IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 601
5644196

	BETWEEN	ADVANCED PERSONNEL SERVICES LIMITED Applicant
	AND	GRAHAM PITMAN Respondent
Member of Authority:	Helen Doyle	
Representatives:	Jeff Goldstein and Linda Ryder, counsel for the Applicant Steven Zindel, counsel for the Respondent	
Date of Determination:	21 October 2019	

DETERMINATION OF THE AUTHORITY
TO VARY NON-PUBLICATION ORDERS

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[1] The Authority in a determination dated 8 December 2017 resolved issues of quantum of damages, costs and a penalty.

[2] In the determination the Authority made a blanket order prohibiting publication of the determination. [1] There is also an order prohibiting from publication details of the applicant's personal finances to the extent they are not set out in the determination.[2]

[3] The Employment Court has issued a judgment in respect of challenges to the determination by both the applicant and respondent.[3]

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[1] *Advanced Personnel Services Limited v Graham Pitman* [2017] NZERA Christchurch 213 at [1] and [2]
[2] Above n 1 at [3]
[3] *Graham Pitman v Advanced Personnel Services Limited and Advanced Personnel Services Limited v Pitman* [2019] NZEmpC 83

[4] In light of the judgment of the Employment Court, and in consultation with the parties about release to an external party, the Authority intends to vary the non-publication orders made in the determination by rescinding the blanket prohibition from publication enabling the determination to be published.

[5] Except to the extent set out in the determination the prohibition from publication of details of the applicant's personal finances placed before the Authority remains.

[6] A copy of this determination is to sit alongside the earlier determination of the Authority to clarify that the blanket prohibition from publication has been rescinded and that the limited prohibition from publication about personal finances remains.

Helen Doyle
Member of the Employment Relations Authority

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 213
5644196

	BETWEEN	ADVANCED PERSONNEL SERVICES LIMITED Applicant
	A N D	GRAHAM PITMAN Respondent

Member of Authority:	David Appleton
Representatives:	Jeff Goldstein and Linda Ryder, Co-Counsel for Applicant Peter McRae, Counsel for Respondent
Investigation Meeting:	15 November 2017 at Nelson
Submissions Received:	15 November 2017 on behalf of Applicant 15 November 2017 on behalf of Respondent
Date of Determination:	8 December 2017

DETERMINATION OF THE AUTHORITY IN RESPECT OF QUANTUM

A. **APS is awarded special damages, less the sum already paid to APS as part of a settlement agreement with A Temp Limited.**

B. **Interest is awarded to APS at 5% on the special damages sustained by APS up to the date of the payment of the settlement sum, and on the balance until payment.**

C. **General damages are awarded to APS.**

D. **Costs (apart from the costs of the quantum investigation meeting) are awarded to APS on an indemnity basis, less disallowed elements.**

E. **A penalty is imposed on Mr Pitman, to be paid to the Crown.**

F. **Costs of the quantum investigation are reserved.**

Prohibition from publication order

[1] The Authority required there to be produced in evidence a record of settlement between the applicant and A Temp Limited, a former party to these proceedings. The terms of the settlement were expressed to be confidential. As the details of the settlement agreement form a key element in the calculation of special damages due to APS, and as it is not practicable to write the determination so as to omit those details, I prohibit from publication this entire determination.

[2] This blanket prohibition from publication order shall be lifted upon application by either party provided that written evidence is provided to the Authority which shows that both APS and A Temp Limited irrevocably waive their rights to confidentiality in respect of the existence of and the terms of the settlement agreement. In order to facilitate the obtaining of that waiver, if relevant, a copy of this determination may be shown to the directors of A Temp Limited, and their legal advisor.

[3] I also prohibit from publication, save to the extent set out in this determination, details of Mr Pitman's personal finances, which were placed before the Authority. This prohibition from publication order shall remain in place even if the blanket prohibition from publication order referred to above is lifted.

Employment Relationship Problem

[4] By way of a determination of the Authority dated 11 September 2017[1] the Authority found that Mr Pitman had acted in breach of various terms of his individual employment agreement, both during his employment, and after it had ended, and had breached his duty of fidelity and his duty of good faith during his employment. It also found that he had breached a term of a consent determination, although no loss flowed from that finding.

[5] The applicant, APS, a recruitment agent and provider of short term labour, is seeking awards of special damages, plus interest, general damages, costs on a full indemnity basis, and the imposition of penalties.

[6] The Authority gave the parties the opportunity to resolve the question of quantum through a further attempt at mediation, but this was unsuccessful. It

[1] [2017] NZERA Christchurch 151.

therefore directed APS to produce evidence of loss. The methodology of the calculation of loss will be explained below.

Background

[7] The Authority found that Mr Pitman had, amongst other things, breached terms of his individual employment agreement by assisting in the establishment of a competing organisation, A Temp Limited, during his employment with APS. The Authority determined that this gave a springboard advantage to A Temp Limited. In addition, Mr Pitman had breached a confidentiality clause both during, and after the termination of his employment. Mr Pitman had also, by working for A Temp, breached a post-termination restraint of trade clause in his employment agreement preventing him from being involved in any business for three months after the termination of his employment which competed with APS.

[8] As a result to these breaches, three clients of APS stopped using the services of APS, or reduced their reliance on APS, during the restraint period and used A Temp instead. APS is therefore seeking to be put back into the position it would have been in had Mr Pitman not breached his various duties. The three clients in question are Talleys Group Limited (Talleys), Stevedoring Services (Nelson) Limited (Stevedoring), and Goldpine Group Limited (Goldpine).

The issues

[9] The following issues need to be determined by the Authority:

a. What damages should be awarded to APS?

b. What costs should be awarded to APS?

c. Should penalties be imposed upon Mr Pitman and if so, in what amount?

The assessment of damages

[10] There are some sub issues to be considered in assessing damages, as follows:

a. Whether APS suffered more than the loss of a chance;

b. Whether A Temp's income from supplying day shift workers to Talleys should be excluded;

c. Whether APS lost all of Goldpine's work for reasons other than Mr Pitman's breaches;

d. Whether the sum received by APS in settling its claim against A Temp should be taken into account; and

e. Whether general damages should be awarded to APS.

Whether APS suffered more than a loss of a chance

[11] Mr McRae submits that APS did no more than lose the chance of earning the gross profit that A Temp made from the three clients during the restraint period. Mr Goldstein submits that APS are entitled to special damages based on the gross profits that A Temp made from the three clients during the period of restraint.

[12] It is undisputed that the underlying principle in assessing damages is that APS is entitled to be restored to the position it would have been in had the breaches of contract not occurred, so far as money can do so, and so long as its damage is not too remote. In addition, APS must have taken reasonable steps to have mitigated its losses.

