

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 74  
5550879

BETWEEN                      AON NEW ZEALAND  
Applicant

AND                              ANDREW WEST  
First Respondent

AND                              ANDREW WEST  
INSURANCE BROKER  
LIMITED  
Second Respondent

Member of Authority:      Vicki Campbell

Representatives:            Michael O'Brien and Ben Nicholson for Applicant  
Mark Ryan for First and Second Respondents

Investigation Meeting:     28 and 29 October 2015

Submissions Received:    18 November and 9 December 2015 from Applicant  
4 December 2015 from Respondents

Determination:              8 March 2016

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**DETERMINATION OF THE AUTHORITY (No 2)**

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- A.      Mr West breached the express terms of his employment agreement with Aon New Zealand.**
  
- B.      Mr West is ordered to pay to Aon New Zealand the sum of \$60,449.88 without deduction within 28 days of the date of this determination.**
  
- C.      Mr West is ordered to pay a penalty of \$8,000 within 28 days of the date of this determination.**

- D. Andrew West Insurance Broker Limited is ordered to pay a penalty of \$5,000 within 28 days of the date of this determination.**
- E. The penalties are to be paid to Aon New Zealand pursuant to section 136(2) of the Employment Relations Act 2000.**
- F. Costs are reserved.**

### **Employment relationship problem**

[1] Aon New Zealand (Aon) claims Mr Andrew West breached the terms of his employment agreement and the terms of an undertaking signed by him on 5 March 2015. Aon seeks damages and penalties for the breaches. In addition Aon claims Andrew West Insurance Broker Ltd (AWIBL) aided and abetted the breaches and claims a penalty against AWIBL.

[2] Mr West denies the claims and AWIBL denies it has done anything to warrant a penalty.

[3] On 9 September 2015 I issued a non-publication determination<sup>1</sup> which applies to all documents included in the “counsel only” bundle of documents lodged in the Employment Relations Authority. These documents contain commercially sensitive information and information which is confidential to Aon and its clients.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Aon, Mr West and AWIBL but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **Background**

[5] Aon carries on business as an insurance broker providing insurance products and services, risk solutions and reinsurance to its clients.

[6] Mr West was initially engaged by Alexander & Alexander on a commission basis as an independent contractor. In 1995 Alexander & Alexander was taken over

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<sup>1</sup> *Aon New Zealand v Andrew West and Andrew West Insurance Brokers Limited* [2015] NZERA Auckland 271.

by Aon. Mr West continued to be engaged as an independent contractor until he was offered and accepted employment as an employee. The new relationship started on or about 2 April 2013.

[7] From April 2013 to 31 July 2014 Mr West was employed as a Senior Account Manager. Over the total period of his engagement as both a contractor and an employee, Mr West had a “book” of clients with whom he developed close professional and sometimes personal relationships. A number of these clients were also personal friends and family. The clients were a mixture of individuals, companies and trusts.

[8] The employment agreement was negotiated between Mr West and Aon from February 2013 until it was signed in March 2013. During that time Mr West had discussions with Mr Russell Bailey, Deputy Managing Director, about the terms of the agreement.

[9] Mr West was offered benefits under the employment agreement that he had not received under the contracting arrangement, in recognition that he would experience a reduction in his annual income. The benefits included superannuation at 10%, a car allowance of \$20,000 per annum, a bonus structure, insurance subsidy and payment of Mr West’s phones and petrol.

[10] Prior to Mr West becoming an employee, he was personally responsible for his own errors and omissions. As part of the employment package, Aon agreed to cover any errors and omissions that occurred prior to his engagement as an employee.

[11] As a contractor Mr West was subject to a 15 month restraint of trade provision that prohibited him from canvassing, soliciting, or dealing with any Aon customers that he had dealt with in the two years prior to his leaving Aon. When Mr West became an employee, this restraint was reduced to 12 months.

[12] Mr West formally resigned from his employment on 1 July 2014 providing one month’s notice with his employment ending on 31 July 2014.

[13] Mr West decided to enter into the broking market on his own account and began preparations for that move on 18 June 2014 when he completed an application to become a member of PSC Connect Insurance Broking Services (PSC Connect)

which is a cluster group of insurance brokers. Mr West formally resigned from his employment on 1 July 2014 and advised Aon that he intended joining PSC Connect with a view to operating his own brokering business.

[14] During his notice period Mr West took steps to set up his business including lodging the requisite documents to the Companies Office to incorporate AWIBL and completing insurance agency application forms for NZI and Vero.

[15] AWIBL was incorporated on 1 August 2014. Mr West is the sole director of AWIBL. AWIBL carries out business as an insurance broker and is in competition with Aon.

