

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Allan McNeill (Applicant)

**AND** Barry James Pilcher (First Respondent)  
**AND** Barry Pilcher Financial Planning Limited (Second Respondent)

**REPRESENTATIVES** Geoff O'Sullivan for Applicant  
Philip Skelton for Respondents

**MEMBER OF AUTHORITY** G J Wood

**INVESTIGATION** 11 and 12 August 2004  
**MEETING**  
**SUBMISSIONS** 28 January 2005  
**RECEIVED BY**  
**DATE OF** 8 February 2005  
**DETERMINATION**

**DETERMINATION OF THE AUTHORITY**

**The Employment Relationship Problem**

1. The applicant, Allan McNeill, is a firm of chartered accountants based on a structure of a partnership of companies. It claims that its former employee Mr Barry Pilcher, the first respondent, breached several express and implied duties of his employment agreement with it in establishing his own business under the auspices of the second respondent, Barry Pilcher Financial Planning Limited (the company). Mr Pilcher denies breaching any express or implied duties.
2. The matter first came to the Authority by way of an application for an interim injunction. However, following the intervention of the Authority and undertakings made by Mr Pilcher that he would not use or disclose any confidential information relating to Allan McNeill including client and associated records, the matter was able

to be deferred until a substantive investigation meeting could take place at the parties' convenience.

## **The Facts**

3. Unsurprisingly, Allan McNeill's two most senior principals are a Mr Robert Allan and a Mr Craig McNeill. Mr Pilcher had worked for the firm and its predecessors since leaving school, a total of 37 years. Mr McNeill and Mr Pilcher, for instance, had been working together for 22 years. Mr Pilcher's main focus of activities was on running the financial planning arm of Allan McNeill
4. In fact Mr Pilcher's written terms of employment related back to his employment at one of those predecessor firms, Price Waterhouse Coopers. That contract required him to adopt and follow all of the provisions of the terms and conditions of the employment handbook. The employment handbook had, unsurprisingly, detailed provisions relating to confidential information as set out below:

### *9.5 CONFIDENTIAL INFORMATION/PROHIBITION ON INSIDER TRADING*

*You must not disclose to any person who is not a member of staff any information relating to clients' or the Firm's business coming to your knowledge in the course of duties. This applies both during and after your employment with the Firm. You should also where appropriate, restrict the discussion of confidential matters and the disclosure of confidential documents to members of the Firm's staff who are directly concerned.*

*In discussing and holding confidential information, you should take particular care:*

- *that where you discuss the affairs of clients among yourselves in public places, your conversation is not overheard.*
- *that where you are required to take confidential files or working papers out of your office*
  - *access to them is restricted to members of the Firm's staff directly concerned with their contents.*
  - *they are not exposed while working at clients' offices.*
  - *adequate security arrangements are maintained at lunchtimes and at night and, in particular, that files/working papers are not left in cars.*

*If confidential papers are stolen or lost you must immediately notify the engagement partner.*

***The Firm considers confidentiality an extremely important issue. Any breach by a staff member would be regarded as a breach of professional confidence which may result in summary dismissal of the individual concerned.***

*As a staff member you should not deal in shares or other securities of a company, even if that company is not covered by the independence rules set out in section 9.4 at a time when, to your knowledge, the Firm has (or you have) unpublished information relating to that company which is likely to be price-sensitive. You should be aware that any such dealing may well constitute an offence under legislation relating to insider trading (a full statement on the Firm's policy regarding insider trading is available from your partner).*

*Breach of the above, in particular any uses you make (either directly or indirectly) for personal financial profit of information you obtain in the course of your employment, will justify you being summarily dismissed and/or legal action being taken.*

*Upon leaving the Firm you must not:*

- (a) use confidential information obtained during employment with the Firm for personal advantage or in any manner to disadvantage the Firm.*
- (b) Use confidential information regarding clients or Firm business to entice clients away from the Firm.*

5. The handbook also dealt with redundancy. The handbook states the following at clause 14.4 and clause 14.5:

### ***REDUNDANCY***

*For the purposes of this contract, redundancy is a condition in which the Firm has staff surplus to requirements because of the re-organisation or the closing down of the whole or part of the Firm's operations due to a change in business, methods, materials or products, economic circumstances or like cause which require a permanent reduction in the number of staff. Redundancy shall not include the termination of the employment a casual or temporary employee or an employee who has reached the qualifying age for National Superannuation.*