[13] A typical loss of a chance situation is one where the successful party recovers a proportion of a loss, being an assessment of the value of the chance of which it has been deprived.[2] Mr McRae's argument is based on the fact that Mr Pitman had the right to resign and that he had a "fan base" of clients who were entitled to follow him. Therefore, once Mr Pitman had resigned, there was a strong chance that the three clients would have left APS in any event, despite APS's efforts to retain them. Therefore, the Authority must assess the chance of APS retaining the clients against that background.

[14] There is some force to this argument. However, a fair analysis of the situation needs to take into account two key facts. The first is that A Temp Limited was set up from scratch with the assistance of Mr Pitman and so was not a pre-existing organisation with a presence in Nelson, already competing with APS, and known to

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[2] *Burrows, Finn and Todd Law of Contract in New Zealand*, 5th edition, 21.2.2(e).

the market. Furthermore, the managing director and active owner of A Temp, Ms Debbie Smith, whilst known to Talleys and Stevedoring, apparently, had no expertise in supplying labour as she had run a commercial laundry for 25 years.

[15] Second, if Mr Pitman had complied with the terms of his employment agreement, he would not have been involved in any way with A Temp until 23 December 2016. The three clients would still have needed to have been provided with temporary labour during the period of the restraint, as is demonstrated by the invoices provided by A Temp during this period, but could not have used Mr Pitman. Mr Pitman would have had to have told the clients this. He would also not have been able to have contacted the for-hire workers himself, or passed their contact details to Ms Smith, as that would have been a breach of the duty not to misuse the confidential information he had in his possession.

[16] Therefore, I must assess the chance that the three clients would either have gone to the brand new company, A Temp, even without Mr Pitman, or would have stayed with APS until Mr Pitman was able to service them himself. Evidence was given that A Temp charged the same rate as APS until early November 2016, when it dropped its rate by 4 cents an hour. This was for administrative convenience Ms Smith said.

[17] On balance, I believe that the three clients would have chosen to have stayed with APS, at least until Mr Pitman was lawfully able to service them directly, despite the small drop in hourly rate. Evidence was given that Mr Pitman's replacement at APS, Mr Reagan Poynter, and the CEO of APS made efforts to contact the key clients of APS once Mr Pitman had left. One can only speculate how successful they would have been had Mr Pitman complied with his obligations. I assess the chance as more than negligible.

[18] Therefore, having determined that it is more likely than not that the three clients would have stayed with APS during the three months of the restraint, the most convenient way of assessing the loss to APS is by examining the work given to A Temp Limited by the three clients of APS during the restraint period.

[19] The Authority directed A Temp Limited to produce copies of all the invoices issued by it to the three clients during the period of three months starting from the date when Mr Pitman ceased to be employed by APS. These invoices were produced

by A Temp Limited and they showed that services were provided to Talleys, Goldpine and Stevedoring by A Temp Limited during the three-month post-termination period.

[20] Mr Goldstein submits that the most accurate way of assessing the loss of gross profit is by adding up the hours charged for by A Temp to the three clients, multiplying that figure by $23.19, the rate charged by APS, and then taking 18% of that figure as the gross profit. Mr Pitman does not dispute that 18% is the appropriate rate to use. I agree that Mr Goldstein's methodology is appropriate given that A Temp reduced its rate in November 2016.

[21] Extracting from the invoices provided by A Temp, the total hours charged for were as follows:

a. Stevedoring, 235.5 hours

b. Talley's, 2,418.25 hours

c. Goldpine, 1,985.5 hours.

[22] These hours amount to 4,639.25 hours. At $23.19 per hour, that amounts to a total of $107,584.20. Taking 18% of that sum equates to $19,365.16. This is the damages that APS says should be paid to it as special damages by Mr Pitman. However, Mr Pitman says that this sum should be reduced for various reasons, which I shall address below.

Talleys Group Limited

[23] Ms Smith says that APS only provided workers to Talleys in respect of their night shift, whereas A Temp Limited provided workers in respect to both night shift and day shift once another recruitment business closed down. Therefore, Mr Pitman argues that only the invoices in relation to workers provided for Talleys night shift should be taken into account. If that is correct, then the hours that should be taken into account should reduce to 1,508.

[24] However, APS provided evidence that it in fact did provide workers in respect to Talleys' day shift requirements as well. It appears that it did this when the other recruitment agent could not supply enough day shift workers. In other words, APS would provide top up labour for Talley's day shift requirements.

[25] APS produced evidence that showed that between the week ended on 20 March 2016 and the week ended on 18 September 2016, it supplied the services of temporary staff on 137 occasions, which includes some workers being supplied for several days in a week, and some workers appearing regularly week after week.

[26] It appears that one worker worked in the cool store, and so does not count as a day worker, and his placements need to be deducted so as to not double count. Removing him means that APS placed dayshift workers on 81 occasions during the period in question. APS provided invoices to Talleys for the period 10 April to 11 December 2016. So as to compare like with like periods, I need to reduce the dayshift placements by another 3. That makes 78.

[27] Assuming that each day shift worker worked 8 hours, that equates to 624 hours of day shift placements between 10 April 2016 and 18 September 2016. In the same period, APS charged Talleys for a total of 9,297 hours ($215,597.31, excluding GST, divided by $23.19). Therefore, roughly 7% of the total charged to Talleys by APS prior to Mr Pitman leaving amounted to day shift top ups. On this basis, it is appropriate to allow 64 hours of the day shifts that A Temp charged Talleys for during the period of restraint (913.25 day shift hours[3] x 7%).

[28] Whilst it is possible that APS could have gained all of the day shift work from Talley's once the other agent closed, if Mr Pitman had not breached his duties, I regard that as too speculative, as insufficient evidence was heard about the circumstances of how A Temp won the day shift work.

[29] Therefore, the hours that should be used to assess the loss caused to APS in respect of Talleys is 1,572. At $23.19, that equates to $36,454.68, and 18% of that sum is $6,561.84.

Stevedoring Limited

[30] A Temp provided limited services to Stevedoring Limited. It charged Stevedoring for a total of 235.5 hours during the period of restraint. At $23.19 per hour, that equates to $5,461.25, and 18% of that sum amounts to $983.02.

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[3] From A Temp's invoices.

Goldpine

[31] Ms Smith says in her evidence that Goldpine ceased providing work to APS not as a result of Mr Pitman's activities but as a result of Goldpine's dissatisfaction with APS. However, there is evidence to show that APS continued to provide services to Goldpine Limited once Mr Pitman left in October (amounting to $18,296) and in November (amounting to $220). A reasonably significant amount of work was provided to Goldpine by A Temp in October, November and December amounting to $43,557.42 excluding GST.