[16] Aon was aware that during his notice period Mr West was advising clients of his imminent departure and that he was setting up in business on his own account. Mr West advised clients that he was subject to restraining covenants and would not be able to deal with them for a period of 12 months.

[17] Following Mr West's departure Aon became aware that Mr West had sent documents from his work email to his personal email address which Aon considered to be confidential documents. The documents included:

- a) An excel spreadsheet containing budgeting information and the names of 600 clients together with the clients' current and historic spends and policy renewal dates;
- b) Aon advice on Cyber Insurance;
- c) A business interruption worksheet;
- d) Information on the Aon Vero Helmsman Charter Boat insurance policies and a Sell Sheet for this policy; and
- e) An email from a Mr Darryl Monteith dated 31 July 2014 in which Mr Monteith offers to recommend clients to Aon and notifying Mr West that he [Mr West] had been added to Mr Monteith's referral network.

[18] On 1 August 2014 Aon wrote to Mr West alleging Mr West had breached the terms of his employment agreement. Aon required Mr West to adhere to the restraining covenants set out in his employment agreement and to return all company property including all confidential information in his possession or control. Mr West was required to confirm that he had not retained any confidential information. On 5 August 2014 Mr West returned the excel spreadsheet and confirmed that it had been deleted from his computer without being printed.

[19] In order to change from one insurance broker to another, a client is required to complete a Broker Authority form which confirms a client's Authority for a Broker to act on its behalf. The form replaces and revokes any previous authorities given to any Agent or Broker to act. Once completed, the form is forwarded to the previous Broker and the client file and all information relating to that client is released to the new Broker.

[20] On 16 February 2015 Mr West advised Aon that he no longer intended to be bound by the restraining covenants of his employment agreement on the basis that the covenants were not enforceable. Following this notification Aon received Broker Authority forms appointing Mr West of AWIBL for six clients. All six clients had previously been managed by Mr West. In addition, Aon received Broker Authority forms appointing two different Brokers (who were also members of PSC Connect) for two clients. Both clients had previously been managed by Mr West.

[21] On 5 March 2015 Mr West signed an Undertaking, the terms of which were identical to the restraining covenants set out in Mr West's employment agreement.

## **Issues**

[22] The issues for determination are:

- a) Did Mr West breach the following express terms of his employment agreement:
  - (i) 12 month non-canvassing, non-solicitation and non-dealing clauses ("restraining covenants") post-employment?

(ii) Signed Undertaking dated 5 March 2015?

(iii) Confidentiality obligations during and post-employment?

- b) If the answer to any or all of the above questions is “yes”, did such breaches cause Aon losses and if so, is Mr West liable to pay damages to Aon?
- c) If Mr West breached his employment obligations is he liable for penalties and if so, how much?
- d) If Mr West breached his employment obligations was he aided and abetted by AWIBL and if so, is AWIBL liable for penalties and if so, how much?

### **Relevant terms of the employment agreement**

[23] The relevant clauses of the employment agreement between Mr West and Aon include (verbatim):

#### **Your duty of Confidentiality**

1. You must not use or disclose any information that is confidential to us, or to our clients, business partners and suppliers, unless we authorise you to do that. This duty applies while you work for us and after your employment ends.
2. Confidential information includes (but is not limited to) such things as:
  - ▶ our trade secrets, know-how and technological information and those of our clients, business partners and suppliers
  - ▶ client and supplier lists
  - ▶ information about our clients, business partners and suppliers, their clients (if any), and their requirements
  - ▶ information about our administrative procedures and business methods and those of our clients, business partners and suppliers
  - ▶ financial information, such as our profit margins, costs and prices
  - ▶ information about our business strategies
  - ▶ information about identified business opportunities
  - ▶ our intellectual property
  - ▶ information, which if disclosed, might cause harm to our business or advantage a competitor.

3. If you are carrying out your duties in a context where you come across confidential information belonging to a third party, or a third party's clients, this is confidential information that must be also kept confidential.

#### **Your duty in relation to Intellectual Property**

16. We own any intellectual property which you discover, make or conceive which is related in any way to our business (whether or not it can be patented, is subject to copyright or can be protected in some other way) if that occurs:
  - ▶ while working for us (whether or not during office hours or in our premises) or;
  - ▶ after you finished working for us, if it is based on something you worked on or knew about while employed by us; or
  - ▶ using confidential information.
17. You must tell us about any intellectual property you create in this way and give us any assistance which we think necessary to obtain, maintain or enforce our intellectual property rights. You appoint us your attorney to do anything you are required to do under this clause.
18. For the purposes of this clause, intellectual property includes but is not limited to any discovery, design, information, data documentation and software (in all its forms) or any improvement or development.

