IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2017] NZERA Christchurch 151
5644196

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

Member of Authority:	David Appleton
Representatives:	Jeff Goldstein and Linda Ryder, Co-Counsel for Applicant Respondent self-represented at the investigation meeting and represented by Peter McRae, Counsel, for submissions
Investigation Meeting:	2 to 4 May 2017 at Nelson
Further information received:	24 May, 31 May, 9 June 2017
Submissions Received:	29 June and 18 August 2017 from the respondent 28 July and 25 August 2017 from the applicant
Date of Determination:	11 September 2017

DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY No. 2

A. Mr Pitman acted in breach of clauses 13, 26.1, 26.2, 16, 7 and 14 of the employment agreement, as well as the duty of fidelity and good faith during his employment, and a term of the Consent Determination.

B. The parties are directed to attend mediation in order to seek to settle the matter of quantum and costs.

C. The matters of quantum and costs are therefore reserved.

Employment relationship problem

[1] The applicant (APS) seeks special and general damages from Mr Pitman in relation to alleged breaches of his individual employment agreement with it, and for breaches of the duty of good faith, for having allegedly:

a. helped an associate to set up a competing business, A Temp Limited, during his employment in breach of his duty of fidelity;

b. misused APS' confidential information during and after he left its employment;

c. failed to return APS' property after he left its employment;

d. competed against APS after he left its employment in breach of a restraint of trade covenant;

e. solicited employees of APS during and after his employment; and

f. solicited clients of APS during and after his employment.

[2] APS also seeks a penalty to be imposed upon Mr Pitman in the sum of $10,000 for each alleged breach of his employment agreement, and for each alleged breach of the Employment Relations Act 2000 (the Act).

[3] APS also allege that Mr Pitman has breached the terms of a Consent Determination issued by the Authority on 28 October 2016[1], following a settlement between the parties of interim injunction proceedings which were to be investigated by the Authority on 27 October 2016. It seeks damages and penalties in respect of that alleged breach.

[4] Mr Pitman resists the application for damages and penalties on the basis that the restraints relied on are not reasonable, are intended to prevent competition and are contrary to the public interest; that he has not solicited APS's clients, or its

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employees, and that he has not misused confidential information. He also denies that he had breached the terms of the Consent Determination.

The scope of the investigation meeting

[5] During the investigation meeting held on 2 to 4 May 2017 I reached the view that the applicant's approach to assessing its losses was too speculative to be safe, and that further information was needed. Accordingly, although some evidence was heard on the subject of loss, the investigation meeting concentrated on issues of enforceability and liability. Mr Goldstein and Ms Ryder ask in their submissions that this approach be reconsidered. I address that request at the end of this determination.

[6] On a separate matter, by way of a determination dated 3 July 2017[2] the Authority declined to find that the effect of the Consent Determination was to retrospectively render enforceable the restraint of trade and non-solicitation clauses contained in Mr Pitman's employment agreement.

[7] The Authority heard oral evidence from Mr Geoffrey Densem, the managing director of APS, Mr Ryan Densem, the National Operations Manager of APS, Mr Tate Ulsaker, the manager of APS's Nelson branch, Mr Regan Poynter, Mr Pitman's replacement at APS, Mr Sean Davies, a former colleague of Mr Pitman at APS, four temporary employees who had been placed in temporary employment by APS, Mr Pitman himself, Ms Debbie Smith, the founder of A Temp Limited, and Mr Fred Gear, the managing director of one of APS's and A Temp's clients.

Background information

[8] APS operates a recruitment business placing individuals on a temporary or permanent basis in its client organisations. Its head office is in Christchurch, and it has other branches in Nelson, Invercargill and Auckland.

[9] Mr Pitman commenced working for APS on 7 March 2016 in its Nelson branch as a senior recruitment consultant. Mr Pitman signed an employment agreement with APS on 10 February 2016. The following are material clauses of that agreement:

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1.5 The parties agree that their relationship is based on good faith and mutual trust and confidence.