[32] The Authority saw an email exchange between Mr Poynter and Mr Julian, the manager of the plant to which APS supplied workers, dated 13 and 14 December 2016. In this email Mr Julian stated:

> ...I told them [the for-hire workers] that if work was to pick up again, I would possibly work with Graham [Pitman] and A-Temp and all of them said that if that was to happen they would like to stick with him as they got on with him well. As things picked up again, I got hold of the boys and asked if they would be keen to come back temping up here under Graham at A-Temp and their reply was "yes". I asked A-Temp-Graham if they would be happy to take them on and supply them to me.

[33] Mr Julian also stated that he was "a little disappointed" in the handling by APS of a work place injury that had occurred to one of the workers, as the branch manager of APS had not contacted the injured worker and had not visited Goldpine's site, despite a promise to do so. Mr Julian stated:

> This possibly persuaded? [sic] me to go to Graham/A-Temp again when looking for more workers. I have dealt with Graham many times in the past as he knows exactly what I need up here (although I do still work with other temp agencies from time to time).

[34] It was agreed by the parties at the Authority's quantum investigation meeting that Mr Julian would not be called to give evidence, as Mr Pitman had had the chance to call him at the liability investigation meeting and neither party wished to incur further cost, as APS would have had the right to call further evidence in reply.

[35] I believe that the email indicates that it was more likely to have been Mr Pitman's presence at A Temp than APS dropping the ball which led to Goldpine deciding to use A Temp during the period of restraint. I believe that it is more likely than not that, had Mr Pitman told Mr Julian that he could not service Goldpine until

late December 2016, Mr Julian would have continued to have used APS, especially as Ms Smith said that she had had no dealings with Goldpine prior to setting up A Temp.

[36] Ms Smith also says that Goldpine was located outside the Nelson City or metropolitan area and that any revenues from Goldpine should be ignored. However, the Authority found that Mr Pitman had acted in breach of clause 26.1 of his employment agreement which the Authority modified pursuant to s.83 of the Contract and Commercial Law Act 2017 so as to apply to any city or town where the employer had a physical presence and where the employee has worked while employed by the employer. It is clear that Mr Pitman had worked in the area where Goldpine was based and had provided services to them in breach of clause 26.1.

[37] In summary, I find that the loss of Goldpine as a client of APS was as a direct result of Mr Pitman's breach of clause 26.1, amongst other clauses of his agreement, and that APS is entitled to be compensated for the damages by those breaches. Therefore, it cannot be excluded from the assessment of loss. A Temp charged Goldpine for 1,985.5 hours of work from the on-hire workers, and that equates to $46,043.75. At 18% the gross profit is $8,287.87.

Total gross profit

[38] The total gross profit from the three clients therefore amounts to $15,832.73.

The settlement agreement between APS and A Temp Limited

[39] A settlement was reached between APS and A Temp Limited in respect of a claim originally made in the Authority by APS against A Temp Limited for the imposition of a penalty for having allegedly incited, instigated, aided or abetted Mr Pitman's breaches of his employment agreement.[4]

[40] Mr McRae submits that any payment made by A Temp Limited to APS in settlement of the latter's claim against the former should be taken into account when assessing APS's losses. He based this submission on the principle that a successful claimant in a civil jurisdiction is only ever entitled to recover its proven loss or losses. Mr McRae submits that, even though the claim by APS against A Temp was for the imposition of a penalty, the Employment Court recognises that penalties can have an

[4] s. 134(2) of the Employment Relations Act 2000.

element of compensation to them and cites the case of *Labour Inspector* v *Preet PVT Limited*[5].

[41] Mr McRae submits that, where a money settlement was agreed, and the payment has gone to the party that suffered loss, it must be necessary to examine the terms and, if necessary, the circumstances of settlement to establish whether it did indeed reduce some part of the relevant loss. Mr McRae refers to the High Court case of *Body Corporate 185960 and others v North Shore City Council and others*[6] to show that sums received by a plaintiff from a defendant in partial settlement should be taken into account when determining the liability of other defendants for losses sustained.

[42] Mr Goldstein opposes the application on the grounds that APS was not claiming any damages from A Temp, as that would require an action based on tort, which falls outside the jurisdiction of the Authority. Therefore, according to Mr Goldstein, the agreed penalty in the settlement took into account the punitive nature of A Temp's actions, which were in breach of s136(2) of the Act.

[43] There appears to be no judicial authority precisely on the issue of whether a settlement of a claim under s.134(2) of the Act imposes a duty on the applicant to take account of monies received by way of such a settlement when seeking damages from a former employee. However, the case of *Preet* does lend some guidance to how this matter should be approached. A full Court of the Employment Court sat to consider the issue of penalties in *Preet* and examined the nature of penalties in doing so. In paragraph [50] they state that:

> Such statutory penalties are primarily penal as opposed to compensatory, although there are potential compensatory elements to them. They are prima facie payable to the Crown although the compensatory elements of them may be discerned by the discretion that the Authority and the Court have to award the whole or any part of such penalties to a wronged party or, indeed, to another person.

[44] In paragraph [51] the Court stated:

> The Authority and the Court should be careful not to conflate the punitive aspects of a penalty with a compensatory assessment of a successful claim that is usually dealt with separately, even though in the same jurisdiction and even the same proceeding.

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[5] [2016] NZEmpC 143, at [62].
[6] 28 April 2009, CIV-2006-004-003535

[45] In paragraph [62] of *Preet* the Court, when considering the objectives of penalties in employment law generally, stated the following:

> Although not generally a reason for the imposition of a penalty, as already noted briefly, the third objective of compensation of a victim of a breach cannot be discounted, if only because of the statutory discretion to award the whole or any part of the penalty to another person who may, in practice, be a victim of the breach.

[46] In paragraphs [149] and [150] the Court briefly examined the general principles applicable to the decision of an application under s.136(2) of the Act:

> That is, a claim that the whole or some part of a penalty or penalties should be payable not to the Crown, as is the presumed default position, but rather to another person

[47] The Court stated, at paragraph [150]:

> Where victims of breaches can be properly compensated and the party bringing proceedings can be reimbursed in costs for doing so, there will not be a strong case for payment of any of the penalties to the victim or anyone other than the Crown. In other cases where a breach has resulted in a non-compensable loss (for example an employer has failed to provide an employee with a written employment agreement but there is otherwise no disadvantage to the employee), the Authority or the Court may consider directing that a proportion of the penalty be paid to the party bringing the proceedings, especially if and to the extent that costs may not adequately compensate for performing this public duty

[48] From these passages one can conclude that the Court sees a clear compensatory element to the penalty regime under the Act and it is plain that the only reason it would contemplate ordering that part or all of a penalty should be paid to the victim rather than to the Crown is where it is appropriate to compensate the victim for the effects of the breach that led to the imposition of a penalty. However, there are other aspects of a penalty which need to be considered.