#### **Return of Company Property**

80. When your employment ends, you must immediately return to us all of our property, and all confidential information in your possession or control.

#### **Personal Computer**

81. If you have used a personal computer at home for work purposes, you must hand over to us all computer storage media, (e.g. floppy discs and CD's), which contain company files, and at your own expense ensure that hard drives are purged of company files.

#### **Restraint of Trade**

90. After this agreement ends you agree that you will not, within the area and for the period of restraint specified in Schedule 2, either personally or as a shareholder, director, partner or employee or in any other capacity, and whether directly or indirectly;
  - ▶ Canvass or solicit those clients whose dealings with us you know about through working for us, or those you had any direct or indirect involvement with, in the 2 year period before your employment ends.
  - ▶ Carry out any work for such clients.
  - ▶ Solicit any of our employees, agents, officers or consultants to end their employment or other relationship with us, or help a third party do that.
  - ▶ Procure or assist anyone else to do any of these things.
91. You acknowledge that the restraints are reasonable for the protection of our business. You also acknowledge that you have received reasonable consideration for the restraints by the salary and other benefits we provide to you.
92. The several restraints contained in this Section are separate covenants. If any of the restraints are unenforceable or illegal, that will not affect the remaining restraints.

[24] The area and period of the restraint was set out in Schedule 2 to the employment agreement. Geographically the area was New Zealand and the period was for 12 months.

## **Breaches of employment obligations**

[25] Aon claims Mr West has breached the following employment obligations:

- a) The restraining covenants set out in the employment agreement;
- b) An undertaking signed by him on 5 March 2015; and
- c) The terms of his employment agreement relating to confidentiality and intellectual property.

### ***Breach of restraining covenants***

[26] Mr West has argued that the restraining covenants in his employment agreement are unenforceable as they seek to restrict competition. This is in line with the principle of common law that restraint of trade clauses are prima facie unenforceable because they are contrary to the public interest. In order for them to be enforceable, such clauses must be reasonable as between the parties and in the public interest.

[27] In *Credit Consultants Debt Services NZ Limited v David Wilson & EC Credit Control Limited (No3)*<sup>2</sup> the Employment Court set out the principles applying to restraining covenants as reiterated by the Court of Appeal:

- Covenants restricting the activities of employees after the termination of their employment as a matter of legal policy are regarded as unenforceable unless they can be justified as reasonably necessary to protect proprietary interests of the former employer in the public interest.
- The reasonableness of the restraint is to be determined at the time the contract was entered into.
- The onus is on the party asserting the reasonableness of the covenant.
- Consideration is necessary but may be satisfied by the mutual promises intrinsic in the offer and acceptance of employment.

[28] The Employment Court noted other principles extracted from *Airgas Compressor Specialists Ltd v Bryant*<sup>3</sup> such as<sup>4</sup>:

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<sup>2</sup> [2007] ERNZ 252 at [45] citing *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 pages 495 and 496; *Fuel Espresso Ltd v Hsieh* unreported, Court of Appeal, 9 March 2007, CA88/07, [2007] NZCA 58.

- Proprietary interests to be protected include trade secrets, confidential information, and business or trade connections.
- Measures of reasonableness can be the duration, the geographical ambit and the scope of the term.
- The public interest requires that the right of every person to trade and be freely employed is only limited by a restraint that is reasonable.
- The use of confidential information is protected post-employment if its use results in a former employee being given an undue advantage in competition with a former employer.

[29] As noted by the Employment Court in *Airgas Compressor Specialists Ltd*<sup>5</sup> a covenant limited to prohibiting the solicitation of clients or customers of the employer is more likely to seem reasonable than a covenant prohibitive of competition generally or over a wide spectrum.

[30] For the following reasons I am satisfied that the restraining covenants in Mr West's employment agreement are reasonable and enforceable.

[31] Mr West accepted that as a Senior Accounts Manager he:

- a) Acquired significant information about the business of Aon, including the names and contact details of current and prospective clients;
- b) Had the opportunity to forge strong links with Aon's clients; and
- c) Had the opportunity to learn and acquire highly confidential information about Aon's business, including client insurance requirements, pricing information and client development information, renewal dates for insurance policies and Aon's new product development.

[32] These factors form a legitimate proprietary interest held by Aon for each of the clients Mr West dealt with during the two years before he ended his employment.

