it from him. When she read it, Ms Wilson was concerned at the poor quality of the document. She believed it contained inaccuracies regarding the statutory process and appeared to use terms associated with the Australian planning system. The document has not been used. Ms Wilson spoke to Mr Tilialo about the matter on 26 March 2008. He admitted the document was 'a shocker', although he now says he was referring to his failure to properly check it rather than commenting on its contents. He also told Ms Wilson that X had done the work, and he had not checked it because of the pressure of his own work.

[36] Mr Tilialo repeated in evidence that he did not check the document because of pressure of work. When it was put to him that there should have been consultation with the staff to whom the document would apply – particularly as it was to apply across the entire RSD – Mr Tilialo said pressure of work meant the matter was not a priority.

[37] Mr Tilialo had resigned on 25 March 2008. While he was still at work during his notice period, the ARC discovered the invoices and initiated a disciplinary process. It dismissed Mr Tilialo for serious misconduct on 23 April 2008.

7. The ARC's investigation

[38] The additional claims for damages are based on the costs of and inconvenience caused by the investigation process embarked upon after the invoices were discovered.

[39] An invoice from the ARC's solicitors, dated 30 April 2008, was expressed to cover attendances in relation to Mr Tilialo and spanned discussions about the invoices, attendance at and advice in respect of a number of meetings, reviewing material and drafting correspondence. The legal fees incurred were \$22,408.12 (excl GST).

[40] Ms Bell, Ms Wilson and a third person comprised the 'investigating team'. Ms Bell sought a meeting with Mr Tilialo in a letter dated 10 April 2008, which described the invoices, referred to X and queried who she was, noted that there was no evidence the work in question had been done at all, and set out the concern that ARC funds had been misused. There followed meetings on 11, 14 and 17 April, and written responses from Mr Tilialo dated 11, 16 and 22 April.

[41] The investigation included a forensic examination of Mr Tilialo's work laptop, including cloning and an analysis of the contents. The investigator's report was dated 21 April 2008. The amount invoiced by the forensic examiner was \$5,408.90 (excl GST).

The claims for damages

[42] The jurisdiction of the Employment Relations Authority to address the claims made here is set out in s 162 of the Employment Relations Act 2000, in particular:

“... the Authority may, in any matter related to an employment agreement, make any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts, ...”

[43] The subject matter is related to an employment agreement in that the ARC says Mr Tilialo has breached several of the express and implied terms of the parties' employment agreement, being:

- (a) the implied terms of fidelity, trust and confidence; and to use reasonable care and skill;
- (b) express terms in the discipline and dismissal policy incorporated into the agreement - namely the prohibitions on misuse or unauthorised use of ARC property and abuse of ARC authority including delegated authority, the failure to disclose a material conflict of interest, and fraudulent activity.

[44] The orders sought are orders for the payment of damages in respect of these breaches. Obviously, orders for damages for breach of agreement are orders the High Court or a District Court may make.

1. The invoices

[45] Although I was unable to make a finding about who created the four-page document discussed in July, I conclude that X probably prepared the customer service document forwarded to Mr Tilialo in draft form on 30 August 2007 and in final form on 2 October 2007. She had merged the two existing documents and made some additions and alterations.

[46] Mr Tilialo had no reasonable grounds for authorising payments as large as were made. The 30 August/2 October document did not warrant a payment of that magnitude and only the most cursory reading of it - particularly by someone familiar with the original two documents - should have shown that to be the case. Further, even if X had prepared the four-page document, I have already commented on the small amount of work that would have been required. Mr Tilialo's explanation that pressure of work led him not to check the 30 August/2 October document is not acceptable.