7. **Employee Obligations**

7.1 The employee shall:

7.1.1 Comply with all reasonable and lawful instructions of the employer;

7.1.2 Perform his/her duties with all reasonable skill, diligence and in the best interests of the employer and the employment relationship;

7.1.3 Devote the whole of the employee's time and attention during working hours to the performance of the employee's obligations under this agreement;

7.1.4 Positively promote and protect the interests of the employer;

7.1.5 Deal with the employer in good faith in all aspects of the employment relationship;

7.1.6 Take all practicable steps to perform the job in a way that is safe and healthy for the employee, his/her fellow employees and any other person;

7.1.7 Use the employee's best endeavours to prevent the disclosure of confidential information;

7.1.8 Notify the employer of any pending criminal charges or serious traffic offences which may affect the employee's ability to carry out his/her duties or affect the trust and confidence in the employment relationship.

13. **Other Work/Business**

13.1 The employee agrees:

13.1.1 not to be employed, engaged or concerned with the conduct of any other business except with the written consent of the employer. Such consent will not be unreasonably withheld;

13.1.2 not to be directly or indirectly interested in any business that may compete in any material respect with the employer's business;

13.1.3 to advise the employer where the employee is employed, engaged in or concerned with any other business.

13.2 Failure to comply with any part of this clause may result in disciplinary action, up to and including termination of employment without notice.

14. **Conflict of Interest/Commercial Risk**

14.1 The employee agrees that there are no contracts, restrictions or other matters which would interfere with his/her ability to discharge the obligations under this agreement.

14.2 While performing the obligations under this agreement the employee has an obligation to immediately advise the

employer of any conflict of interest or commercial risks in the following circumstances:

14.2.1 where the employee becomes aware of any potential or actual conflict between the employee's interests and those of the employer; and/or

14.2.2 where there is a risk the employee could inadvertently disclose confidential information to the employer's competitors, for example where a relative is employed in a similar business in New Zealand.

14.3 Where the employer forms the view that a conflict of interest or commercial risk or other situation exists that in any way harms or potentially harms the employer's interests, it may direct the employee to take action to resolve the problem and the employee shall comply with that instruction.

14.4 If in the employer's opinion the employee has been unable to satisfactorily resolve the problem, the employer shall be entitled at its discretion to transfer the employee to an alternative position which the employer considers suitable, or if this is not possible, to terminate the employee's employment on six (6) weeks' notice or payment in lieu thereof.

14.5 Where an employee fails to declare a conflict of interest, or commercial risk, this may result in termination of employment without notice.

14.6 The employee shall not either directly or indirectly, receive or accept for his/her own benefit or for the benefit of any person or entity other than the employer, any gratuity, or payment of any kind from any person having or intending to have any business with the employer.

14.7 If the employer believes the employee may have entered into another employment arrangement, business relationship or activity which could bring the employee into conflict with his/her obligations under this agreement or which might adversely affect his duty of fidelity to the employer, the employee will on request, make full disclosure to the employer of all relevant matters.

16. Confidentiality

16.1 During the employee's employment and after its termination for any reason, the employee shall not:

16.1.1 other than in the course of the employees' duties, disclose any confidential information to any person other than a director or another employee of the employer's business who is authorised to receive it;

16.1.2 use confidential information to the employee's own benefit, or the benefit of any unauthorised person, as distinct from the benefit of the employer;

16.1.3 use confidential information in any manner that may cause injury or loss, whether directly or indirectly, to the employer;

16.1.4 turn or attempt to turn the employee's personal knowledge of any suppliers or customers/clients of the employer to his/her personal benefit, or the benefit of any unauthorised person, as distinct from the benefit of the employer;

16.1.5 retain, copy or memorise any confidential information for personal use or for use by any unauthorised person.

16.2 In this clause "confidential information" means any information relating to the business or financial affairs of the employer, its customers/clients/suppliers, which has come to the knowledge of the employee or which has been disclosed or might reasonably be understood to have been disclosed to the employee in confidence, other than information which is already public knowledge or which is obvious or trivial. Without limiting the foregoing, "confidential information" shall also include:

16.2.1 any trade secrets, specialised know-how or practices in the employer's area of business or in any other area of business in which the employer may from time to time operate, customer lists, customer/client/supplier requirements, performance reports or profitability figures or reports;

16.2.2 profitability of contracts, margins on products, and other financial information in relation to the business or in relation to any customer/client/supplier which are or may be of value to a competitor;

16.2.3 information pertaining to any other employee of the employer which is protected from disclosure under the Privacy Act 1993 and its amendments.