[49] The primary object of the imposition of a penalty is to punish the wrong doer[7]. However, it is not appropriate for that punishment to be meted out by private organisations. The right to impose a punishment resides in the State and so any payment made to APS in respect of the penalty claim against A Temp cannot be characterised as being in satisfaction of any forgone right of APS to punish A Temp.

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[7] Paragraph [50] of *Preet*.

[50] However, on the other hand, there is another element often inherent in the imposition of a penalty; namely, one of deterrence[8]. It may be that an element of the payment made in settlement of APS' claim against A Temp is a recognition that A Temp should be deterred from aiding and abetting other employees of APS to breach the terms of their employment agreements. In that sense, there is an aspect of the payment to APS by A Temp that could be seen not to be compensatory.

[51] A final matter to be taken into account is that, in the world of litigation, parties often settle proceedings by paying money for commercial reasons, regardless of their risk of losing. It is often not the case that the payer admits that it has done any wrong; however, parties often have better things to do than to spend time and money fighting claims in the judicial system, and commercial entities often settle a matter for reasons of expediency by making a payment without admission of liability which serves to settle the litigation once and for all. Again, this aspect of the settlement may be seen as being non-compensatory.

[52] In order to more fully understand what the payment from A Temp to APS was for, it is necessary to look at the settlement agreement, a copy of which was shown to the Authority. It was expressed to be confidential, and to be in full and final settlement of any claims the parties have or may have against the other. The sum of $15,000 was agreed to be paid to APS by A Temp. It was not expressed to have been made without admission of liability.

[53] The High Court case cited by Mr McRae, *Body Corporate 185960,* concerned claims for damages to a residential development tortiously arising from leaky building syndrome. The developer and project manager, Mr Gailer, was found to be liable for the damages[9], but he and the local territorial authority each proved their respective claims in contribution against the other. By the time of the hearing, North Shore City Council had already settled with the plaintiffs.

[54] The damages suffered by the plaintiffs in *Body Corporate 185960* were the cost of repairs, loss of rent, repair management fees and general damages suffered by the tenants. The High Court found that the North Shore City Council and Mr Gailer were concurrent tortfeasors (as opposed to joint tortfeasors), as they were responsible for different torts producing the same damage. There were each liable for the entire

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[8] Paragraph [52] of *Preet.*
[9] In an earlier judgement, 22 December 2008, CIV-2006-004-003535

loss suffered by the plaintiff. However, even though they were each liable for the full loss, the plaintiffs could not recover more than their respective full losses. The court entered judgement against Mr Gailer for the full loss of the plaintiffs, but stipulated that they had to take into account the settlement sum received from the City Council.

[55] The fact that *Body Corporate* deals with tortious liability rather than contractual damages does not change the general principle that APS cannot recover more than its loss. The question is, what was the nature of the payment made under the settlement agreement between APS and A Temp? First, I agree with Mr Goldstein that I cannot look behind the wording of the settlement agreement itself. That wording is unhelpful, though, as the purpose of the payment is not characterised in any way. All I can do is infer its purpose.

[56] I do not believe that the fact of paying a penalty, or part of a penalty to the victim under s 136(2) of the Act, turns the penalty into a payment of compensation. It remains a penalty, and it serves more than one role, as I have explored above, including, but not limited to that of compensation. To that extent, I agree with Mr Goldstein.

[57] However, equally, there cannot be a windfall for APS, so that it recovers from the proceedings more money than the amount of the damage it suffered. I regard this situation as similar to that in *Body Corporate 185960,* in that there were concurrent acts by Mr Pitman and by A Temp which led to the same damage. Whilst there has been no finding that A Temp incited, instigated, aided or abetted the breaches of employment agreement by Mr Pitman in breach of s 134(2) of the Act, it has made a payment to APS in settlement of proceedings alleging that it did. One could infer, therefore, that it did accept liability. However, accepting that inference, even though there were separate wrongful acts by Mr Pitman and A Temp, the same damage flowed from those acts; namely, the loss of revenue from its three clients.

[58] When one considers why a wronged party brings a claim in the Authority for the imposition of a penalty against another under s 134(2) of the Act, it is arguably to seek a public declaration of express disapprobation for the act of having incited, instigated, aided and abetted a breach of employment agreement. However, when a party also seeks the payment of the penalty to itself, it is additionally seeking to be compensated for the wrong it has suffered by the actions for which it seeks disapprobation. There can be no other reason, as it not able to lawfully gain a

windfall. APS chose to settle the claim against A Temp on a confidential basis, thereby foregoing the disapprobatory element of the claim.

[59] Furthermore, when the Authority considers whether to order payment of a penalty to the party, it will expressly consider what wrong it has suffered and whether that wrong should be compensated for. If it believes that the wrong has already been compensated for, it will decline to order the penalty to be paid to the party, but instead will order it to be paid to the Crown.

[60] Taking all these arguments together, I am satisfied that APS did recover a sum from A Temp which has to be taken into account when assessing what damages should be paid to it by Mr Pitman. Therefore, the award of damages against Mr Pitman will be reduced by $15,000. That results in special damages being due to APS in the sum of $832.73.

Interest

[61] APS seeks interest on the award of special damages. The appropriate period for interest to accrue on the whole sum is from 23 December 2016 (when the three months period of restraint expired) to 27 February 2017 (when the settlement sum was due to be paid).

[62] Clause 11 of Schedule 2 of the Employment Relations Act 2000 provides as follows:

> **11 Power to award interest**
> (1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.
> (2) Without limiting the Authority's discretion under subclause (1), in deciding whether to order the inclusion of interest, the Authority must consider whether there has been long-standing and repeated non-compliance with a demand notice.
> (3) Subclause (1) does not authorise the giving of interest upon interest.

[63] I have found that, but for the breaches, APS would have had the benefit of the revenue that A Temp gained during the restraint period. I therefore accept that it is

appropriate for interest to be awarded on the loss of that revenue at the prescribed rate of 5%[10]. This should be awarded in two tranches:

a. from 23 December 2016 (when the three months expired) to 27 February 2017 (when the settlement between APS and A Temp required the sum to be paid) on $15,832.73; and

b. from 28 February 2017 to the date of payment on $832.73.

[64] The sum due under (a) is $142.49.