[33] Mr West argues that the prohibition on dealing with Aon clients applies only to those clients he has solicited. I do not accept that as an accurate interpretation of the clause. The non-dealing clause refers to "such clients" as described in the

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<sup>3</sup> [1998] 2 ERNZ 42.

<sup>4</sup> *Supra* n 2 at [46].

<sup>5</sup> *Supra* n 3 at page 53.

preceding clause. If Mr West has breached the first part of the clause by canvassing or soliciting those clients he had dealt with for the two years prior to the ending of his employment, the non-dealing clause would be redundant.

[34] The purpose of the clause is to protect Aon's customer connections and to prevent Mr West from leveraging the relationship he established while employed by Aon, to his advantage.

[35] Mr West retained the same mobile phone number when he left his employment. This made it easy for clients to find and contact him. It seems logical that the non-dealing clause must apply wider than only clients Mr West had canvassed or solicited, but must also apply to clients who made direct contact with him.

[36] The geographical boundary was as wide as it was because Aon's clients, for whom Mr West undertook brokerage duties, were spread throughout New Zealand. The geographic boundary becomes moot as Aon clients located in New Zealand and who Mr West had not dealt with for the two years prior to the ending of his employment were available for Mr West to canvass, solicit or deal with in his new business.

[37] The 12 month period took into account that the insurance policies are renewed on an annual basis. Mr West acknowledged at the investigation meeting that in respect of each client he dealt with he knew the value of the client's policy and the margin Aon was making. I accept the uncontested evidence of Ms Christine Martin, Aon's Regional Manager for the Waikato Region that requiring Mr West not to deal with clients for a period of 12 months would ensure that he no longer knew the value of the client's policy and the exact margin that Aon was making.

[38] Ms Martin told the Authority she had a number of discussions with Mr West during his resignation period about his reasons for leaving and what he would be doing after his resignation. Mr West advised Ms Martin that he had been unhappy with the change to being an employee because he had lost the freedom that comes from being your own boss. Ms Martin discussed this with Mr Russell Bailey, which resulted in Mr West being offered the opportunity to take on a contracting role with Aon after his employment ended. Mr West declined the offer.

[39] Ms Martin also enquired about Mr West's intentions with respect to his business and whether he intended taking any Aon clients or employees with him. Mr West advised Ms Martin that he did not intend to take any employees with him, but he wished to take clients he considered to be either family or close friends.

[40] Mr West collated a number of files of clients he considered to be family or close friends and asked Ms Martin if he could take them across to his new business. Ms Martin reminded Mr West of the restraining covenants in his employment agreement and offered to make enquiries on Mr West's behalf. Ms Martin made those enquiries which resulted in Mr West being advised that he could not take any Aon clients with him to his new business.

[41] Ms Martin asked Mr West how he was going to survive in his new business given that he could not take any Aon clients with him. Mr West advised Ms Martin that he understood the restraining covenants and would not abuse them and would manage for the 12 months of restraining covenants.

[42] I am satisfied Mr West was fully aware of his contractual obligations when he left Aon. He had sought legal advice prior to entering into the employment agreement which contained restraining covenants similar or the same as those contained in his previous contracting arrangement. Further, Mr West advised clients that he was subject to a 12 month restraint.

[43] On or about 16 February 2015 Mr West wrote to Aon advising that he no longer intended to abide by his restraining covenants. Immediately following this Aon received letters of appointment from seven clients appointing Mr West of AWIBL as their insurance broker. The letters of appointment were dated 16 and 23 February 2015.

[44] Aon wrote to Mr West and advised him it would seek damages against him if he continued to breach the restraining covenants in his employment agreement. Despite this notice Mr West accepted appointments for a further four Aon clients in March 2015.

[45] I find the restraining covenants were only to prevent Mr West from doing business with those clients he had dealings with while employed by Aon. Mr West

was free, as he acknowledged at the Authority's investigation meeting, to compete with Aon in the insurance broking industry and gain business within the Waikato insurance market. This extended to clients of Aon with whom Mr West had not had any direct or indirect involvement with in the 2 year period before his employment ended.

[46] When Mr West began dealing with the 11 Aon clients in February and March 2015 he was in breach of the restraining covenants contained in the employment agreement. He further breached this agreement when he began dealing with another five clients following the signing of the undertakings in March and May 2015.

### *Undertakings*

[47] On 5 March 2015 Mr West signed written undertakings which reflected the restraining covenants set out in his employment agreement. Through signing the undertakings Mr West agreed that prior to 31 July 2015 neither he personally (verbatim):

...or as a shareholder, director, partner or employee or in any other capacity, and whether directly or indirectly:

1. Canvass or solicit clients of Aon New Zealand (Aon) whose dealings with Aon I know about through working for Aon, or who I had any direct or indirect involvement with, in the 2 year period before my employment with Aon ended.
2. Carry out any work for clients covered by clause 1 above.
3. Solicit any of Aon employees, agents, officers or consultants to end their employment or other relationship with Aon, or help a third party do that.
4. Procure or assist anyone else to do any of these things.

