**This determination includes an order prohibiting publication of the name of an individual**

**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2014] NZERA Auckland 169
5444010

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| | BETWEEN | PRODUCT PLACEMENT 2011 LIMITED<br>Applicant |
| | AND | JILL COCKBURN<br>Respondent |

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| Member of Authority: | Robin Arthur |
| Representatives: | Richard Upton, Counsel for the Applicant<br>Respondent in person |
| Investigation Meeting: | 1 April 2014 |
| Submissions: | 1 April and 3 April 2014 from the Applicant and 3 April 2014 from the Respondent |
| Determination: | 5 May 2014 |

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## DETERMINATION OF THE AUTHORITY

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**A.** **Within 14 days of the date of this determination Jill Cockburn must comply with the terms of her employment agreement with Product Placement 2011 Limited (PPL) by returning all copies of documents, data and lists belonging to PPL and by permanently deleting any electronic copies of such material.**

**B.** **Jill Cockburn must also pay a penalty of $3000 for breaching her duties of fidelity, confidentiality and good faith to PPL, with the full sum of the penalty to be paid to PPL within 28 days of the date of this determination.**

**C. Jill Cockburn must also pay PPL special damages of $6,215.08 for its legal fees prior to the issue of proceedings in the Authority and its forensic investigator's fees.**

**D. Costs in respect of representation in the Authority investigation are reserved.**

**Employment relationship problem**

[1] Product Placement 2011 Limited (PPL), a product promotions business, employed Jill Cockburn as a campaign manager on 9 September 2013. Twenty-one days later it gave her four weeks' notice of dismissal. She was dismissed soon after PPL began a disciplinary inquiry into how Ms Cockburn had carried out a promotional campaign for a client in a Hamilton supermarket.

[2] After attending a disciplinary meeting on Friday, 27 September Ms Cockburn advised PPL director Merilyn Havler by email that she was too distressed and exhausted to work on Monday, 30 September. Ms Havler then arranged for a courier to collect Ms Cockburn's work laptop computer for use by another employee at PPL's office. On opening the laptop that employee found a series of instant messages between Ms Cockburn and a former PPL employee (who is referred to as Ms D in this determination). The messages were from Ms Cockburn's Facebook account, which was said to have been left open and minimised on the laptop. The messages were exchanged in three days from 27 to 29 September while Ms Cockburn was still employed by PPL.

[3] Ms Havler was soon told of the content of the messages. These included what she considered to be unacceptable comments and conduct by Ms Cockburn. They comprised:

(i) derogatory remarks about Ms Havler and PPL's campaign director Zelda Botes; and

(ii) how Ms Cockburn could or would make remote and undetectable access to electronic records of PPL and another business owned by Ms Havler called Beauty Review (which operated a website advertising beauty products); and

(iii) how Ms Cockburn and Ms D could use information from Beauty Review to set up a competing business.

[4] Ms Havler then dismissed Ms Cockburn on four weeks notice, relying on a 90-day trial period term included in Ms Cockburn's employment agreement. The notice period meant Ms Cockburn's employment formally ended on 28 October 2013.

[5] Ms Havler arranged for the developer of her Beauty Review website to check the electronic records on recent access to the 'backend' of the site. Such access required logon and password details. She received a report from the developer that a PPL laptop was used to access the site around 2am on Friday, 27 September. She checked with two other staff members who could have accessed the site but was told they had not. Because Ms Cockburn's instant messages had referred to getting information about Beauty Review's business plan, Ms Havler concluded it was most likely that Ms Cockburn was responsible for unauthorised access to the site.

[6] PPL had its lawyers write to Ms Cockburn seeking return of confidential information it believed she had taken. Ms Cockburn's solicitors at the time replied that they were instructed Ms Cockburn had not accessed or kept any confidential information of PPL for any purpose other than her former employment. They also raised a personal grievance on Ms Cockburn's behalf.