General damages

[65] General damages compensate a victim of a breach of contract for non-monetary aspects of the specific harm suffered. Such damages usually are limited to individuals, who have suffered distress, physical inconvenience or suffering. In the case of a corporation, as opposed to an individual, the type of general damage that one may expect would concern loss of executive time, inconvenience, interruption to the company's business and/or a loss of reputation.

[66] Mr Goldstein originally submitted that the sum of $30,000 would be an appropriate award of general damages, but reduced that to $10,000 in his oral submissions, on the basis, I believe, that APS was also seeking recovery of costs on an indemnity basis. Those costs would include the cost of flights and travel, and the cost of engaging counsel to take action to protect itself from Mr Pitman's breaches.

[67] Despite Mr McRae's submission that there would be "nothing left" to compensate for after an assessment of special damages, I accept Mr Goldstein's submission that, once APS discovered that Mr Pitman appeared to have engaged in activities in his employment in breach of his employment agreement, and also appeared to be breaching the post termination clauses after his agreement had ceased, it will have had to have spent a considerable amount of time investigating those apparent breaches and taking steps to mitigate their effects. That would have taken up executive time, and disrupted the normal operation of the business. It is not possible to quantify that loss of time, but a figure of $10,000 falls within what one might assess as a reasonable range. I therefore accept that sum.

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[10] By virtue of the Judicature (Prescribed Rate of Interest) Order 2011.

[68] Turning to the assessment of loss of reputation, I am not convinced that the alleged loss of reputation was real. It is hard to see how other companies who gave their business to APS would even have known that Talleys, Goldpine and Stevedoring had shifted its business elsewhere. Even if they had known, they would almost certainly have been aware that this was as a result of Mr Pitman leaving. He was entitled to leave APS, and if him leaving APS resulted in APS suffering a loss of reputation, Mr Pitman cannot be made to compensate APS for that. If the other clients had known that Mr Pitman was taking business away from APS due to his breaches of his employment agreement, that would not have reflected particularly badly on APS in my view.

[69] Therefore, I do not accept that there was sufficient proof, on a balance of probabilities, to entitle APS to recover any further general damages from Mr Pitman. I limit the award to $10,000.

Indemnity costs

[70] APS also seek costs from the respondent on an indemnity basis, on the basis of a term of his individual employment agreement, at clause 26.6, which stated as follows:

> In the event of any failure by the Employee to comply with this clause the Employee shall indemnify the Employer against all losses, liabilities, costs, claims, charges, expenses, actions or demands which the Employer may incur as a result of any failure to perform these obligations.

[71] APS rely on the costs judgement of the Employment Court in *Laura Jane George v Auckland Council*[11] which Ms Ryder submits provides authority for the proposition that solicitor to client costs may be ordered to be paid on an indemnity basis pursuant to an enforceable clause in an employment agreement. In *George*, the Court set out the steps that are necessary to address when considering whether costs should be ordered to be paid on an indemnity basis in reliance on an indemnity clause in an employment agreement[12]. These steps may be conveniently summarised as follows;

a. An assessment of the indemnity clause to determine what costs fall within and outside of it:

[11] [2014] NZEmpC 100
[12] At [14].

b. An assessment of whether there are any public policy reasons preventing reliance on the contractual indemnity; and

c. An assessment of whether the costs claimed under the indemnity clause are objectively reasonable.

[72] First, however, it is necessary to consider whether *George* applies to the Authority, as Mr McRae contends that it does not. He also suggests, I believe, that *George* was wrongly decided, as it did not address the prohibition against contracting out in s 238 of the Act. Specifically, Mr McRae argues that the indemnity clause at 26.6 of the employment agreement cannot be interpreted to include an assessment of solicitor/client costs as to do so would offend against the principle enshrined in s 238 of the Act that the provisions of the Act have effect despite any provision in any contract or agreement; that is to say, parties cannot contract out of the Act. Mr McRae submits that the indemnity clause robs the Authority of its discretion under schedule 2, clause 15 of the Act, which gives the Authority a discretion in the matter of costs, by use of the word 'may". Clause 15 of schedule 2 provides:

> **15 Power to award costs**
> (1) The Authority may order any party to a matter to pay to any other party such costs and expenses (including expenses of witnesses) as the Authority thinks reasonable.
> (2) The Authority may apportion any such costs and expenses between the parties or any of them as it thinks fit, and may at any time vary or alter any such order in such manner as it thinks reasonable.

[73] Mr McRae also argues that costs in the Authority are assessed differently than in the Employment Court, arguing that *George* should be distinguished.

[74] Addressing the s 238 argument first, with respect to Mr McRae and the Employment Court, I do not read *George* as impermissibly overriding s 238, as discretion still remains with the Authority. The Authority's discretion is not arbitrary, and must be exercised according to principle and the rules of natural justice. This will mean, in reality, considering a number of factors which are relevant. For example, the Authority must determine whether the indemnity clause in question has been engaged; that is, has there been a breach of obligations which triggers the operation of the clause.

[75] Next, the Authority must assess the scope of the clause in question to ascertain whether it encompasses solicitor/client costs. It is therefore not fettered in its role in

that regard. Next, it must also assess whether the costs that have been incurred have been incurred in relation to addressing the wrong. Finally, it must assess whether the costs are objectively reasonable. A considerable amount of residual discretion resides with the Authority in respect of an indemnity clause in my view.

[76] Furthermore, the Authority regularly considers whether to uplift an award of costs above the starting point of the daily tariff. While it is rare to uplift costs to the level of a full indemnity, it is permissible.

[77] I agree with Mr McRae that the usual position in the Authority is governed by the principles set out in *PBO Ltd v Da Cruz*[13], in which the Employment Court held that costs in the Authority should be governed by the following tenets:

a. There is discretion as to whether costs would be awarded and in what amount.

b. The discretion is to be exercised in accordance with principle and not arbitrarily.

c. The statutory jurisdiction to award costs is consistent with the equity and good conscience jurisdiction of the Authority.

d. Equity and good conscience are to be considered on a case by case basis.

e. Costs are not to be used as a punishment or as an expression of disapproval of the unsuccessful party's conduct although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award.

f. It is open to the Authority to consider whether all or any of the parties' costs were unnecessary or unreasonable.

g. That costs generally follow the event.

h. That without prejudice offers can be taken into account.

i. That awards will be modest.

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[13] [2005] ERNZ 808

j. That frequently costs are judged against a notional daily rate.

k. The nature of the case can also influence costs and this has resulted in the Authority ordering that costs lie where they fall in certain circumstances.