[48] As the undertakings reflect the terms Mr West had already agreed to in the employment agreement I have taken the view that the undertakings are merely a restatement by Mr West of his post-employment obligations and his agreement to adhere to them.

[49] After signing the undertakings five clients appointed other members of PSC Connect as their broker and have now appointed Mr West of AWIBL. Mr West referred those clients to PSC Connect. Also, two clients requested extensions to their policies, at the end of which, they have also appointed Mr West of AWIBL as their broker.

[50] When asked about the extensions Mr West told the Authority that he had clients contacting him on a regular basis asking what they could do, given the restraint period. He acknowledges advising those clients that they could request an extension to take them outside the 12 month period.

***Effect of breaches of restraining covenants and undertakings***

[51] In total Mr West dealt with 18 clients. All were Aon clients with whom Mr West had had dealings during the two year period before ending his employment.

[52] I find these dealings were in breach of Mr West's restraining covenants and Aon is entitled to a consideration of damages.

***Breach of confidentiality in intellectual property***

[53] Mr West was bound by confidentiality and intellectual property clauses set out in his employment agreement. During the months leading up to him leaving Aon Mr West took a number of steps to set up his own brokering business.

[54] In May 2014 Mr West dined with a client of Aon during which he discussed with the client his new business. When challenged about this Mr West acknowledged it was inappropriate.

[55] Mr West applied to join PSC Connect on 18 June 2014. The client he dined with in May 2014 was named as a Referee on his PSC Connect application form and subsequently on his application with Vero, which if accepted, would allow Mr West to obtain quotes and do business through Vero.

[56] During April and July 2014 Mr West sent information to his personal email address. That information included:

- a) A list of Aon's clients (9 April and 2 May 2014);
- b) Aon's information on Cyber Liability (20 June 2014);
- c) A business interruption calculation sheet (1 July 2014);

- d) Aon's information on the Aon Vero Helmsman policies (7 July 2014); and
- e) An email from Mr Monteith (31 July 2014).

[57] Ms Martin's uncontested evidence is that after checking Mr West's Aon email address and, with the exception of the documents sent between April and July 2014, almost all of the emails sent to Mr West's personal email address were of a personal nature. This led to a conclusion by Aon that the documents Mr West sent to his personal email address were for use in his new business.

[58] When Mr West sent these documents to his personal email address he was potentially disclosing them for use by himself in operating his new company. If that is the case this would constitute a breach of the employment agreement which prohibits the disclosure of Aon's confidential information. The only exception to this is where Mr West had authority to make such disclosure.

#### List of Aon's clients

[59] Mr West sent copies of lists of Aon clients to his personal email address on 9 April and 2 May 2014. The lists were contained on excel spreadsheets and listed over 600 of Aon's clients and included budget information, Aon's earnings from each client, and renewal policy dates.

[60] Mr West told the Authority he sent the client lists home in order to prepare for weekly meetings that were occurring at this time. That explanation is simply not credible.

[61] The confidentiality clause of the employment agreement sets out the types of documents which are protected and deemed to be confidential and which includes:

- client lists;
- information about clients and their requirements; and
- financial information.

[62] I am satisfied Mr West has breached the terms of his employment agreement when he sent to his personal email address the client list spreadsheets. Mr West had no authorisation to disclose these documents.

*Aon's information on Cyber Liability*

[63] On 20 June 2014 Mr West forwarded to his personal email address a copy of a document that contained advice on Cyber Liability Insurance and included a training video.

[64] Mr West denies this information is confidential because the information is available through many Insurers. Ms Martin disputed Mr West's evidence and told the Authority that the information Mr West had sent to his personal email address had been put together by Aon as it was not commonly available. This included the training video.

[65] The confidentiality clause in the employment agreement includes information about identified business opportunities and Aon's intellectual property. Aon has identified that its intellectual property includes any development, design or information.

[66] I am satisfied Mr West has breached the terms of his employment agreement when he sent to his personal email address information on cyber insurance which included a training video all developed by Aon. Mr West had no authorisation to disclose these documents.

*Business interruption calculation sheet*

[67] Mr West told the Authority that he developed this document prior to joining Aon and that he adapted it for use at Aon. Mr West's employment agreement makes it clear that Aon owns any intellectual property conceived while working for Aon. The agreement required Mr West to advise Aon if he created any document.