[7] In early November PPL arranged for an independent computer forensic analyst, Mike Spence, to examine data on the company laptop previously used by Ms Cockburn. Mr Spence's report indicated that, while still in Ms Cockburn's possession, the laptop was used to access nine PPL files on 27 September and another 12 files on 29 September. He reported the records of the 29 September activity showed access to a Dropbox 'cloud' storage account. He concluded that this access was most likely for the purpose of copying files from the laptop to a Dropbox account.

[8] PPL considered the information it had about access to the Beauty Review website and from Mr Spence's report showed Ms Cockburn had taken and kept its information in breach of a term of her employment agreement, at clause 4.5, that read (in part):

> *Upon termination of employment … the Employee will return to the Employer all of the Employer's property including client lists, company data and any equipment … This will include all copies held of written, electronic or oral communications which have come into the Employee's possession in the course of the employment.*

[9] A similar clause at 15.4 of the agreement, under the heading of 'Confidentiality', included this obligation:

> *Upon termination of Employment the Employee … shall return to the Employer … all equipment, materials, documentation, data and the like, relating in any way to the business affairs of the Employer …*

[10] PPL lodged an application in the Authority setting out six alleged breaches by Ms Cockburn of her terms of employment and seeking orders for penalties, compliance, special damages and costs. Ms Cockburn did not lodge a statement in reply within the allotted time, despite two extensions of time being granted for her to seek legal advice and to lodge a reply. She said her failure to do so was, in part, due to a fire at her residence. She was nevertheless granted leave to lodge a witness statement and participate in the Authority investigation.

[11] The Authority's investigation meeting received written and oral evidence, under oath or affirmation, from Ms Havler, Ms Cockburn and Mr Spence. The parties also provided written closing submissions. As permitted under s174 of the Employment Relations Act 2000 (the Act) this determination has not set out all the evidence and submissions received. Rather it has recorded findings of fact and law and expressed conclusions on the issue before the Authority for resolution.

**Issues**

[12] The issues for investigation and determination were:

(i) Whether Ms Cockburn breached her obligations as an employee in the six instances alleged by PPL; and

(ii) If one or more of the alleged breaches were found, on the balance of probabilities, to have occurred, whether the Authority should:

  (a) award penalties, and, if so, in what amount; and

  (b) issue a compliance order for Ms Cockburn to return PPL property, and if so, with what particular requirements; and

(c) order Ms Cockburn to pay special damages for PPL's costs of its computer forensic investigation and legal representation; and

(iii) Whether either party should contribute to the reasonably incurred costs of the other party for representation in the Authority proceedings.

**Order prohibiting publication of the name of a former employee**

[13] At the start of the Authority investigation meeting I made an order prohibiting publication of the name of a former PPL employee with whom Ms Cockburn exchanged the messages through Facebook referred to in the evidence. I did so because that former employee was not invited to participate in the investigation or otherwise comment on the content of that evidence. As negative inferences could have been drawn from that evidence about what that former employee may or may not have said and done, and because no claims about her were before the Authority for resolution, it would be unfair for her to be named in the public record without an opportunity to be heard. I have referred to her as Ms D in this determination.

**Admissibility of Facebook messages**

[14] Ms Cockburn alleged PPL breached her privacy by opening and using the contents of her instant message 'conversation' with Ms D between 27 and 29 September. I have accepted Ms Havler's evidence that, when the laptop used by Ms Cockburn was returned to PPL's offices, the account was open and minimised on the device and no password was needed to open or read the messages. The exchanges occurred while she was employed by PPL and at least some of the messages were most likely exchanged using the laptop provided to Ms Cockburn for work purposes.

[15] Use of the content of those exchanges, I considered, was within the scope of the "*conduct of proceedings*" exception provided in the Privacy Act 1993 as grounds for non-compliance with that Act's principles. It was also within the scope of the discretionary power given to the Authority to "*take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not*".[1] It would not have been equitable for Ms Cockburn to have those

[1] Section 160(2) of the Employment Relations Act 2000.

exchanges excluded from evidence, given what she said in them about what she intended to do or had already done.