[78] At paragraph [45] the Court in *PBO* stated in respect of these tenets:

> We hold that these principles are appropriate to the Authority and consistent with its functions and powers. They do not limit its discretion and proper application of them should ensure that each case is considered in the light of its own circumstances. While these general principles are applicable also to the Court, the Authority is not bound by the *Binnie* principles which extend the range of costs which the Court may award beyond what could reasonably be labelled "modest."

[79] It is my view that the Authority cannot ignore *PBO* and that the indemnity clause is just one of the factors which should be taken into account when applying it. The indemnity clause in 26.6 is one of the "circumstances" of the case. Therefore, it is necessary to examine the clause in accordance with *George*.

An assessment of the indemnity clause

[80] First, there was a failure by Mr Pitman to comply with clause 26, as he breached clauses 26.1 and 26.2. I believe, therefore, that the clause is potentially engaged. Second, the phrase "costs" does, in my view, encompass solicitor/client costs, as it is not unlikely that, if the parties had considered expressly at the time they entered into the employment agreement what the term "costs" meant, they would have contemplated APS engaging legal advice if clause 26 were breached, and being charged for that advice and legal assistance. Equally, the terms "charges" and "expenses" could, to non-lawyers, be contemplated as legal solicitor/client costs.

[81] The indemnity clause is widely drafted, deliberately in my view. It contemplates that a breach of clause 26 would result in the expenditure and incurring of costs by the company, and I see no reason why legal costs would fall outside of the scope of the clause.

An assessment of whether public policy reasons prevent reliance on a contractual indemnity

[82] Her Honour Judge Inglis, as she was then, dealt very briefly with this issue in *George*. However, as that case concerned an indemnity that protected the employee, rather than the employer, I shall assess this question afresh.

[83] Turning to the present circumstances, the indemnity was limited to breaches of s 26, which had a non-competition clause and a clause preventing Mr Pitman from establishing a competing business. A company is entitled to protect its proprietary interests from wrongful misuse, subject to the usual test of reasonableness. It is entirely foreseeable that a company may need to take urgent steps, including but not limited to injunctive action, to protect those interests where it reasonably believes that the clauses are being breached, and to then follow up that urgent action with substantive proceedings to assess liability in accordance with often detailed evidence, and then loss, if relevant. APS has taken all of these steps.

[84] Such steps can, and often do entail a significant amount of work by both the directors and employees of the company and by outside agents, such as legal counsel and various experts. Such work costs money.

[85] Given that the law contemplates that an employer can protect itself from the actions of an employee seeking to misuse its connections and confidential information with reasonable contractual restraints, I see no reason why it cannot also seek to protect itself from the financial consequences of such misuse. If it could not, it is likely that the cost of the protective steps would often completely outweigh the amount of damages recovered.

[86] This is especially the case in the Authority, where the costs regime is designed to ensure that awards of costs are 'modest'. However, a restraint of trade case in the Authority is not of the same nature as a typical personal grievance claim. The Authority must apply exactly the same legal principles, and standards of evidence in a restraint case as are required in the High Court. It is therefore not unreasonable for an employer to seek to protect itself from extinguishing any damages it may win by way of an indemnity clause.

[87] This is similar in effect to the "steely approach" that the Authority has been directed to use when a valid Calderbank offer has been made, and unreasonably rejected[14].

[88] I therefore do not consider that there are any public policy reasons why the indemnity clause should not be relied upon.

An assessment of whether the costs claimed under the indemnity clause are objectively reasonable

[89] First, the costs must have been incurred as a result of the breaches of clauses 26.1 and 26.2; not any other breach of duty. I agree with Mr McRae that the clause should be interpreted strictly, as it has a potentially onerous effect upon Mr Pitman. I do not accept that one can imply that breaches of other clauses of the employment agreement are encompassed in the scope of the indemnity.

[90] APS seeks recovery of $81,707 of legal fees, not including the costs of attendance at the quantum investigation. These fees (excluding GST) divide broadly into the following:

a. $12,750 billed on 2 November 2016, relating to advice and drafting of the injunctive proceedings;

b. $8,500 billed on 1 December 2016, relating to continued advice to APS, and attending the interim injunction investigation meeting;

c. $4,845 billed on 1 February 2017, relating to continued advice to APS, and attending mediation;

d. $1,485 billed on 22 February 2017, relating to drafting the record of settlement and attendances;

e. $2,275 billed on 30 March 2017, relating to drafting witness statements for the substantive investigation meeting, preparing the bundle of documents and attendances;

[14] *Blue Star Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385, [2010] ERNZ 446, *Davide Fagotti v Acme & Co Limited* [2015] NZEmpC 135

f. $5,000 billed on 30 April 2017, for steps related to the forthcoming Authority investigation meeting;

g. $26,000 billed on 9 June 2017 in relation to attendance at the liability investigation meeting;

h. $15,852 billed on 29 September 2017 in relation to the preparation of APS's submissions and considering Mr Pitman's submissions, and attendances;

i. $5,000 billed on 31 October 2017 in relation to attendance at mediation, and attendances.

[91] I can immediately disregard the fees billed on 22 February 2017 as they clearly relate to the drafting of the record of settlement between APS and A Temp Limited. The proceedings that APS launched against A Temp were separate and should not be included. I assume that costs related to those proceedings will have been factored into the settlement.

[92] I also note that the fees billed on 1 February 2017 included attendance at mediation. I infer that this was the mediation between APS and A Temp. What I do not know is whether there was also a mediation meeting with Mr Pitman. I assume there was. However, it cannot be just to include the whole of this invoice in the costs to be potentially borne by Mr Pitman. I therefore halve it, to $2,200. This reduces the total fees to $77,777.

[93] Another significant issue to consider is whether it is just to allow both Mr Goldstein and Ms Ryder's fees to be charged to Mr Pitman. Whilst they have discounted their work in progress by around $10,400, I do not understand that to be entirely on account of the duplication. Indeed, I understood that discount to have been for the inevitable work that lawyers often choose not to charge for, such as time taken to research the law, and administrative type tasks.

[94] Ms Ryder said that she and Mr Goldstein have tried to avoid double charging, and that the tasks were divided between her and Mr Goldstein so as to avoid duplication. However, I am not satisfied that I have been given enough information to enable me to be confident that there is no unfair duplication. I certainly do not accept

that the matter was so complex as to warrant the participation of two very experienced employment law specialists such as Mr Goldstein and Ms Ryder.

[95] In order to avoid the effects of possible unfair duplication, I reduce the sum of $77,777 by 10%. That results in the sum of $70,000.