[68] At the investigation meeting Mr West conceded that the document is used extensively within Aon and forms part of Aon's intellectual property.

[69] Mr West told the Authority that he uses the form in his new business and he sent it to his personal email address with the express purpose of using the form in his new business.

[70] The confidentiality clause in the employment agreement includes Aon's intellectual property. Aon has identified that its intellectual property includes any Aon document.

[71] I am satisfied Mr West has breached the terms of his employment agreement when he sent to his personal email address on 1 July 2014 the Business Interruption Calculation Sheet. Mr West had no authorisation to send the document outside of the company or to use it in his new business.

*Aon's information on the Aon Vero Helmsman Charter Boat insurance policies and Sell Sheet*

[72] On 7 July 2014, Mr West sent Aon product information to his personal email address including an update on Aon Vero Helmsman Charter Boat insurance policies and an associated "sell sheet".

[73] I accept Ms Martin's uncontested evidence that the Aon Vero Helmsman Charter Boat insurance policies are unique to Aon and falls within the confidentiality and intellectual property clauses of the employment agreement.

[74] Mr West acknowledged at the investigation meeting that he sent this information to his personal email address on the basis that it may assist him in his new business.

[75] I am satisfied Mr West has breached the terms of his employment agreement when he sent to his personal email address Aon product information including the update on Aon Vero Helmsman Charter Boat insurance policies and the associated "sell sheet". Mr West had no authorisation to disclose these documents.

*An email from Mr Monteith*

[76] On 31 July 2014 Mr West received an email at his Aon email address from Mr Darryl Monteith, an American based in Boston. Mr Monteith advised Mr West that he wanted to recommend clients to Aon and had added Mr West to his referral network.

[77] Three minutes after receiving the email at Aon, Mr West forwarded the email to his personal email address. He did not advise anyone in Aon of the contact.

[78] In his evidence Mr West told the Authority that many years ago he used to flat with Mr Monteith, but they had lost contact and had recently reconnected through LinkedIn. Mr West asserted that he could not understand why Mr Monteith felt they could make referrals to each other as Mr Monteith lives in Boston.

[79] Ms Martin told the Authority that Aon has offices in Boston and that this was a potential lead for Aon which ought to have been passed on.

[80] I find on balance it is more likely than not, that Mr West viewed Mr Monteith's referral network as an opportunity to assist him in his new business.

[81] I am satisfied Mr West has breached the terms of his employment agreement when he sent to his personal email address Mr Monteith's email offering to include him in his referral network. This was a business opportunity for Aon and is one of the items covered by the confidentiality clause of the employment agreement. Mr West had no authorisation to disclose this email.

### **Claim for damages and penalties**

[82] Aon seeks damages for the loss caused by Mr West's breaches of his restraining covenant and penalties for his breaches of the employment agreement.

### ***Damages***

[83] Aon seeks damages for actual loss suffered by Mr West's breaches and future losses in the amount of \$364,709.51.

[84] The objective of any damages award is to put Aon, as far as an appropriately calculated sum of money could, in the position it would have been in if Mr West had not breached his obligations.<sup>6</sup> Losses arising from reasonable steps taken by Aon to minimise losses caused to it by Mr West's actions are also recoverable.<sup>7</sup>

[85] The Employment Court in *Medic Corporation Ltd v Barrett (No 2)* provided a summary of the analysis required:<sup>8</sup>

The purpose of damages is to compensate a plaintiff for the loss it has sustained. ... I recognise, of course, that any sum which [the respondents] are ordered to pay by way of

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<sup>6</sup> Blanchard & Ors *Civil Remedies in New Zealand* (2003) 1.3.1 at 9.

<sup>7</sup> Burrow, Finn & Todd *Law of Contract in New Zealand* (3<sup>rd</sup> ed, 2007) 21.2.4 at 712.

<sup>8</sup> [1992] 3 ERNZ 977 at 983-984.

compensation will inevitably act as a punishment in that they will be deprived of it but in law the doing of justice by way of compensation is not regarded as a punishment but as a restoration to a plaintiff of something that was always his and of which he has been wrongfully deprived.

Compensation means an award of a sum of money which will place the plaintiff back in the position in which it can be supposed that it would have been if the defendants had acted correctly towards it. It follows that while the plaintiff is entitled to receive compensation, it is not entitled to a windfall. It may have sustained an injury at the hands of the defendants, but it has not won a lottery. It is entitled to no more than is necessary to compensate it for the injury for which the defendants are responsible but it cannot look to them to make good losses, the result of some unconnected reversal of fortune. But it is still entitled to such an amount as will put it back, so far as money can achieve that result, in substantially the same position financially as it would have been in if the defendants had not injured it by unlawful activity. That is the measure of the loss – no more and no less. Just as the Court may not exceed that amount in making its award, so it is not entitled to deprive the plaintiff of one cent of that recovery.