**The alleged breaches**

[16] After considering the evidence and submissions I concluded three of the six alleged breaches by Ms Cockburn of her terms of employment were established to the necessary standard. My reasons are given under the following six headings stating the alleged breaches.

*(i) Giving away stock and not telling the truth about what happened*

[17] Ms Cockburn submitted she did not breach her obligations of good faith and fidelity in how she carried out her part in the "powder swap" promotional campaign in a Hamilton supermarket on 25 and 26 September. She denied she was accountable for control of the stock of the dishwashing product that was to be given to customers during the campaign. She also submitted Ms Botes had agreed she could swap a single tablet of a rival product for a ten-tablet pack of the product being promoted.

[18] Ms Havler's evidence established that Ms Cockburn's suggestion that supermarket staff were responsible for misplacing promotional stock did not 'add up' and still left at least 40 packs unaccounted for. Ms Havler also had a report from the store manager that video footage from the store's closed circuit cameras showed Ms Cockburn simply gave away samples rather than did the required 'swap'. Ms Cockburn's explanation, that there was some ambiguity in their training for the campaign about what a customer could swap, was unlikely given that no other promotion staff made the same error.

[19] The disciplinary process Ms Havler began on 27 September was not completed. She had not asked to see the video evidence from the Te Rapa store. She had relied on the store manager's account of what it appeared to show. It was possible that, if given the opportunity to see and explain what it showed, Ms Cockburn might have persuaded Ms Havler to interpret it differently from the store manager's account. However that process was overtaken by other concerns about what was revealed by Ms Cockburn's exchange of messages with Ms D.

[20] Because the investigation and opportunity for explanation was not completed, I could not conclude PPL had established, to the necessary level of proof, the breaches alleged about the store promotion and Ms Cockburn's account of it.

*(ii) Breaching good faith obligations by what she wrote in instant message exchanges with Ms D between 27 and 29 September 2013*

[21] Ms Cockburn submitted use of the messages she exchanged with Ms D was a breach of her privacy. She said what she wrote in those exchanges was no more than angry words shared privately to vent her feelings, without resulting in any actual breaches of her employment obligations.

[22] For reasons already given I have accepted the message exchange was admissible. That evidence supported PPL's allegation about Ms Cockburn's action in the following two respects:

a) Ms Cockburn told Ms D that she would "*delete*" and "*trash*" emails Ms D had left on her work computer so that Ms Havler and Ms Botes could not look at them because Ms Cockburn "*[did]n't want them to see any emails we have sent to one another*". Ms Cockburn confirmed in her oral evidence that she was referring to emails exchanged between her and Ms D using their PPL work emails addresses. Those email addresses were for work purposes and it was for PPL to decide whether they should be deleted, not Ms Cockburn or Ms D for the purpose of keeping information from their employer, present or previous.
b) She discussed with Ms D how to get a "*business model*" used by Ms Havler to set up Beauty Review. When Ms D was not sure whether she could provide a copy of a research report she had prepared on Beauty Review's marketing strategy, Ms Cockburn said she could probably "*get copy from work*" by checking the sent items in Ms D's email records. Ms Cockburn worked for PPL, not Ms Havler's Beauty Review business. She was not entitled to use electronic access she had for work purposes to winkle out material that might be of potential private commercial use to her.

[23] But Ms Cockburn denied she had used that electronic access to delete Ms D's emails or to get a copy of a report Ms D had prepared. There was no evidence from

PPL that reliably contradicted her denial. She also said Ms D's report was prepared as an assignment for a marketing course and Ms D was free to provide her with a copy (as the instant messages exchanges indicated Ms D did). Ms Havler confirmed she had approved Ms D using information about Beauty Review for part of her studies.