25. Return of Company Property

25.1 The employee shall return all company property upon termination of employment, or earlier if directed.

25.2 This includes but is not limited to all company keys, vehicle, fuel cards, uniforms, company software, records, memoranda, notes, drawings, manuals, disks, and documents pertaining to the employer's business, including all copies whether hard copies or electronic copies.

25.3 If at the time of termination of the employee's employment the employee has not returned any property that belongs to the employer, the employer may elect to deduct from the employee's final pay (including holiday pay) the reasonable depreciated value of the property.

26. Restraint of Trade

26.1 In consideration of the remuneration package in this agreement, the Employee agrees that during the period of his/her employment and for a period of three (3) months following the termination of employment he/she will not:

26.1.1 be directly or indirectly involved (whether as an employee, independent contractor, shareholder, director,

consultant, partner, owner, agent or in any other capacity) in any business, organisation or venture which competes with and/or provides similar products or services to that provided by the Employer.

26.2 The Employee agrees that during the period of his/her employment and for a period of six (6) months following the termination of employment he/she will not:

26.2.1 establish any business or organisation which will compete with and/or provide similar products or services to that provided by the Employer.

26.3 This restraint shall apply to any city or town where the employer has a physical branch located.

26.4 The Employee acknowledges that the Employer has a genuine proprietary interest in protecting its business interests including but not limited to its confidential information and business relationships.

26.5 The Employee acknowledges that this restraint is reasonable and necessary to protect the genuine proprietary interests of the Employer.

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

26.7 In the event that the Employee seeks employment in the future which could bring him/her into conflict with this restraint of trade clause, he/she shall notify the prospective Employer of the terms of this restraint.

27. Non-Solicitation

27.1 The employee shall not during the term of this employment or for a period of six (6) months after the termination of this employment, endeavour to solicit or entice away from the employer, directly or indirectly:

27.1.1 any employee of the employer;
27.1.2 any client of the employer.

[10] Schedule A of the employment agreement identified Mr Pitman as 'Senior Recruitment Consultant', reporting to the Branch Manager. It stated that the location of work was 'Nelson Branch or any other reasonable location or any replacement premises within a reasonable distance of these premises'. In practice, Mr Pitman worked in Nelson. He also lives in Nelson.

[11] Schedule B of the agreement set out a detailed job description for Mr Pitman and included business development, establishing and maintaining client accounts and

records, including for prospects, quotations, tenders, assignments, clients and candidate files; marketing and branding to promote both applicants looking for positions and clients looking to fill positions; recruiting applicants to fill temporary placement orders and associated administration and travel.

[12] Mr Pitman also signed a separate document entitled 'Declaration of Confidentiality'. This stated as follows:

> **Declaration of Confidentiality**
>
> I acknowledge that while I am contracted, engaged or on work experience by Advanced Personnel Services Ltd, I will encounter documents and information that is confidential and private. I understand that under the Privacy Act I must not disclose that information to any person.
>
> I agree, that during the period of my contract/engagement/work experience or at any time thereafter, not to disclose to any unauthorised person confidential business information, process, technique, paper or documents to which I have had access during the period of my contract or engagement or at any time thereafter.
>
> I acknowledge that I am in a position of trust in relation to both the client and the company and will not take or pass any confidential information or material (whether written or oral) on to a third party or utilise the information in any way.
>
> I understand that any breach of this agreement may lead to legal action or termination of contract.
>
> Declaration.
>
> I have read and understood this Declaration and agree to abide by it.

An approach to buy APS' Nelson operation

[13] In August 2016, APS had been approached by a Mr Murray, an accountant, who told Mr Geoffrey Densem that a female client of his (Ms Smith) was interested in purchasing APS's Nelson operation. Mr Geoffrey Densem says that Mr Murray had wanted information relating to APS's Nelson operation but, as Mr Geoffrey Densem became concerned that no confidentiality agreement had been put in place, he decided not to provide that information.

[14] A Temp Limited was incorporated on 16 September 2016, with Ms Smith and Mr Murray as shareholders. APS says that A Temp Limited directly competes with APS (which is not denied by Mr Pitman) and that it believes that A Temp was

incorporated in order to compete with APS, having successfully approached Mr Pitman to set the business up for them.