*In the case of a redundancy situation, the Firm will provide a redundancy payment. The amount will be determined on a case by case basis, and will take into consideration factors such as seniority and length of service. The redundancy payment will be in addition to the notice period described in the 'Termination of Employment' clause of this contract.*

*If you fail to work out the notice by reason of your own choice or resignation, you will not be paid for the unworked proportion of the notice.*

*Where you work out the notice period, the Firm will allow time off for interviews as agreed between the Firm and yourself.*

*The Firm will select affected staff on the basis of maintaining an efficient operation.*

#### **14.5 TECHNICAL REDUNDANCY**

*The Firm will not be required to pay any redundancy compensation where the Firm is selling, merging, amalgamating, reconstructing or transferring all or any part of its business and the purchaser or transferee of the business or part thereof offers employment to you:*

- (a) in the same or a substantially similar capacity to your employment prior to the sale or transfer; and*
- (b) on terms which are overall substantially no less favourable than the terms of your employment prior to the sale or transfer.*

6. It is worthy of note that the handbook covers the issue of failure to work out notice by resignation. It is implied that if a worker were to leave by way of resignation earlier than the period of notice given for redundancy then s/he would still be paid the redundancy payment.
7. At some point in 2003 the principals of Allan McNeill determined to sell the financial planning arm of the practice and entered into negotiations with Spicers Portfolio Management Limited (“Spicers”). Investment advice and management had been provided to date to Allan McNeill and Mr Pilcher by NZ Funds Management Ltd (“NZ Funds”). Spicers and NZ Funds are, as might be expected, major competitors in the funds management industry. Mr Pilcher, being the main employee in the financial planning operation and having 37 years experience dealing with Allan McNeill’s clients, was clearly a key person in relation to the operation of that part of Allan McNeill’s business.
8. Both Allan McNeill and Spicers saw benefits in Mr Pilcher moving over to Spicers. From Spicers’ perspective they would get the benefit of Mr Pilcher’s deep knowledge of the business (and the clients in particular) and from Allan McNeill’s perspective a redundancy payment could be avoided if the technical redundancy provision could be relied on, as well as meaning that Mr Pilcher would have a job to go to. In this regard I am satisfied that Mr McNeill, in particular, went out of his way to ensure that

opportunities were afforded to Mr Pilcher and that he was not simply 'left on the scrap heap'.

- 9 For these reasons, when Allan McNeill and Spicers came close to agreement Mr Pilcher's position was specifically provided for. There were three provisions in this regard under active consideration when Mr Pilcher was first informed by Mr McNeill of the proposal to sell the business on 1 December 2003. What was agreed was that Spicers would have to offer Mr Pilcher employment on terms and conditions the same or no less favourable (except for continuity of service) in writing and that Allan McNeill would use its reasonable endeavours to procure the acceptance by Mr Pilcher of the offer of employment. Also in contemplation was a term that Allan McNeill would be responsible for any subsequent redundancy payment to Mr Pilcher, but in that case the purchase price would be increased. As at 1 December the sum under discussion between the parties, but not yet agreed, was \$50,000. The sum of \$50,000 was clearly concluded within the terms of the Handbook applying to Mr Pilcher. When one considers his seniority and length of service (37 years) and the redundancy compensation sum, this sum equates to about 59 weeks of Mr Pilcher's ordinary remuneration. Given his length of service this is somewhere between a 4+1 and 4+2 redundancy settlement, which is within the bounds of what might be expected to be provided. It is also consistent with the \$50,000 sum later negotiated between Allan McNeill and Spicers.
10. Matters were sufficiently well advanced, including the possible sum that Spicers would pay Allan McNeill to offset Mr Pilcher's redundancy payment, that Mr McNeill was able to meet with Mr Pilcher to tell him about what was likely to happen on 1 December 2003. At that meeting Mr Pilcher was told for the first time that the financial planning business was to be sold to Spicers, that he would be offered an equivalent or better position and that if he chose not to accept such a position, he would be paid redundancy compensation. The sum of \$50,000 was mentioned. It was clear to all concerned that provided the sale to Spicers went through Mr Pilcher's position with Allan McNeill was going to be made redundant. Mr Pilcher was encouraged to take up a role with Spicers.