[24] As a result I have accepted Ms Cockburn's evidence that she did not, in fact, carry out either action she had suggested. However her comments in the messages were, in and of themselves, a breach of her duties of good faith and fidelity to PPL as her employer. She had told Ms D that she would act in a way that suited their personal and mutual interests, using access she only had as an employee, for a purpose inconsistent with her employer's interests, and to keep it secret from PPL. The intended secrecy – which was a breach of her good faith obligation not to do anything likely to mislead or deceive her employer – was clear from messages Ms Cockburn wrote where she referred to being able to look at information without Ms Havler or Ms Botes being able to trace her doing so. These included writing:

> *… I can copy folders to my desktop and look at them at home*
> *Lol*
> *And they could not see I looked at them … doh*
> *…*
> *But I will look at z [a reference to Ms Botes] personal stuff at home*
> *Can do that and no one can trace as on my network*

*(iii) Being dishonest about her reasons for taking sick leave on 30 September 2013*

[25] Ms Cockburn submitted that she had a medical certificate for 30 September and PPL could not know better than her doctor whether she was genuinely sick. On the afternoon of 29 September – a Sunday – she had sent Ms Havler an email saying she would not be at work the next day as she was going to her doctor because she was "*stressed, distressed [and] mentally and emotionally exhausted*".

[26] However on the previous day – Saturday, 28 September – Ms Cockburn made these comments in a message to Ms D:

> *Decided I wont go to work on Monday*
> *Go to doctor and get medical certificate for stress leave*
> *And leave them in sh*t on Monday as no you or me …. Lol*
> *Had a bath*
> *Feel a million dollars*
> *Lol*

[27] As PPL noted in its reply submissions Ms Cockburn provided no evidence to the Authority investigation confirming that a medical certificate was actually issued to her by a doctor on the Monday. Even if such a certificate was issued, whatever probative value it might have was outweighed by the intention and state of mind revealed in Ms Cockburn's 28 September message. While she may have been distressed about being questioned about work matters in the previous week, I have concluded as more likely than not that her purpose in not attending work on the Monday was to inconvenience PPL rather than due to any significant incapacity on her part.

[28] It was, in all the circumstances, deliberately misleading behaviour that was in breach of her statutory duty of good faith and her common law duty of being honest in her dealings with her employer.

*(iv) Accessing the Beauty Review computer system (with the purpose of removing PPL and Beauty Review confidential information)*

[29] Ms Cockburn submitted PPL had not established she was the person who Ms Havler said accessed the Beauty Review computer system at 2am on Friday, 27 September.

[30] Messages from Ms D referred to files about Beauty Review being on a shared drive and including "*the business model*" as well as a proposal Ms Havler took to clients. That evidence was circumstantial. There was no evidence to confirm the rigour or reliability of the inquiries Ms Havler said she had made of her website developer and other PPL staff about who had accessed the Beauty Review computer system. Ms Havler suggested that a 13-page "*admin guide*" for Beauty Review might be a document taken by Ms Cockburn through such access but there was no other evidence to corroborate that allegation.

[31] While I concluded PPL had not cleared the necessary evidential hurdle to establish that alleged breach of duty by Ms Cockburn, Ms Cockburn's own evidence confirmed that she had – through Ms D – got a copy of Ms D's report which included some information about Beauty Review. While I had not seen the content of Ms D's report, whatever information about Beauty Review was in it was given to her for the

purposes of her studies and not to provide to Ms Cockburn for potential use in setting up a similar business to Beauty Review that would, as she expressed it in one message, "*waste them at their own game*". When Ms D wrote that she had done a research report on Beauty Review's marketing strategy Ms Cockburn replied: "*Excellent. We can use some of it for loco* (the working title of the business that she and Ms D were discussing setting up)."

[32] To have and keep the Beauty Review report sent to her by Ms D was not, strictly speaking, a breach of Ms Cockburn's obligations to PPL under clauses 4.5 and 15.4 of her employment agreement. Beauty Review was a different business and legal entity. Neither, again strictly speaking, was it a breach of her duty of fidelity to PPL at the time that she received a copy of that report from Ms D.