[15] APS says that a number of its temporary workers have been solicited to work for A Temp Limited, and that four of its clients have been solicited. These clients are Talley's Group Limited, Stevedoring Services (Nelson) Limited, Goldpine Group Limited and JC Contracting Limited (collectively referred to in this determination as the four clients). APS says that these actions by Mr Pitman have caused a considerable loss to its Nelson business.

Mr Pitman's resignation and documents emailed to his home email address

[16] On 7 September 2016 Mr Pitman gave notice of his resignation from his employment with APS and ceased to be employed on 23 September 2016. Just prior to Mr Pitman ceasing employment, Mr Pitman deleted all of his work emails. As a result of that, APS's in-house IT expert undertook an audit of Mr Pitman's work computer. It was discovered that, on 16 August 2016, Mr Pitman had sent the following documents to his home email address:

a. "Nelson Budget 2016";

b. APS' Nelson Branch Monthly Budgeted Profit and Loss statement for the period from 1 April 2016 to 31 March 2017;

c. "WorkForce Budget Prelim FY16"; and

d. "Staff Business Plan 2016/17.

[17] On 31 August 2016 Mr Pitman had emailed to his home email address a scanned image of a completed Health and Safety Audit form dated 24 August 2016 relating to a specific audit carried out on 24 August 2016.

[18] While Mr Pitman had been employed by APS, he had been provided with remote access to its computers and had been able to gain remote access through his home computer or his mobile phone. Therefore, according to APS, there had been no need for Mr Pitman to send any company information to his personal email address.

[19] APS say that the Nelson Budget and the WorkForce Budget documents were budgets that Mr Pitman had prepared during APS time, and using its resources, to

assist in the setting up of A Temp Limited. Mr Pitman denies this, saying that the first document was an APS budget, which he had emailed to himself so he could "play with it at home", implying he was doing so for the benefit of APS. Mr Pitman says that the second document was prepared for a friend who was thinking of expanding his Australian company (called WorkForce) to New Zealand.

[20] In his affidavit prepared in defending the interim injunction application, Mr Pitman said that he sent information to himself for "his reference", and that it was not to pass to A Temp Ltd. He also says that he has not retained the information, and that no-one at A Temp has been "privy" to it. He made no reference in the affidavit to the evidence he gave orally.

[21] Under cross examination Mr Pitman accepted that he could not explain why the first document (which was supposedly an APS budget document) had quite different coding numbers from the APS profit and loss statement he had also sent himself. He also could not explain why the second budget, supposedly for a third party company called WorkForce, had identical coding numbers as the first document.

[22] My firm conclusion is that Mr Pitman deliberately tried to mislead the Authority in his oral evidence in this respect, and that he created the two documents during his employment with APS to assess the future profit potential of A Temp Limited.

[23] With respect to the health and safety form, Mr Pitman said that he brought it with him as one of his precedents when he joined APS as it had no health and safety systems in place. I accept this, although there is no explanation as to why he emailed a scanned form containing information regarding a specific site audit.

Mr Ulsaker's evidence

[24] Mr Ulsaker's evidence is that Mr Pitman reported to him in his role as Nelson Branch Manager and that, during his employment, Mr Pitman procured the ability for APS to place temporary employees into the four clients. The Authority saw evidence that APS had placed a number of workers on assignment to the four clients between March and September 2016.

[25] Mr Ulsaker's evidence is that, on Sunday 25 September 2016 he was in the offices of APS at 11 Buxton Square, Nelson, when a young man came to the door

asking for Mr Pitman and door number 21. The young man told Mr Ulsaker that he had an appointment to meet Mr Pitman at number 21.

[26] Mr Ulsaker says that Mr Pitman had told him, and others, prior to him leaving APS that he was going to be running a cadet programme for Maori youth after he left APS. In light of this, Mr Ulsaker asked the young man if he was part of the Maori cadet programme and he was told that he was not. Mr Ulsaker asked him whether "this was about work on the Port" and the young man replied that he did not know but that he would take any work.

