

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON BRANCH**

BETWEEN	Recon Professional Services Limited (applicant)
AND	Christopher Michael Andrews (respondent)
REPRESENTATIVES	Blair Malcolm for the applicant No appearance by or for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	10 May 2005
DATE OF DETERMINATION	16 May 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. The Company seeks to recover various monies or damages from its former Operations Manager, Mr Chris Andrews – statements of problem filed on 5 July and 8 October 2004, and as varied at the investigation on 10 May 2005.

2. No statement in reply has ever been received from Mr Andrews. Mr Andrews has never made himself available for mediation despite the Company's willingness to undertake the same. Similarly, and despite his undertaking on at least one occasion to attend, Mr Andrews has consistently avoided participating in telephone conference calls convened by the Authority so as to attempt to resolve this employment relationship problem by setting it down for mediation and/or an investigation, etc.
3. Because of Mr Andrews' determined non-cooperation I directed this matter to an investigation: ss. 160 & 173 of the Act applied. Notice of the investigation was served on the respondent – refer to the affidavit from Trevor Prescott, the Company's present Operations Manager, dated 6 April 2005. I am also satisfied Mr Andrews was properly informed because, by telephone on the morning of the investigation, Mr Andrews confirmed his knowledge of it by advising an Authority support officer that he was unable to attend because he had not been able to obtain a relief for his courier duties.
4. I elected to proceed to investigate the application as Mr Andrews had enjoyed reasonable notice of the investigation. Also, he had made no earlier effort to advise the Authority of his difficulties when it was reasonable to expect him to do so. Finally, because the respondent has consistently failed to co-operate in efforts to address this employment relationship problem, I deemed it appropriate to proceed: Clause 12 of Schedule 2 of the Act applied.
5. During the investigation the Company's Managing Director, Mr Blair Malcolm, advised he was withdrawing a matter earlier put before the Authority by way of the amendment to the statement of problem received on 18 October 2004: Clause 14 of Schedule 2 of the Act applied.

The Company's Problem

6. The applicant is a limited liability company providing security and related services.
7. By letter dated 22 April 2004 Mr Andrews was dismissed by it for serious misconduct, including claiming to be in possession of a warrant to enter and install surveillance equipment when no such warrant existed while stating approval existed to undertake

surveillance services for a client up to a value of \$50,000 when no authorisation in fact existed (refer to notice of dismissal set out in the applicant's bundle of documents received by the Authority on 2 May 2005).

8. In an unsigned letter of the same date Mr Andrews gave an account of his conduct and, amongst other things, accepted that "... *you could dismiss me for serious misconduct for being overly eager and dishonest ...* " (refer to the applicant's bundle).
9. At the investigation on 10 May the Company confirmed it was seeking the following from Mr Andrews:

First Damages Claim: Bogus Surveillance Operation

10. In September 2003, and as a result of advice from Mr Andrews, the Company says it set up an elaborate surveillance operation. It ran for two weeks and involved nine officers and a significant amount of technical equipment. Mr Malcolm said that Mr Andrews told him he had approval for the operation from the Department for Child Youth and Family (CYF). Mr Malcolm says that he subsequently became suspicious about the operation and pressed Mr Andrews for documentary evidence of the client's authority. He says Mr Andrews showed him a letter, on CYF letterhead.
11. Mr Malcolm now believes the respondent and not the client created the letter; Mr Malcolm does not have a copy of it.
12. Mr Malcolm also says that, on presenting to CYF an invoice for the operation, along with the client's order number provided by Mr Andrews, he discovered that both the order and the order number were fictitious. CYF had never authorised the operation: it declined to pay the applicant's invoice.
13. Mr Malcolm says he spoke to the respondent and obtained Mr Andrews' agreement to reimburse the Company the cost of the operation (refer to the undated and unsigned 6 paragraph memo reportedly provided by Mr Andrews, commencing with the words, "*Hi Sorry this might sound impersonal etc*", and including the following, "... *I will reimburse you **all** your costs on this job*", as attached to the amended statement of problem filed on 18 October 2004).

- 14 The cost of this bogus operation to the Company was \$39,798.90 (refer to invoice 26005 dated 12 February 2004. Mr Malcolm seeks to recover that money from the respondent.