11. On 12 December Spicers confirmed that they would agree to the \$50,000 term in the agreement between them and Allan McNeill. Arrangements were then put in place for Mr Pilcher to meet with Mr Patrick Middleton, Chief Executive of Spicers.
12. In the meantime Mr Pilcher, who was not subject to any restraint of trade clause in his employment agreement, had taken steps to pursue certain options once his employment with Allan McNeill ended. He contacted senior members of NZ Funds to tell them that Allan McNeill were planning to sell the business to Spicers from about 8 December. In so doing he was clearly in breach of his obligation not to disclose information relating to Allan McNeill's business coming to his notice in the course of his duties. The handbook is clear that any breach would be regarded as a breach of professional conduct which may result in summary dismissal. Mr McNeill informed the Authority in evidence that had he been aware of this breach of professional confidence by Mr Pilcher he would have sacked him straight away.
13. In a conference call with senior people from NZ Funds on 12 December it was suggested to Mr Pilcher that he approach Allan McNeill with a view to purchasing the practice himself and that NZ Funds could help with financing.
14. Mr Pilcher then went to see Mr McNeill and asked him whether he might be able to purchase the business, but was not given any positive feedback. Mr Pilcher then had another conference call with people from NZ Funds a few days later. In this conference call he was told that NZ Funds would be happy to give him an agency and that it would write to clients wishing to pull out of Allan McNeill's funds placed with NZ Funds advising them that Mr Pilcher could assist and offer its products.
15. The next day, 16 December, Mr Pilcher met with Mr Middleton from Spicers. Before Mr Middleton had the opportunity to tell Mr Pilcher of Spicers' position, Mr Pilcher told him that he did not want to accept any role with Spicers, and that he wanted to take time out to decide what he wanted to do. I do not accept that that was an accurate description of his intentions. It is clear that by then he had decided to set up in business on his own account. Mr Middleton in fact asked Mr Pilcher if he intended going into business himself. Mr Pilcher replied that that was not his intention at all.

16. Mr Pilcher did, however, agree to hear Mr Middleton's proposal. The proposal did not meet with the terms of the handbook in respect of technical redundancy. There were many reasons for this, but the principal one is that the offer was not even one of employment - it was one of an independent contractor.
17. Mr McNeill found out very quickly of Mr Pilcher's responses to Mr Middleton's proposals and raised the matter with him directly. Mr Pilcher again confirmed to Mr McNeill that it was time for a break, that he had no hidden agenda and that he did not plan to go out on his own. Given the efforts that Mr McNeill had made to look after Mr Pilcher's interests, it is thus simply unsurprising that Mr McNeill is so upset about all Mr Pilcher's actions in setting up and pursuing his own business interests.
18. What then occurred I find, on the balance of probabilities, was that Mr Pilcher made it clear that he wanted to accept the \$50,000 redundancy payment and leave at Christmas. Mr McNeill and Mr Allan agreed to this provided Mr Pilcher assisted Spicers taking over the Allan McNeill financial planning clients. It was agreed that he would be remunerated separately for this assistance. It was also agreed that Mr Pilcher would not tell anyone about him leaving the firm and that a farewell function would be held for him towards the end of February, when all his work for Allan McNeill had been completed. In so finding I rely in particular on the fact that Mr Pilcher received a pay slip the next day, authorised by Mr McNeill, which paid him out for all his holiday pay plus 15 days special leave that was owing to him.
19. The next day Mr Pilcher received into his account the sums mentioned above. He did not receive the \$50,000. The day after that Mr Pilcher went to see Mr McNeill about the \$50,000. Mr McNeill did not want to pay the redundancy compensation until the full sums owed by Spicers had been paid. However, he agreed to pay \$15,000 as soon as the sale to Spicers was completed, which was to be on 5 January.
20. Over the Christmas period Mr Pilcher came into the office to deal with existing clients. There was no evidence that he took away any confidential client information.
21. After the sale to Spicers went through in early January, some of Allan McNeill's clients starting seeking to withdraw funds from NZ Funds to Spicers and this caused difficulties for the relationship between Allan McNeill and NZ Funds. In the meantime

Mr Pilcher was busy organising his new business and this was incorporated on 13 January 2004, under the name Barry Pilcher Financial Planning Limited.