That statement needs, however, to be understood in a sensible way – as with any question of fact and degree. The law places limits on the consequences that may be laid at the door of a defendant. They must be consequences of which it can convincingly be said that they are the result of the defendant's conduct, in the sense that they would probably not have ensued but for the defendant's conduct. And ... any award of damages must be sufficiently linked to the breach, whether of contract or of duty, to merit recovery in all the circumstances. Whether it is or is not is, of course, a question of fact and degree.

It is for the plaintiff to prove, not for the defendants to disprove, that loss has been sustained that is not too remote to be taken into account and the extent of that loss, but only on a balance of probabilities and not beyond reasonable doubt. While the plaintiff must prove the extent of its losses, in some areas it will be neither necessary nor possible to do so with great precision and the Court must then do its best, upon the material presented, to make an assessment using its general knowledge of human and business affairs and common sense. Some kinds of conduct are by their nature likely to cause certain types of loss; so that if the conduct has taken place and the loss has been sustained, it is not a large step to conclude that the one has occasioned the other without any more specific or concrete evidence to that effect. It is nevertheless necessary to keep in mind that other forces may operate to contribute to, or even cause independently of the wrongdoing, the harm that has been sustained.

[86] Aon took reasonable steps to mitigate its loss. Prior to his employment ending Aon made it clear to Mr West that he was not to take any Aon clients that he had been dealing with for the previous 2 years.

[87] On 1 August 2014 Aon wrote to Mr West advising Mr West of its knowledge that before his employment had ended he had been speaking to clients whose accounts were managed by him and had advised those clients that he was setting up his own brokering business. Aon advised Mr West that these discussions were a breach of his employment agreement.

[88] Aon advised Mr West it would seek damages and compensation for any losses suffered as a result of Mr West's breaches and would seek penalties. Aon reminded Mr West of the restraining covenants in his employment agreement and that it would

be monitoring carefully his compliance with the restraint. Mr West was advised that if he was found to be in breach of the restraining covenants Aon would pursue the matter formally and seek damages for any loss suffered as a result of a breach.

[89] When Mr West notified Aon on 16 February 2015 that he no longer intended to be bound by the restraining covenants, Aon responded by setting out the clients it was aware of that had appointed Mr West of AWIBL as Broker and notified Mr West that Aon had suffered damage as a result. Aon requested Mr West to provide an immediate undertaking that he would abide by the restraining covenants or urgent injunction proceedings would be lodged against Mr West.

[90] While Mr West signed the undertakings on 5 March 2015 Aon had reserved its rights with respect to the damage already occasioned by Mr West's breaches of his obligations to Aon.

[91] Mr West has breached his obligations not to solicit or deal with clients he had been dealing with for the 2 years preceding the ending of his employment. Mr West was fully cognisant of these obligations and he was also aware, after 1 August 2014 of the possible consequences if he ignored those obligations.

[92] Aon suffered an actual loss of \$60,449.88 in lost brokerage fees for the 18 clients that appointed Mr West or a member of PSC Connect (on Mr West's recommendation). Aon seeks a sum based on the actual and future loss over a total period of seven years.

[93] I heard from all but one of the clients who had appointed Mr West as their broker. In the main, the evidence was consistent that even if they had not left Aon when they did, they would have moved their business as their policies fell due for renewal.

[94] I agree with the submissions for Mr West that the claim for seven years losses is not sustainable. I consider total damages of \$60,449.88 appropriate in the circumstances.

[95] Mr West is ordered to pay to Aon New Zealand the sum of \$60,449.88 without deduction within 28 days of the date of this determination.

### ***Penalties***

[96] Aon seeks the imposition of penalties against Mr West for each of the two breaches of his employment agreement under section 134(1) of the Act. The maximum penalty the Authority can impose on an individual is \$10,000.<sup>9</sup>

[97] It is generally accepted that a penalty should be imposed for the purpose of punishment and deterrence. In *Tan v Yang & Zhang*<sup>10</sup> the Court set out the following non-exhaustive list of factors that may usefully be considered by the Authority when dealing with applications for penalties:

- a) The seriousness of the breach;
- b) Whether the breach is one-off or repeated;
- c) The impact, if any, on the employee/prospective employee;
- d) The vulnerability of the employee/prospective employee;
- e) The need for deterrence;
- f) Remorse shown by the party in breach; and
- g) The range of penalties imposed in other comparable cases.