[47] Not only that, X's expertise in the area was doubtful and her suitability for the engagement was questionable. More importantly, even if she was in principle a suitably qualified person, Mr Tilialo was conducting a personal relationship with her at the time. The ARC disciplinary policy included the failure to disclose a material conflict of interest as a ground of serious misconduct. Mr Tilialo said he did not

disclose the relationship (and was later unwilling to admit to it) because he considered it a personal matter and not the ARC's business. Later he said he was embarrassed. That view is unacceptable from someone in a relatively senior management position, purporting to engage his lover as a contractor to the ARC and subsequently approving for payment to her a significant sum of money.

[48] Further, there was no transparency in the arrangement. Mr Tilialo did not complete a letter of engagement, or require X to provide the level of detail usually required in a contractor's invoice. Such circumstances point away from the possibility of an innocent explanation of the difference between the payee and contact details on the invoices X forwarded to Mr Tilialo, and the invoices he approved for payment.

[49] Finally immediately on receipt, the payments made to the 'Matukutureia Trust' were moved to X's credit card account. This was done just before and just after the trip to the USA. The funds went towards paying costs of the trip also charged to the card.

[50] For these reasons I accept the ARC's submissions that Mr Tilialo breached the implied duty to serve his employer in good faith and fidelity, and breached his obligation of trust and confidence. Even on a view of events most favourable to him, Mr Tilialo failed to use proper care and skill in the engagement and payment of X.¹

[51] I also accept the submissions based on breach of the express terms of the agreement in that Mr Tilialo misused ARC funds by authorising payment at a level that was plainly not warranted, failing to follow understood procedures for engaging contractors and failing to disclose the relationship with X in the process. For the same reasons I accept the submission that he abused his delegated authority to authorise expenditure of up to \$50,000. The failure to disclose a material conflict of interest also contributes to the misuse of funds and abuse of delegated authority.

[52] The allegation of fraud is more serious. In that regard I take into account that X was overpaid, the failure to disclose the conflict of interest and its nature, the lack of transparency in X's engagement and the lack of an explanation of the change to the

¹ ref **Lister v Romford Ice & Cold Storage Co Limited** [1975] 1 ALL ER 125

payee details on the invoices, and the fact that X was able to fund her share of an expensive trip to the USA with Mr Tilialo. It is difficult to avoid an inference of dishonesty in that conduct, and I find accordingly.

[53] Mr Tilialo's breaches of the employment agreement caused loss to the ARC. Mr Tilialo is therefore ordered to pay to the ARC the sum of \$9,000 in order to return it to the position it would have enjoyed had the breaches not occurred.

2. The cost of the investigation

[54] The Court of Appeal has commented that legal costs incurred prior to the issue of proceedings may be treated as special damages.² The invoiced fees of \$22,408 here are readily separable from costs associated with bringing this proceeding, and in principle can be claimed.

[55] The allegations against Mr Tilialo were very serious, as was the conduct giving rise to them. The conduct amounted to breaches of the employment agreement in the several respects discussed above. Its existence, or suspected existence, caused the ARC to seek legal advice and in turn to incur the costs as claimed. It was reasonably foreseeable that legal advice would be sought and costs incurred in such circumstances.

[56] The forensic investigator's fee was \$5,408.90. Since much of the communication and documentation relevant to the breaches was in the form of emailed messages or otherwise captured electronically, and Mr Tilialo was not forthcoming with the details himself, I accept there was a causal link between his breaches and the cost of the forensic investigation. I also find it reasonably foreseeable that such investigation - and the resulting cost - would be necessary as a result of the breaches.

[57] Mr Tilialo is therefore ordered to pay to the ARC special damages in the amounts of:

- (a) \$22,408 in respect of legal fees; and

² **Binnie v Pacific Health Limited** [2002] 1 ERNZ 438

(b) \$5,408.90 in respect of the cost of the forensic investigation.

3. General inconvenience

[58] The claim for damages in respect of general inconvenience was brought as a claim for general damages. It amounts to a claim for compensation for pecuniary loss where no specific loss can be proved. It is in contrast with and addition to the claims for special damages, where the specific loss can be proved.