22. Mr Pilcher also entered into agreements for support services with NZ Funds the next day, which was “made” on 14 January.
23. Mr Pilcher arranged for all his family investments to be administered by his company. As well as members of his immediate family he approached at least two other Allan McNeill clients with whom he had a close association to try and sign them up with his company. These clients had in excess of \$2 million invested with Allan McNeill.
24. On 20 January there were a succession of calls between Mr McNeill and Mr Pilcher. Mr Pilcher had been asked by Mr Bryce Pratt from Spicers to assist with the transition of clients and he told him that he would, but only after he received the redundancy pay that was due to him. By this point Mr McNeill was alarmed about what he had discovered was going on in relation to the potential loss of clients, as well as Mr Pilcher’s response to requests for assistance from Spicers and the risks these actions posed for Allan McNeill’s agreement with Spicers. Mr McNeill told Mr Pilcher that he was required to assist Spicers and that he would reduce the sum payable to him because of legal costs he had incurred over the matter. No doubt this reference was to problems that were occurring between Allan McNeill and NZ Funds at that point.
25. Mr Pilcher accordingly wrote to Allan McNeill demanding payment of the balance of the redundancy sum and indicating that it would not be until after payment had been received that he would be happy to negotiate as to how he could assist with any queries from Spicers about the clients or financial planning processes. In this sense it can be seen that Mr Pilcher was using co-operation with Spicers as a bargaining tool to get the monies he was owed.
26. In response Mr Allan wrote on behalf of Allan McNeill setting out quite a different view of events (a view which I have not referred to but is at variance both with Mr Pilcher’s account and my determination on the facts) and suggesting a payment of the \$50,000, but less costs to date. Significantly it noted “*you will be paid for the hours you work in the transition period at the equivalent hourly rate at which you ceased employment*”. Mr Pilcher was also asked to return his keys within the next day, which

he did. He also then provided Allan McNeill with a letter reiterating that he would assist with queries relating to clients or processes only on receiving the balance of monies due to him.

27. Mr Allan replied the next day disagreeing on the facts again, but proposing an alternative solution to matters. This involved Mr Pilcher confirming in writing that he had not been made redundant and that he would fully assist in the transition of clients to Spicers. In return Allan McNeill would pay the balance of the \$50,000 and also pay him for the hours he worked, estimated to be 10-14, in assisting Spicers.
28. Mr Pilcher responded promptly accepting Allan McNeill's proposal, in order that he might receive the much needed balance of the \$50,000. The funds were then paid on 26 January. On 28 January Mr Pilcher worked alongside someone from Spicers with transitional matters.
29. Soon afterwards the principals of Allan McNeill discovered that Mr Pilcher had set up his own financial planning business with the assistance of NZ Funds and that he had been into the office several times outside of normal work hours. There is no evidence, however, that Mr Pilcher accessed or utilised any confidential information during these periods.
30. At about the same time Allan McNeill issued a memo to its clients inviting them to meet with Spicers and informing them that Barry Pilcher no longer worked for Allan McNeill. This ironically may have led to a large number of clients (not being close associates or relatives of Mr Pilcher) approaching Mr Pilcher directly. Mr Pilcher was successful in taking many of those peoples' business from Spicers.
31. Soon afterwards Mr Pilcher was written to in the following terms:

*"It is with disappointment that we have to write to you about matters that have become a concern to us since the termination of your employment on 23 December 2003.*

*We strongly believe that we carried out your exiting from the firm in a very professional and ethical manner. We have been informed by Fund Managers and Spicers Portfolio Management Ltd that certain actions by yourself have been of a nature that reflect you were still an employee of Allan McNeill.*

*We also thought we had an understanding and verbal agreement with you in respect to your termination of employment whereby there was to be co-operation by yourself to*

*ensure the smooth transition of our financial planning clients to Spicers Portfolio Management Ltd.*

*Once again, actions that you have taken have impeded the smooth transition of our financial planning clients to Spicers Portfolio Management Ltd.*

*We also note from our alarm monitoring system that your entry and exit to the premises after 23 December 2003 was always outside normal working hours and we question why this had to take place.*

*In the light of the above we are pursuing legal action to recover the previous retirement sum payment.”*

32. Mr Pilcher responded denying Allan McNeill’s allegations. He also sought to have all his work for Spicers completed by the end of the week.

