

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 24
5312242

BETWEEN	CHRISTIAN PATRICK JORDAN Applicant
AND	COMPASS COMMUNICATIONS LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Submissions Received	10 October 2011 and 12 January 2012
Determination:	18 January 2012

COSTS DETERMINATION OF THE AUTHORITY

[1] In its determination of 12 September 2011 – [2011 NZERA Auckland 395] - the Authority reserved costs for written application to be made within 28 days. The parties did not dispose of the question by agreement and an application was made on behalf of Mr Christian Jordan on 10 October 2011.

[2] Compass Communications Ltd was granted extensions of time to file written submissions by 12 January 2012, which it did.

[3] The parties claim costs against each other; Mr Jordan seeking \$6,000 and Compass Communications Ltd \$6,900.

[4] The investigation meeting took two days. The Authority (member Yvonne Oldfield) determined that Mr Jordan had been unjustifiably dismissed because it found that Compass Communications Ltd had withheld from him crucial information relied on by when deciding to dismiss him and that this had rendered the process unfair.

[5] In assessing the remedies that Mr Jordan should receive to resolve his grievance the Authority, as required, considered whether by his conduct he had contributed to the situation that gave rise to his unjustified dismissal. The Authority concluded from the evidence that while employed by Compass Communications Ltd, Mr Jordan had attempted to solicit other employees of company to follow him into employment he had been seeking with a direct competitor of it. The allegations of breach of fidelity against Mr Jordan were held to be well founded by the Authority which determined:

[28] The conduct in question amounts to a clear cut and serious breach of his duties of loyalty and of good faith. Had [Compass Communications Ltd] followed a fair procedure, with full disclosure to Mr Jordan of all the relevant information, the dismissal would have been justified. I am satisfied that Mr Jordan's conduct was sufficiently serious for his contribution to be set at 100%.

[6] Accordingly no monetary remedies were required to be paid by his former employer to Mr Jordan.

[7] While the provisions of s 124 of the Employment Relations Act 2000 relating to contributing behaviour do not expressly apply to costs awards, as they are not a remedy for a personal grievance, the Authority's discretion to award costs has been held as one appropriate for the exercise of its jurisdiction in equity and good conscience: see *PBO Ltd v. Da Cruz* [2005] 1 ERNZ 808. As a further matter of principle costs awards are not to be used as a punishment for a party's conduct in relation to a case.

[8] Although on behalf of Mr Jordan it is submitted he was "successful" in his claim for unjustifiable dismissal, that is not the reality of the situation and I consider it unlikely that Mr Jordan expended \$11,500 to achieve a declaration that he had been unjustifiably dismissed for procedural reasons, but nothing else.

[9] Mr Jordan was well represented in this case and is likely to have known the risk that his conduct would be counted against him to largely if not fully extinguish his entitlement to any of the financial remedies he was seeking.

[10] Turning to the application by Compass Communications Ltd for costs, I am not satisfied that *legal* costs such as may be properly compensated for have been incurred. Total costs are claimed to be \$9,749 which include an unspecified amount of "fees paid for our legal consultant". Other costs appear to be expenses in relation

to preparation by the General Manager – Sales of the company, Mr Woodhams, who was the representative of the company at the two day investigation meeting. There is no documentation such as an invoice establishing the fees paid to a legal consultant and who that agent might have been.

[11] Considering all the circumstances and the outcome of the case in practical terms, I find that costs should lie where they fall. Accordingly, no order is made.

A Dumbleton

Member of the Employment Relations Authority

(Pursuant to clause 16 of Schedule 2 of the Employment Relations Act 2000)