[59] The claim is based on the loss of executive time, general inconvenience and interruption of the ARC's business caused by Mr Tilialo's breaches. It relies in particular on the time and effort the ARC's investigation team was obliged to devote to the investigation at the expense of the team members' other duties.

[60] Counsel for the ARC cited in support a decision of the Employment Court in **Medic Corporation Ltd v Barrett (No 2)**³. Although the matter was discussed in association with a claim for special rather than general damages, the court allowed in part a claim for executive time spent on particular attempts to restore supplier relationships damaged as a result of the defendants' breaches.⁴

[61] In doing so the court expressed reservations about aspects of the calculation of the loss. The reservations have less prominence in a claim for general damages. Thus there has been no attempt here to make an assessment based on a notional hourly rate and the time spent on the investigation into Mr Tilialo's conduct, for example. That the claim here is modest also avoids difficulties in quantification.

[62] I consider it likely that the team members were obliged to devote significant amounts of time to the investigation, including preparing for and attending meetings with Mr Tilialo and deliberating on and reporting the outcome. Unless they had nothing else to do, which was not suggested, this would inevitably have been inconvenient and had an adverse effect on their attendance to other duties.

³ [1992] 3 ERNZ 977.

⁴ At p 987-988.

[63] Bearing in mind that three people were involved, that the matter under investigation was serious, and that the investigators were senior managers, I regard the amount sought as reasonable. The loss was caused by, and foreseeable as a result of, Mr Tilialo's breaches.

[64] Mr Tilialo is therefore ordered to pay the ARC \$3,000 as general damages.

The claims for penalties

[65] In **Xu v McIntosh**⁵ the Employment Court said of penalties in general:

“[47] ... A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching ... an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it.

[48] The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate. In deciding whether any part of the penalty should be paid to the victim of the breach regard must be had to the degree of harm that the victim suffered as a result of the breach. ...”

[66] Mr Tilialo's conduct was such that punishment and deterrence is appropriate. His breaches of the employment agreement were not technical and inadvertent. An order for the payment of a penalty is appropriate. Since the ARC suffered harm as a result, it is appropriate to make an order under s 136(2) of the Employment Relations Act for the payment of the penalty to it.

[67] Since the same set of facts, and the same breaches, underlay both invoices I order a single penalty in respect of the matter. In assessing the level I take into account that, in addition to the order for repayment of the invoiced amounts, I have made other orders for payment by way of special and general damages. Much of the harm suffered by the ARC has been addressed in those orders, leaving the punitive and deterrent elements available in the form of an order for payment of a penalty.

[68] For these reasons Mr Tilialo is ordered to pay a penalty of \$2,000 to the ARC.

⁵ [2004] 2 ERNZ 448

Summary of orders

[69] Mr Tilialo is ordered to pay to the ARC damages of:

- (a) \$9,000 in respect of the invoices;
- (b) \$22,408 in respect of legal fees;
- (c) \$5,408.90 in respect of the forensic IT investigation; and
- (d) \$3,000 as general damages.

[70] Interest is payable on the above amounts, calculated as 4.8% per annum from the date of this determination to the date of payment.

[71] Mr Tilialo is further ordered to pay to the ARC a penalty of \$2,000.

Additional matter

[72] On 7 October 2009 counsel for the ARC drew attention to a decision of the Employment Court in **Masonry Design Solutions Limited v Bettany**.⁶ Both parties have filed memoranda regarding the decision. I have considered the decision, and it reinforces the view I had reached.

Costs

[73] Costs are reserved. Mr Tilialo is in receipt of a grant of legal aid. The ARC said if its claim succeeds it intends to seek costs against Mr Tilialo under s 40(3) of the Legal Services Act 2000.

[74] If the matter is not resolved any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in response.

R A Monaghan

Member of the Employment Relations Authority

⁶ 21 August 2009, Chief Judge Colgan, AC 30/09