[27] Mr Ulsaker says that, after finishing his work at the office around 2pm that same day, he saw three familiar faces leaving door number 21 Buxton Square. One of them was called Abdul Harris. Mr Ulsaker asked Mr Harris whether he had just come out of number 21, and Mr Harris replied that he had. He also confirmed that he had been interviewing about a job and that Mr Pitman was doing the interviewing. Mr Harris told Mr Ulsaker that it was the same work as he had carried out before for APS, including unloading boats and sorting fishing containers for Talley's. Mr Ulsaker says that it was at this point that he realised that Mr Pitman was working in competition with APS, using APS's temporary workers and clients to build a competing business.

[28] Mr Ulsaker says that, on Monday 26 September 2016, he arrived at Talley's premises in order to assist with some work being undertaken by APS and, in their smoko room, saw what looked to be an APS sign-in form with some APS employee's names on the form. He saw that someone had ripped the Advanced Personnel logo off the form and had written *A Temp* in pen. Mr Pitman says that the form was actually a Talley's form that had been in use for some time, before APS had started servicing it. This was confirmed in an affidavit by the wharf manager at Nelson of Talley's. I accept Mr Pitman's evidence in this respect.

[29] Mr Ulsaker says that, on checking APS's records, he found that at least five of the names recorded on the A Temp sheets were employees of APS. Annexed to Mr Ulsaker's affidavit were copies of employment agreements and work histories of five individuals. The names of some of these individuals appear on two of the sign-in sheets annexed to the affidavit.

Evidence from temporary workers

[30] The Authority heard evidence from three temporary workers who had been workers on the books of APS prior to Mr Pitman leaving. Their evidence was credible, and I accept it. The gist of their evidence is that they were signed up to A Temp Limited books in late September 2016 at 21 Buxton Square and that Mr Pitman had been present. One of the witnesses (Aditya Bogati) said that he had been contacted directly by Mr Pitman by telephone around 21 or 22 September 2016 (during Mr Pitman's employment) telling him that he had left APS, and that he was now working for A Temp Limited.

[31] Mr Bogati says that Mr Pitman told him that he should come to A Temp's offices in Nelson the following Saturday (24 September) and fill in the necessary paperwork. Mr Pitman also asked Mr Bogati to bring 5 to 7 other people along. Mr Bogati seemed to have a lot of contacts amongst the Nepalese community living in and around Nelson, and he did manage to bring some of his associates along to A Temps' offices that Saturday to be registered.

Mr Pitman's alleged active steps to establish A Temp Limited during his employment

[32] APS allege that Mr Pitman took active steps to establish A Temp Limited during his employment with APS, putting him in breach of his duty of fidelity and his employment agreement. Evidence presented to the Authority shows that Mr Pitman:

a. Assisted Ms Smith to buy a company car for A Temp Limited;

b. Arranged for the engagement of a health and safety consultant for A Temp Limited;

c. Arranged for the engagement of a web designer and media adviser for A Temp Limited;

d. Arranged for the engagement of accounting software for A Temp Limited.

[33] Mr Pitman says he was only the contact point for these supplier organisations and Ms Smith. However, at least one of the documents that was disclosed indicates that Mr Pitman had identified himself as being the A Temp Limited contact, (prior to

Mr Pitman ceasing work for APS) and stated that Mr Pitman had "ultimate authority and responsibility [for the] project" and that he "signs off upon all deliverables".

[34] On balance, I find that Mr Pitman was more than a mere intermediary between Ms Smith and the organisations. First, the documents suggest otherwise, as described above. Second, there was no reason proffered in evidence as to why Ms Smith, an experienced businesswoman, could not have engaged with these entities herself once the introductions were made by Mr Pitman.

Other evidence from APS

[35] After the Authority's investigation meeting a report was commissioned from an IT specialist (Mr Graham Vincent of Vintron Electronics Limited) by APS into the contents of Mr Pitman's mobile telephone. The report showed a print out of all texts between Mr Pitman and specified individuals who APS said were for-hire individuals on its books between September 2014 and May 2017. APS asserts that these texts demonstrate breaches of one or both of the restraint of trade clause and the non-solicitation clause in respect of 10 individuals and one client.