33. On 7 February Mr Pilcher wrote to Allan McNeill seeking payment for 1 hour and 6 minutes of his time spent with a representative of Spicers. That money has not been paid to him.

34. On 9 February Mr Pilcher sent a further letter setting out the following:

*“On Thursday 5 February Bryce Pratt from Spicers verbally advised me that they no longer required my services for the transition of clients from Allan McNeill to Spicers.*

*I formally give notice that all my work obligations to both Allan McNeill and Spicers have been discharged. If you have a contrary view to this fact could you please let me know today, otherwise I will take Bryce Pratt’s verbal notice as completion of these obligations.”*

35. Allan McNeill responded on 9 February, outlining a new claim that Mr Pilcher had deceived it over the fact that he was now completing taxation returns, contrary to a previous undertaking.

36. On 13 February Mr Pilcher’s firm sent out flyers to 70 former clients of Allan McNeill seeking their business.

37. To date Mr Pilcher has been successful in obtaining more than \$9.5 million of funds which were previously under the management of Allan McNeill, being over one third of the business purchased by Spicers from Allan McNeill.

38. On 1 March 2003 Allan McNeill filed an application for breach of an employment agreement, damages and costs, as well as an application for an interim compliance order requiring Mr Pilcher to discontinue his use of confidential information, namely

Allan McNeill's clients and associated records. This was followed by an urgent conference call with the Authority and an undertaking provided by Mr Pilcher as set out in paragraph 2 of this determination.

39. Allan McNeill have subsequently filed an amended statement of problem and added Barry Pilcher Financial Planning Limited as a second respondent. It seeks penalties against Mr Pilcher for contractual breaches and penalties against Barry Pilcher Financial Planning Limited for inciting instigating, aiding or abetting breaches of said contract. Repayment of the \$50,000 is also sought, plus damages in the sum of \$35,000 plus GST per year for 8 years for loss of Allan McNeill's accounting and taxation clients. These latter claims were, however, withdrawn during the submission process. Damages in respect of any liability to Spicers that Allan McNeill may incur as a result of Barry Pilcher or his firm's actions, plus costs, are also sought.
40. The matter has been to mediation but unfortunately has not been able to be resolved subsequently, despite regular effort by the parties and their representatives and the Authority over several months. It therefore falls to the Authority to make a determination.

### **Credibility**

41. I have set out the facts above on the basis of my findings on credibility. In this regard the best thing that can be said about Mr Pilcher's evidence was that his memory of events in the December/January period was faulty. He appeared to have no memory of certain key events that took place and therefore I have had to treat all of his evidence with a great deal of caution.
42. On the other hand it appeared that Mr McNeill's recollection as to events surrounding the \$50,000 payment was subject to certain embellishments and glosses not in keeping with the actual communications between the parties. While this is understandable, especially given the period of time that has occurred and the inevitability that people remember events more as they want to remember them than may have actually occurred, I can not accept his evidence on this point. Otherwise I accept his evidence in total.

## Determination

43. It is clear that Mr Pilcher's employment with Allen McNeill terminated on 23 December as this was agreed between them (see paragraphs 18 and 31). I do not accept that Mr Pilcher owed the same duties to Allen McNeill after this point. Even although Mr Pilcher did do some transitional work thereafter, it was clearly under terms of engagement that had to be agreed afresh and these were not the same terms as existed before 23 December. Thus while Mr Pilcher's employment with Allan McNeill ended on 23 December I accept that there were some duties that he had to undertake after that period. These duties were different from his duties while an employee of Allan McNeill I hold, in that his responsibilities were in the nature of direct requirements of him and the explicit confidentiality and fidelity responsibilities of existing employees under the handbook no longer applied. The particular requirements of him were to do the administration work that was required over the Christmas period and to action any requests from Spicers in respect of the clients that had previously been part of the financial planning arm of Allan McNeill. There was no evidence that Mr Pilcher breached any of these obligations.