*(v) Removing nine files confidential to PPL (on 27 September) and failing to return them at the end of her employment (in breach of clause 4.5 of her employment agreement)*

[33] Ms Cockburn submitted Mr Spence's report and the other evidence from PPL did not establish that she had taken any confidential information belonging to the company.

[34] The report identified nine 'shortcut' files created between 9.48am and 4.58pm on 27 September – a period of time during which I have accepted, on Ms Cockburn's evidence, that she was in PPL's office. Mr Spence's analysis confirmed those files had been accessed but his evidence was that this did not indicate if the file was then only viewed or was also edited or copied. PPL could only provide actual copies of four of the files accessed – three were documents with information about the powder promotional campaign at other stores and one was a PowerPoint presentation about sales training for a pet nutrition firm's products. Three other files were in jpg format with a 25 September date. Ms Cockburn's evidence was that those jpg files were probably photographs she took during the promotion in the Te Rapa store and sent to Ms Havler. Neither Ms Cockburn nor Ms Havler could provide any useful information about two other files – with the titles "*results*" and "*Micro Scooters*".

[35] I have accepted Ms Cockburn could have legitimate reasons for access to all but one of those files during 27 September. Seven of them (based on their titles or known content) were, most likely, related directly to the powder swap campaign that

was the subject of a disciplinary discussion with her. It was not unreasonable for her to look at that material, in PPL's offices and during her working hours, in preparation for talking further with Ms Havler.

[36] However there was no apparent reason for Ms Cockburn to access the pet nutrition sales training PowerPoint file and she did not explain why she had done so. I have accepted that PPL had a legitimate concern that Ms Cockburn had accessed that file and had copied it. The file belonged to a client of PPL. The information in it about how to carry sales promotions for its particular products was the property of that client. It was of particular concern given that, after her dismissal by PPL, Ms Cockburn had worked for a business that was a rival of that client.

[37] Neither was there any reason for Ms Cockburn to take electronic or paper copies of any of the nine files she accessed on 27 September. However I was not satisfied that the circumstances on that day, as described in the evidence of Ms Havler and Ms Cockburn, or the inferences that could be drawn from Mr Spence's forensic analysis were such that I could reasonably conclude Ms Cockburn did, in fact, make such copies of those particular files on 27 September. Consequently neither could I conclude she had failed to return such files.

*(vi) Removing 12 files confidential to PPL (on 29 September) and transferring them to a personal 'drop box' cloud based storage system and failing to return them*

[38] Ms Cockburn also submitted a similar conclusion should be reached regarding this allegation – saying that PPL had not established she took any confidential information and she could not return what she did not have.

[39] However I considered Mr Spence's evidence – based on his forensic analysis of file activity on 29 September – and the contents of Ms Cockburn's messages with Ms D during the weekend of 28 and 29 September supported a different conclusion in respect of at least two important files. Mr Spence's report showed access to 12 files between 5.23and 7.23pm on 29 September.

[40] Ms Cockburn accepted in her oral evidence that, during those hours, she had accessed eight files that – by their titles – referred to survey or results information. Those files were probably information about the powder promotion. Such

information was expected to be the subject of further disciplinary discussions, or, as Ms Cockburn's messages revealed, relevant to a personal grievance claim she intended to make. Another file was in jpg format with a March 2011 date and no one could provide any information about its likely or actual contents.

[41] Ms Cockburn also accepted she had accessed a file with the title "*WIP-Merilyn*". She said it contained her notes of an earlier discussion with Ms Havler. She said she "*was accessing that to take to the meeting next week which was going to be quite confrontational. It was my record of a WIP meeting*". Ms Cockburn's use of the phrase "*to take to*" suggested, I considered, that she had a copy of that file in some form.

[42] Ms Cockburn entirely denied any knowledge regarding two other files that Mr Spence's report showed were created during this period – one relating to use of a Dropbox account and one showing the creation of a copy of her email account. She said she did not have a Dropbox account and, while she did access her email remotely, did not have the technical knowledge to create a copy of her email account in order to transfer her emails and their attachments into the Dropbox.