Second Damages Claim: Exceeding Quoted Authority

15. The Company says Mr Andrews provided another client with a quote of \$13,000 for a separate surveillance operation. The client authorised the operation, consistent with the quote given, in February 2004. The Company says it unnecessarily incurred costs well in excess of the quoted amount as a result of unauthorised initiatives by Mr Andrews. Mr Malcolm says when he initially questioned Mr Andrews he was assured he had authority from the client to incur the additional costs. The client denied this was the case and relies instead on the original quote.
16. The Company now seeks to recover the difference – \$21,948.50 (refer to invoice 30607, dated 29 March 2005, attached in the applicant's bundle of documents) – from Mr Andrews

Third Damages Claim: Purchases and Motor Vehicle Excess

17. The Company says that Mr Andrews has acknowledged his debt to it in respect of his purchasing cell phones and tyres for personal use, and his personal liability for a Company motor vehicle insurance excess payment.
18. The debt originally totalled \$4,590.55 but the Company says that – by way of wage deductions – the outstanding amount was reduced to \$1,400.44 (refer to the copy of the letter of 22 April 2004 attached to the original statement of problem and to Karin Andersen's witness statement attached to the amended statement of problem). It seeks to recover the latter amount.

Fourth Damages Claim: Legal Costs

19. The Company says that because of Mr Andrews' unauthorised actions it has been forced to incur legal costs totalling \$6,854.75 (refer to the invoices dated 30 July, 7 &

30 September and 23 December 2004 and 27 April, 31 May and 31 July 2004 attached to the applicant's bundle). It seeks to recover that amount.

Discussion

20. I find in favour of the Company's claims for the following reasons:
21. Section 162 of the Act allows the Authority, in any matter related to an employment agreement, to make any order that the civil Courts are entitled to make under any enactment or rule of law. This includes an award of damages. The Authority thereby enjoys jurisdiction to award damages against an employee for breaches of the implied term of fidelity, of duty to act with good faith and their contractual duty of care, where the employer suffers loss: see *F v A-G* [1994] 2 ERNZ 62, 69.
22. The Court of Appeal has observed that, "[The] more senior the employee, the more onerous is the duty of fidelity", *Morris v Interchem Agencies Ltd* [2003] 1 ERNZ 93, 102.
23. The purpose of damages is to compensate, in this case, the Company for the loss it has sustained, i.e. to put it back in the position it would have been in were it not for Mr Andrews' reckless conduct. It is for the Company to prove its losses, on a balance of probabilities basis: *Medic Corporation Ltd v Barrett (No 2)* [1992] 3 ERNZ 977. In some areas it will not be possible to do so and the Authority must then do its best, upon the material presented, to make a proper assessment (*Medic*, above).
24. The nature of the claims brought by the Company in this instance is that Mr Andrews' actions were in breach of his duty of care and caused the employer the losses set out above. Damages are sought on the, inferred, grounds that the respondent acted negligently if not recklessly. Evidence in support of the applicant's claims is to be found in Mr Andrews' acceptance of his liability and the unpaid invoices.
25. I am satisfied that Mr Andrews enjoyed sufficient notice of the applicant's claims, as they developed, so as to be able to fairly respond to them, had he elected to do so. I am also satisfied that the Company's claims for damages and money owed it by the respondent are fairly and reasonably made out, in all the circumstances. I reach that conclusion, on a balance of probabilities basis, because of the evidence presented by

the Company and the written acknowledgements by Mr Andrews that his actions caused loss to the Company and he owed money to them in a personal capacity. I have no reason to doubt the evidence produced by the applicant.

26. I therefore accept the claims brought by the Company.

Determination

27. For the reasons set out above I find in favour of Recon Professional Services Limited's claims against Chris Andrews for the following damages:

- a. First damages claim: bogus surveillance operation - \$39,798.90
- b. Second damages claim: exceeding quoted authority - \$21,948.50
- c. Third damages claim: purchases and motor vehicle excess - \$1,400.44
- d. Fourth damages claim: legal costs - \$6,854.75

28. I also accept that Recon Professional Services Limited is entitled to recover its filing fee of \$70.

29. Chris Andrews is to pay to Recon Professional Services Limited a total damages sum of \$70,072.59 (seventy thousand and seventy two dollars and fifty nine cents).

Denis Asher

Member of Employment Relations Authority