[98] Mr West's action in taking and keeping Aon's confidential information was deliberate and calculated. Mr West acknowledged at the investigation meeting that he was using the Business Interruption Calculation sheet on a daily basis and had sent that form as well as the Aon Vero Helmsman Charter Boat insurance policies and sell sheet specifically for use in his new business. These breaches are not technical and not made inadvertently and a penalty is required.

[99] Mr West took the documents with the intention of using them for his own benefit. He had previously requested to take clients he considered to be family or friends and this request had been declined. On balance I believe it is more likely than not that Mr West wanted the client lists as he viewed this as his "asset base" and this would give him a head start in establishing his business.

[100] Mr West has demonstrated no remorse in his actions and steadfastly held to the view that he had adhered to his obligations at all times.

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<sup>9</sup> The Employment Relations Act 2000 section 135(2).

<sup>10</sup> [2014] NZEmpC 65.

[101] In determining the amount of penalty to be paid I have considered the level of penalties awarded in similar cases. In *Tag Oil (NZ) Ltd v Watchorn*<sup>11</sup> a penalty of \$12,000 was awarded for four breaches of taking confidential information and in a more recent case of *Tex Onsite Limited v Hill*,<sup>12</sup> Mr Hill was ordered to pay a penalty of \$8,000.

[102] I have taken a global approach to the imposition of a penalty and consider a penalty of \$8,000 to be appropriate in the circumstances. This takes into consideration that to some extent the damages award has ameliorated Aon's position. Mr West is ordered to pay a penalty of \$8,000 within 28 days of the date of this determination.

### **Claim for aiding and abetting**

[103] Aon alleges AWIBL aided and abetted Mr West's breaches of his employment agreement and seeks the imposition of a penalty under section 134(2) of the Act.

[104] Aiding and abetting a breach of an employment agreement can include situations where the employment has ended and a former employee has ongoing obligations concerning the use of confidential information or restraining covenants.<sup>13</sup> The person (or entity) alleged to have aided and abetted a breach of such obligations must know of the agreement (but not necessarily the exact term) and deliberately intend to interfere with it.<sup>14</sup>

[105] Mr West decided while he was still employed with Aon, to set up and operate his own insurance broking company. The day after his employment ended, on 1 August 2014, Andrew West Insurance Brokers Ltd (the name was changed to Andrew West Insurance Broker Ltd on 14 November 2014) was registered with the Companies Office. Mr West is named as the sole director.

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<sup>11</sup> [2014] NZERA Wellington 58.

<sup>12</sup> [2016] NZERA Auckland 25.

<sup>13</sup> *Aarts v Barnados NZ Ltd & Ors* [2013] NZEmpC 85 at [26].

<sup>14</sup> *Supra* n 2 at [76].

[106] I am satisfied that what Mr West did and knew when operating the broking business was also known by the separate legal entity of AWIBL as a registered limited liability company. In that way AWIBL knew what Mr West knew, that he:

- a) Had ongoing obligations to Aon under the employment agreement in respect to the restraining covenants and the confidentiality and intellectual property provisions;
- b) Had taken information from Aon that he was not entitled to take; and
- c) Was using that information in AWIBL's business.

[107] AWIBL is liable for penalties under section 134(2) of the Act for abetting Mr West's breaches. The maximum penalty in the case of a company is \$20,000.

[108] There is an element of "double counting" in imposing a penalty on both Mr West and AWIBL. In coming to my conclusions, however, I have taken into account that Mr West and AWIBL are two separate legal personalities. Mr West is an individual and AWIBL is a registered company. As such the abetting of Mr West's breaches of his employment obligations by AWIBL were wrongdoings of that separate legal entity.

[109] In all the circumstances a penalty of \$5,000 against AWIBL is appropriate. Andrew West Insurance Broker Limited is ordered to pay a penalty of \$5,000 within 28 days of the date of this determination.

### **Application of penalties**

[110] Aon has asked that it receive any penalty paid by Mr West and/or AWIBL pursuant to section 136(2) of the Act.

[111] The breaches were not statutory breaches but were breaches of the relationship between Mr West and Aon and AWIBL's abetting of those breaches. It is therefore appropriate that the full amount of the penalties imposed against both respondents is to be paid to Aon. Therefore the penalties are to be paid to Aon New Zealand pursuant to section 136(2) of the Employment Relations Act 2000.

## **Costs**

[112] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Aon shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr West shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[113] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards

Vicki Campbell

Member of the Employment Relations Authority