[96] Were all of these costs incurred in respect of the breaches of clause 26? The breaches entailed Mr Pitman being involved in A Temp during the three months after he left APS, and his establishing A Temp during his employment. It is impossible to accurately differentiate between work done by Goldstein Ryder in respect of proving these breaches as opposed to other alleged breaches. All I can do is assess broadly the work the firm did. In my view, a good part of the work related to Mr Pitman's activities which appeared to have been in breach of clauses 26.1 and 26.2. The principal exclusion would be the work they did to try and prove that Mr Pitman solicited for-hire employees and breached his duty of confidentiality. I very broadly estimate that two thirds of the work was in relation to clause 26, and one third in relation to other matters. This means that the $70,000 should be reduced by one third. That, rounded down, makes $46,000.

[97] For the record, I accept that the legal fees appear to have been reasonably incurred.

[98] The interim investigation meeting, which resulted in a settlement of that part of the proceedings against Mr Pitman, lasted around half a day. The substantive liability investigation lasted a further two days and two hours. Applying the Authority's usual tariff approach, the first day of investigation attracts a daily rate of $4,500 (as the application was lodged after 1 August 2016) and so half a day attracts a potential costs award of $2,250. The following days attract a rate of $3,500 each. That amounts to $7,000 for days two and three, and $1,000 for the final day. Altogether, that amounts to $10,250. To award costs of $46,000 would be close to a 350% increase.

[99] Is an uplift of that magnitude in the Authority's costs in keeping with the principles of *PBO*? In this case, I believe it is warranted. First, the Authority is not obliged to always use the daily tariff. Indeed, the Authority frequently determines costs by reference to an uplift or reduction from the starting point of the tariff. Second, the award of costs of this order is not a punishment, but a reflection of the

nature of the matter that came before the Authority to be determined, and the fact that an indemnity clause had been entered into by the parties, to be invoked in the event that clause 26 was breached.

[100] Third, this was not a run of the mill case involving a personal grievance brought by a vulnerable and low paid worker, but was more akin to a commercial case, in the sense that Mr Pitman had successfully assisted an associate to set up a competing enterprise during his employment. All in all, I regard an award of $46,000 costs appropriate in this particular case.

Disbursements

[101] In addition to legal fees, APS incurred a liability to pay the disbursements of Mr Goldstein and Ms Ryder. These disbursements amount to $2,948.11, including GST. First, GST has to be excluded as APS has been able to recover the GST element, as it is registered for GST itself. Deducting the GST element leaves $2,563.57. This breaks down as follows:

a. 26 October 2016 – travel to Nelson for interim reinstatement investigation- $274.78

b. 26 October 2016 – accommodation in Nelson $127.53

c. 1 December 2016 – wasted flight to Nelson, for investigation subsequently adjourned - $209.57

d. 1 February 2017 – travel to Nelson for mediation - $379.13

e. 1 February 2017 –cost of changing flight to 1 May - $130.44

f. 1 February 2017 – Taxi costs - $82.44

g. 1 February 2017 – airport car parking - $21.74

h. 1-5 May 2017 – car hire in Nelson for liability investigation - $204.04

i. 1-5 May 2017- 4 nights' accommodation in Nelson - $978.26

j. 4 October 2017 – flight to Nelson for mediation - $155.25.

[102] I regard each of these disbursements to be reasonable, save for 4 nights of accommodation in Nelson in May 2017. It is not appropriate to charge Mr Pitman for four nights, when the investigation meeting lasted three days. I therefore deduct $244.35 from $978.26 to leave $733.91. This leaves a total of $2,318.83 potentially allowable disbursements, excluding GST.

[103] APS also seek reimbursement of out of pocket expenses it incurred directly. These expenses (excluding GST) are as follows:

a. 12 October 2016 – Ryan Densem Jetstar invoice - $64.35

b. 15 October 2016 – Geoff Densem - Beachcomber Motor Inn invoice - $219.30.

c. 19 October 2016 – Ryan Densem – Jetstar invoice - $102.61

d. 27 October 2016 – Vanessa Krambeck - Beachcomber Motor Inn invoice - $104.35.

e. 8 November 2016 – Vintron Electronics invoice - $282.00

f. 7 December 2016 – Ryan Densem Air New Zealand invoice - $37.39

g. 8 December 2016 – Ryan Densem Beachcomber Motor Inn invoice - $234.69

h. 1 February 2017 - Ryan Densem Jetstar invoice - $163.48

[104] It is not clear what all of these expenses were for. Geoff Densem said in his evidence that he flew to Nelson on 14 October 2016 to speak to Talleys, and that accounts for his accommodation cost. It is not known who Ms Krambeck is, and it is not clear why Mr Ryan Densem incurred these costs apart from the trip to Nelson on 1 February. Whilst he may have been visiting Nelson to try to mitigate losses, he did not give evidence of this.

[105] To be just to Mr Pitman, I am not prepared to guess the reasons for the expenses set out above. I accept that the expenses at paragraph numbers 103 (b), (e) and (h) are potentially recoverable expenses. They amount to $664.78.

[106] The total amount of costs and expenses that are recoverable, therefore, is $48,983.61.

[107] I recognise that it is not likely that Mr Pitman will be in a position to pay this sum. I encourage the parties to enter into discussions to seek a way of agreeing how the costs order in this determination will be dealt with.

The imposition of a penalty

[108] APS also seek an order for the imposition of a penalty against Mr Pitman of $10,000 for each breach of the employment agreement and each breach of the Act. It seeks that the penalty be paid to APS in accordance with s.136 of the Act.

[109] The parties agree that the guidance set out by the Employment Court in *Preet* should be applied. The following steps need to be taken in considering whether penalties should be imposed, and if so, how much:

a. Should penalties be imposed at all?

b. If so, how many punishable breaches have been committed?

c. What is the maximum penalty that could be imposed for each breach?

d. Should any of the penalties be globalised?

e. What is the starting point of the overall penalty in terms of severity?

f. Are there any ameliorating circumstances which should reduce the penalty?

g. What are the financial circumstances of Mr Pitman, and what effect will they have on the overall penalty?

h. Is the resultant penalty proportionate to the breaches?

Should penalties be imposed at all?

[110] Mr McRae submitted that Mr Pitman breached the employment agreement 'inadvertently". I must disagree with this. I am satisfied that he wilfully took steps to help set up a completing business during his employment, and attempted to hide that fact from APS, and then to compete against APS once he had left its employment

during the period of restraint. I therefore accept Mr Goldstein's contention that penalty should be imposed.

If so, how many punishable breaches have been committed?

[111] The Authority found that Mr Pitman had breached six express clauses of his employment agreement, as well as the duty of fidelity and the duty of good faith. Treating the duty of fidelity as an implied term in his employment agreement, Mr Pitman potentially faces penalties for eight breaches, seven being imposed under s 134 of the Act and one under s 4A of the Act.