Mr Pitman's evidence

[36] Mr Pitman says that he had been employed as a recruiter for the past six or seven years and that his expertise related to trade and general labour. He had been the manager of the Nelson office of another recruitment agency, Allied Workforce Limited, up until 2014, when he relocated to Wellington with the same organisation. He returned to Nelson in January 2016 and took up a role with APS in February the same year. He says that, when many of his contacts learned that he was back in Nelson, they wanted him to provide services, including the four clients.

[37] Mr Pitman says that he had been thinking of resigning from APS for some time, but that his decision was ultimately made when he was reprimanded for spending too much time with a worker who had been injured in a serious harm incident. He said that the final decision was on the spur of the moment and he knew that Ms Smith was interested in employing him, so he decided to pursue that option. Ms Smith has extensive networks in the Nelson and Marlborough area.

[38] In the affidavit sworn by Mr Pitman for the purposes of defending the interim injunction application, he deposed that A Temp Limited has an office in Blenheim,

where he is based, and that it has shared space in Nelson. In his oral evidence he said that A Temp did not have an office in Blenheim but that he has been given a desk by a local iwi. He also deposed that his role is to place iwi members in temporary work in the Marlborough region, generally relating to labouring and agriculture, viticulture or horticulture.

Alleged solicitation of clients

[39] Mr Pitman denies that he solicited clients from APS. He says he is well known to several key clients in Nelson from his time at Allied Workforce, as is Ms Smith.

Talley's

[40] He says that Talley's Group followed him on the strength of his relationship with that organisation, and produced a letter by Mr Peter Talley which effectively confirmed this. He says that he has known the wharf manager of Talley's, Mr Larry Moses, since 2010 or 2011. He says he did not actively ask Mr Moses to cause Talley's to change providers, but Mr Moses contacted him. Ms Smith's evidence is that she has also known the Talley's directors and Mr Moses for many years.

[41] The affidavit from Mr Moses prepared for the interim injunction application says that he has known Mr Pitman since he was working with Allied Workforce as its Nelson manager, first meeting him in approximately 2010 or 2011.

[42] Mr Moses deposed that Talley's transitioned to APS solely because Mr Pitman was employed there. When it became apparent to Mr Moses that Mr Pitman had left APS, he sought to continue the engagement with Mr Pitman through A Temp. He says that, as a business practice, Talley's always retained two recruitment companies. Talley's had recently ended their engagement with another recruitment company as it has left the Nelson area and Talley's therefore intends to continue to use Advanced Personnel Services Limited alongside A Temp Limited.

[43] Mr Moses deposed that Mr Pitman had not solicited the custom of Talley's and caused it to move to A Temp Limited. He says it was he that called Mr Pitman on his personal phone when he discovered that Mr Pitman had left Advanced Personnel. It was his decision to engage A Temp Limited and was not made because of any attempt by Mr Pitman to secure Talley's business.

Stevedoring Services

[44] Mr Pitman says that he has always worked with Stevedoring Services since his time at Allied Workforce, but has not had any direct conversations with anybody at Stevedoring Services. Ms Smith's evidence is that she contacted the services manager of that company when she set up A Temp Limited.

JC Contracting

[45] Mr Fred Gear, the managing director of JC Contracting, said in evidence that he had known Mr Pitman for more than 20 years, and that he serviced the company when he was with Allied Workforce. He said that JC Contracting used A Temp Limited, via Ms Smith, when Mr Pitman left APS. Ms Smith's evidence corroborates this. Mr Gear said that he had also known Ms Smith before through her previous business.

Goldpine

[46] The evidence suggests that Goldpine Group Limited ceased using APS because its manager was unhappy with how APS responded to an incident in which one of its temporary staff was injured while working at Goldpine.

[47] Mr Pitman says that he has not retained any client lists from APS and that workers follow the work, and that there is a cross-over in client lists because workers may have left their numbers at an A Temp induction. He says that he has not solicited workers to change, but they have provided their details to A Temp as available to work.

The issues

[48] The following questions require determination by the Authority at this stage:

(a) Did Mr Pitman breach his duty of fidelity during his employment?

(b) Did Mr Pitman breach the terms of his individual employment agreement during his employment?

(c) Are the post termination restrictive covenant clauses relied upon by APS enforceable?

(d) If they are not, should any be modified in accordance with s 83 of the Contract and Commercial Law Act 2017?

(e) Did Mr Pitman breach any of the post termination restrictive covenant clauses after his employment?