44. I consider that the sum of \$50,000 paid to Mr Pilcher by Allen McNeill was a redundancy payment and the purpose of it was to compensate him for the loss of his job after 37 years of service. He is entitled to retain that payment. The acknowledgment Mr Pilcher made that he was not redundant was clearly made under duress because he needed the balance of the \$50,000 and he had already agreed to assist with the transition of clients to New Zealand Funds.

45. For assessing Mr Pilcher's responsibilities post-employment I rely on *Peninsula Real Estate Ltd v. Harris* [1992] 2 NZLR 216 where it was held:

*"There is nothing wrong with an ex-employee, not under restraint of trade, making use of a name or names of his former employer's clients. The malice comes in my view from ex-employee taking away with him, either on paper or in his head, the whole or the material part of his former employer's business records ...An ex-employee who, without a list or deliberate memorisation, happens to recall that somebody is a customer or client of his former employer is ordinarily allowed to approach that person to do business in competition with his former employer."*

46. It was argued for Allan McNeill that Mr Pilcher's responsibilities went further as he was in a fiduciary position. Mr Skelton, on behalf of Mr Pilcher, raised the issue of whether a breach of fiduciary duty is within the Authority's jurisdiction. I hold that it is because that relationship simply categorises the nature of the contractual duty owed by Mr Pilcher to Allan McNeill. Mr Pilcher was, however, not a director or partner of Allan McNeill, but rather was in a relatively junior position. In this context I can not accept that he was ever in the position of a fiduciary.
47. There is a possibility that Spicers may seek the repayment of the \$50,000 that was the increase in purchase price to be paid by Spicers to cover Allen McNeill for the cost of Mr Pilcher's redundancy. However, given that this matter is now over one year old and no action has been taken by Spicers against Allan McNeill I determine that the chance of that occurring and Mr Pilcher being found liable to repay any of that sum is minimal. I therefore decline to consider any remedies under this heading.
48. It was argued that Mr Pilcher had agreed to assist Allan McNeill by inviting clients to seminars being held by Spicers. There was, however, no evidential basis for such an allegation, nor that Mr Pilcher acted to prevent Spicers holding seminars.
49. There can be no doubt that Mr Pilcher was in breach of his employment agreement when he told a third party, NZ Funds, about the fact of the sale to Spicers of the financial planning arm of Allan McNeill. In between the time of that date and the time of his leaving Allan McNeill on 23 December he also discussed with NZ Funds details about Allan McNeill's clients. However, most, but probably not all of these matters were already in the knowledge of New Zealand Funds and the penalty to be applied against Mr Pilcher thus need not be as high as it may otherwise have been.
50. I consider an appropriate penalty to be paid to the Crown to be \$2,000 and so order.
51. Mr Pilcher also approached, I find, a small number of clients, mostly family members, about transferring their custom to him and his company while he was still an employee of Allan McNeill and that is in breach of his duties to them. In terms of any damage to Allan McNeill, there was none as it subsequently completed the sale to Spicers. In any event the chance of Spicers retaining that custom when Mr Pilcher set up in competition was, I find, nil, as these clients were so personally closely associated with

Mr Pilcher. That does not change the fact, however, that he was competing with his employer at that time and he had failed to advise Allan McNeill of that fact. In fact he went to some lengths to deny that he was in fact even intending to set up in competition. Had Mr Pilcher been honest Allan McNeill and Spicers would have been able to take more immediate steps to contact and perhaps even retain more of the client base.

52. An appropriate penalty for these breaches I also find to be the sum of \$2,000 to be paid to the Crown and order accordingly.

53. It follows from all the above that the second respondent, Barry Pilcher Financial Planning Limited, can not have been a party to any breaches committed by Mr Pilcher as it did not come into existence until 13 January, by which time Mr Pilcher had already left the employment of Allan McNeill.

### **Summary**

54. The first respondent, Mr Barry Pilcher, has been ordered to pay penalties in the total sum of \$4,000 to the Crown for breaches of his employment agreement with the applicant, Allan McNeill.

55. All claims by the applicant against the second respondent, Barry Pilcher Financial Planning Limited, have been dismissed.

### **Costs**

56. Costs are reserved.

**G J Wood**  
**Member of Employment Relations Authority**