What is the maximum penalty that could be imposed for each breach?

[112] As Mr Pitman is an individual, the maximum penalty that could be imposed per breach is $10,000[15].

Should any of the penalties be globalised?

[113] I believe that it is appropriate to globalise some of these penalties. The breaches of clauses 7 (the obligation to devote the whole of his time and attention during working hours to his obligations), 13 (not to be directly or indirectly interested in a competing business during employment) and 26.2 (not to establish a competing business during his employment) all stemmed from essentially the same activities. I therefore 'globalise' or, to express it more elegantly perhaps, treat as aggregated the penalties that arise from those breaches.

[114] The breach of fidelity stems from the same activity that put Mr Pitman in breach of clause 26.2, and so the penalty stemming from that breach should also be aggregated with those above.

[115] The failure to advise APS of the conflict of interest that had arisen during his employment (clause 14), the misuse of confidentiality (clause 16) and the breach of clause 26.1 post termination are distinct matters each of which should attract a penalty in their own right in my view. This means that there are four breaches of the employment agreement each of which should attract a penalty. That attracts a total penalty of $40,000 maximum.

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[15] S135(2)(a) of the Act.

[116] The breach of the duty of good faith is, I believe, a separate matter which stems from Mr Pitman misleading his employer about his intentions after he had resigned but before he left APS. That should, in theory, therefore attract a penalty but will be examined separately due to the separate test in s 4A of the Act.

What is the starting point of the overall penalty in terms of severity?

[117] These four breaches of the employment agreement were serious, as they were done wilfully in order to give springboard assistance to a new competitor, to the detriment of APS, his employer. Although Mr Pitman may have misunderstood the scope of his obligations, that is no excuse. He also took pains during the investigation meeting to seek to minimise or misrepresent some of his actions. I believe that a starting point of 60% is appropriate. That takes the maximum penalty for the breaches of the employment agreement down to $24,000.

Are there any ameliorating circumstances which should reduce the penalty?

[118] Mr Pitman did offer undertakings in response to the interim injunction proceedings which were launched, and this resulted in the parties entering into a Consent Determination. In addition, Mr Pitman did cooperate in having his phone examined forensically.

[119] I believe that these steps should be recognised, and I reduce the penalty by 25%. That makes $18,000.

What are the financial circumstances of Mr Pitman, and what effect will they have on the overall penalty?

[120] Mr Pitman said in evidence that he has a significant amount of personal debt and very little in terms of assets. He also has a fixed and limited income which leaves him very little spare at the end of each week. Mr Goldstein did not seriously challenge this evidence in cross examination, and I believe that it is accepted.

[121] Mr Pitman's finances show that he would be unable to pay a penalty in anything but the most modest sum. There is no point in imposing a penalty that there is little prospect in recovering, especially when Mr Pitman faces an award of damages and substantial costs. I believe that it is still appropriate to impose a penalty to show

disapproval for the actions taken by Mr Pitman. However, I believe a relatively nominal sum is sufficient. I therefore reduce the penalty to $1,000.

Is the resultant penalty proportionate to the breaches?

[122] The sum of $1,000 is, arguably, disproportionately small relative to the breaches. However, for the reasons stated above, to impose a higher penalty will achieve little. I therefore confirm that the penalty is to be $1,000.

[123] It is to be paid to the Crown, as APS is already being compensated for the breaches in respect of which the penalty is imposed.

Payment by instalments

[124] Section 135(4A) of the Act provides that the Authority may order payment of a penalty by instalments, but only if the financial position of the person paying the penalty requires it. I believe that Mr Pitman's financial position does require the payment by instalments, and I order that he does so in four equal consecutive monthly instalments, the first instalment commencing on 19 January 2018.

Breach of the duty of good faith

[125] In order to impose a penalty under s 4A of the Act in this case, the Authority must be satisfied that the breach was deliberate, serious and sustained, or was intended to undermine the parties' individual employment agreement, or its employment relationship.

[126] Mr Pitman did mislead his employer during his notice period about his post-employment intentions. The breach was certainly deliberate, as Mr Pitman chose to mislead his employer. It was also serious, as APS would almost certainly have taken steps to protect itself had it known that Mr Pitman was going to be working for a newly formed direct competitor.

[127] It was also sustained, in the sense that Mr Pitman maintained the fiction that he was only going to be working in a Maori cadet programme until he left his employment. The criteria are therefore satisfied for the imposition of a penalty under s 4A of the Act. However, I do not regard it as appropriate in view of Mr Pitman's financial situation. I therefore decline to do so.

Conclusion

[128] I find as follows:

a. APS is awarded special damages, less the sum already paid to APS as part of a settlement agreement with A Temp Limited;

b. Interest is awarded to APS at 5% on the special damages sustained by APS up to the date of the payment of the settlement sum, and on the balance until payment;

c. General damages are awarded to APS;

d. Costs (apart from the costs of the quantum investigation meeting) are awarded to APS on an indemnity basis, less disallowed elements; and

e. A penalty is imposed on Mr Pitman, to be paid to the Crown.

Orders

[129] I order Mr Pitman to make the following payments to APS, by no later than 19 January 2018:

a. The sum of $832.73 special damages, together with interest at 5% per annum from 28 February 2017 until payment in full; and

b. The sum of $142.49 interest due on the lost revenue sustained by APS between 23 December 2016 and 27 February 2017.

[130] I further order Mr Pitman to pay to APS the sums of:

a. $48,983.61 in respect of costs and expenses incurred by it; and

b. $10,000 in respect of general damages.

[131] The parties are directed to use their best endeavours to reach agreement on a schedule in respect of payment of these sums. If requested to do so, the Authority will issue the agreed payment schedule as a determination, or a consent determination. If a binding agreement on the payment schedule has not been reached by 2 February 2018, then the sums referred to in paragraph 130 become due immediately thereafter in their entirety.

[132] I further order Mr Pitman to pay the sum of $1,000 to the Authority, which will then be paid by the Authority into a Crown bank account. These payments are to be paid in four equal consecutive monthly instalments, the first payment to be paid by no later than 19 January 2018.

Costs of the quantum investigation

[133] There remain to be determined the costs of the quantum investigation. I invite the parties to seek to agree how they will be dealt with between them. If the parties are unable to agree by 22 December 2017, then either party seeking a contribution towards their costs shall serve and lodge a memorandum of counsel by no later than 2 February 2018, and any reply must be served and lodged by 16 February 2018.

David Appleton
Member of the Employment Relations Authority