(f) Did Mr Pitman breach the terms of the Consent Determination?

Did Mr Pitman breach his duty of fidelity during his employment?

[49] The duty of fidelity does not preclude an employee from leaving his or her employer in order to compete, or from making preparatory competitive steps, provided that these actions are not in breach of obligations not to compete or to damage the employer.[3] I agree with Mr McRae's analysis of *Rooney* in that respect, and his statement that the duty to disclose one's intention to compete only arises if the employee is actually engaging in misconduct.

[50] Therefore, it is necessary to examine whether the actions that I have found Mr Pitman took during his employment were unlawful; that is to say, in breach of his contractual duties. This takes me to the second issue listed above.

Did Mr Pitman breach the terms of his individual employment agreement during his employment?

[51] Addressing first clause 7, I find that this clause is clear in its meaning, and is clearly enforceable, as it relates to Mr Pitman's duties during his employment.

[52] I am satisfied that Mr Pitman breached various sub-clauses of clause 7 by various actions when he was still employed by APS. I refer, in particular, to the following:

a. By drafting budgets for A Temp Limited, scanning documents for A Temp, and liaising with other organisations on behalf of A Temp Limited during his working hours, Mr Pitman did not devote the whole of his time and attention during working hours to the performance of his obligations under the agreement.

[3] *Rooney Earthmoving Ltd v McTague* [2009] ERNZ 240 at [142]

b. By taking the same actions, he failed to promote and protect the interests of APS, as he was assisting in the establishment of a competitor which he knew would seek to deprive it of clients. I am satisfied that clause 7.1.4 is capable of embracing future interests of the company as well as current interests.

c. By misleading APS managers into thinking he was going to be working exclusively in a Maori cadetship scheme in Blenheim, he did not deal with APS in good faith.

d. By using for-hire workers' details for the benefit of A Temp Limited he failed to use his best endeavours to prevent the disclosure of confidential information.

[53] In addition, I am satisfied that, during his employment, by drafting budgets for A Temp Limited, scanning documents for A Temp, and liaising with other organisations on behalf of A Temp Limited, Mr Pitman was engaged and/or concerned in the conduct of another business without the written consent of APS, in breach of clause 13.1.1, and 13.1.2. He also failed to advise APS that he was so engaged or concerned in breach of clause 13.1.3.[4]

[54] In addition, I believe that Mr Pitman's preparatory acts were in breach of clause 26.2 of the employment agreement as it applied to him during his employment. Mr Pitman gave evidence that he had no financial investment in A Temp Limited. Ms Smith corroborated this, and I accept this evidence, as do APS. However, the word "establish" in 26.2 is not confined to giving financial backing. The word "establish" is defined in the New Zealand Oxford Dictionary[5] as "set up or consolidate (a business, system, etc.) on a permanent basis".

[55] The actions Mr Pitman took as described in paragraph [32] of this determination were essential tasks which were necessary in order for A Temp Limited to operate. Therefore, they were essential tasks in order for it to be established as a business or trading entity. I am therefore satisfied in turn that Mr Pitman did act in breach of s 26.2 during his employment.

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[4] APS do not appear to allege that Mr Pitman breached clause 13, although that does not prevent the Authority from finding that he did.
[5] Oxford University Press 2005

[56] I agree with the submissions of Mr Goldstein and Ms Ryder that these actions in breach of his employment agreement gave A Temp a springboard start to its existence which it would not likely to have had if Mr Pitman had not acted in this way in breach of his contractual duties. This springboard advantage is likely to have had a tangible adverse effect on the ability of APS to take steps to try to protect its position and consolidate its relationship with its clients following Mr Pitman's departure, and is also thereby likely to have both hastened and increased its loss of revenue, which can therefore be directly attributable to Mr Pitman's breaches. The quantification of these losses will need to be examined separately.

Are the post termination restrictive covenant clauses relied upon by APS enforceable?

[57] I shall address these issues by reference to each clause of the employment agreement which APS seeks to rely upon. First, I set out the principles that I shall adopt.

[58] The issue of enforceability requires the Authority to examine a number of sub-issues as follows:

(a) What the respective clauses mean when properly construed;

(b) What legitimate proprietary interest the clauses purport to protect; and

(c) Whether the clauses are no wider than is reasonably necessary (considering the reasonableness of the period of restraint of each clause, its scope and geographical limits).