[43] I have preferred Mr Spence's conclusion, in his report and his evidence, that the apparent opening of a Dropbox account at 7.21pm followed about two minutes later by the creation of a particular database file that was generated on the copying of an email account and its contents, had only one likely explanation. The email database was copied. It was done during the time when Ms Cockburn had her PPL laptop and was using it to access other files that she accepted in her evidence she did access on that day.

[44] The database file was reviewed onscreen during the Authority investigation meeting. It comprised more than 600 emails, many with attached documents. Ms Cockburn said it appeared to contain her whole email account from 9 September to 29 September. The sample of the emails viewed had attachments with a range of commercially useful or sensitive information that were compiled by or for PPL use.

[45] I have concluded that it was more likely than not that Ms Cockburn did copy some or all of the documents identified as having been accessed by her on 29

September. Her access that day was made remotely (rather than in PPL's offices as on 27 September). Comments by Ms Cockburn in her instant message exchanges with Ms D that weekend showed that she believed she could access and copy files without being traced.

[46] To make those copies – particularly of the contents of her PPL email account – was a breach of her duties of fidelity and good faith at a time that she remained PPL's employee. Not to return such copies on or after 30 September, after her dismissal, breached clauses of her employment agreement that protected the confidentiality of PPL's commercial and business information.

**Compliance order**

[47] On the balance of probabilities Ms Cockburn, I have found, made and took copies of a number of documents to which she had access to as a PPL employee. It was a breach of clauses 4.5 and 15.4 of her employment agreement for her to keep those copies after her employment was terminated on 30 September 2013.

[48] Accordingly PPL was entitled to an order for the return of the documents. It was invited to provide detailed wording for the compliance order but submitted that an order for Ms Cockburn to simply comply with the relevant clause of her agreement was sufficient. On that basis I have made the bare order sought, with, as required by s137(3) of the Act, a time within which the order is to be obeyed.

**Penalties**

[49] PPL submitted a global penalty of $40,000 should be awarded for the six breach of contractual obligations pleaded. I have concluded a penalty, on a global basis, of $3000 was warranted and sufficient for the three categories of breach found in this determination. I have done so on the following grounds:

(i) Ms Cockburn's actions were deliberate and flagrant in what she said to Ms D about what she would do through her access to the PPL computer system, in misleading Ms Havler about the basis of her planned absence on 30 September, and in copying documents on 29 September.

(ii) PPL's business was harmed by the uncertainty created by Ms Cockburn's actions and the efforts it reasonably considered necessary to attempt to remedy that situation.

(iii) The amount is a significant deterrent, particularly in light of the order for further payments as special damages.

[50] PPL sought an order under s136(2) of the Act that any penalties ordered be paid to it rather than the Crown. That was appropriate in this case as the breaches established were of duties owed to PPL, rather than of statutory obligations, and the order leaves enforcement of any resulting debt in PPL's hands.

**Special damages**

[51] I have accepted PPL's special damages claim for costs and expenses incurred and reasonably foreseeable as a result of Ms Cockburn's breaches of her duties to the company. These damages total $6,215.08 being:

(i) Legal costs of $1090.20 for its earlier attempts to have her comply with her confidentiality obligations (to return documents); and

(ii) The $2624.88 fee of Mr Spence's firm for his forensic analysis of her activities on the PPL laptop; and

(iii) A further fee for analysis of the database file and Mr Spence's attendance at the Authority investigation meeting (estimated as up to $3000 but which, for the purposes of this determination, I have assessed as $2500).

**Costs**

[52] Costs are reserved. If not resolved by the parties between themselves PPL may lodge a memorandum on any costs issues within 28 days of the date of this determination. Ms Cockburn, on service of PPL's memorandum, is to have 14 days to reply. Costs will not be considered outside this timeframe unless prior leave to do so has been sought and granted.

Robin Arthur
Member of the Employment Relations Authority