The starting point

[59] The starting point with respect to the enforceability of restraint of trade clauses is that they are unenforceable unless they can be justified as being reasonably necessary to protect the proprietary interests of the former employer, and are in the public interest[6].

[6] *Gallagher Group Ltd v. Walley* [1999] 1 ERNZ 490 (CA)

[60] Reasonableness must be determined by reference to what the parties might reasonably have foreseen at the time of entering into the contract[7].

[61] In the Australian case *Stacks/Taree Pty Ltd v. Marshall (No 2)*[8], in a passage cited with approval by the Employment Court in *Air New Zealand Ltd v. Kerr*[9], McDougall J stated:

> … the validity of a covenant in restraint of trade is to be assessed having regard to the terms of the particular covenant and the facts of the particular case.

[62] The Employment Court in *Kerr* pulled together these various strands of authority in paragraphs [23] and [24], as follows:

> [23] The approach to restraint covenants is for the Court to determine what the clause means when properly construed and then to consider whether the employer or former employer has established a legitimate proprietary interest requiring protection. Legitimate proprietary interests have been held to include the protection of customer connections, confidential information and the integrity or stability of the workforce. In the present case the proprietary interest claimed is the protection of confidential information. If such an interest is established, then the issue arises as to whether the restraint provision is shown to be no wider than is reasonably necessary. That in turn requires a consideration of the reasonableness of the period of the restraint, its scope and its geographical limits.
>
> [24] The reasonableness of the restraint must be established by the party who seeks to enforce the provision; and is then up to the party resisting enforcement to establish that the restraint is contrary to the public interest. If the Court is satisfied as to these matters then, in the exercise of its discretion, it will need to decide whether or not to grant injunctive relief, either interlocutory or permanent as the case may be.

[63] It has been confirmed in the Employment Court case of *Kerr* that the construction of a restraint covenant requires the same principles of interpretation as are to be applied in the construction of any other contractual term. These principles

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[7] *Fletcher Aluminium Ltd v. O'Sullivan* [2001] 2 NZLR 731, [2001] ERNZ 46 (CA)
[8] [2010] NZWSC 77 at [54]
[9] [2013] NZEmpC 153

were affirmed by the Supreme Court in *Vector Gas Ltd v. Bay of Plenty Energy Ltd*[10]. The first principle was stated in these terms:

> Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

[64] APS alleges that the following post termination obligations have been breached by Mr Pitman:

a. the two restraint of trade clauses at 26.1 and 26.2;

b. the non-solicitation of employees clause at 27.1.1

c. the non-solicitation of clients clause at 27.1.2

d. the confidentiality clause at 16;

e. the conflicts of interest/commercial risk clause at 14; and

f. the return of property clause at 25.

The two restraint clauses

[65] The first restraint, at clause 26.1, can be broken down into the following material elements:

a) For a period of three months starting from the date when Mr Pitman ceased to be an employee of APS, he must not:

(i) be directly or indirectly involved in any business, organisation, or venture which competes with and/or provides similar products or services to that provided by APS,

a. whether in the capacity as an employee, independent contractor, shareholder, director, consultation, partner, owner, agent or in any other capacity, and

b. in any city or town where APS has a physical branch located.

[10] [2010] NZSC 5; [2010] 2 NZLR 444 at [61]

[66] The second restraint clause, at 26.2, can be broken down into the following material elements:

a) For a period of six months starting from the date when Mr Pitman's employment with APS ceased, he must not:

(i) establish any business or organisation which will compete with and/or provide similar products or services to that provided by APS;

(ii) in any city or town where APS has a physical branch located.

[67] One reading of these two clauses is that the six months restraint is wholly subsumed into the scope of the three month restraint, and is therefore redundant. This is because establishing a business necessarily entails being involved in it. However, it is my view that the two clauses are separate and intended to address two separate mischiefs. The first, three month clause is intended to address an employee who becomes involved in a competing business that already exists. The second, six month clause is intended to address an employee who sets up a competing business.

[68] The term 'competes with' in the three month restraint is not defined, but I believe that a common sense interpretation can be applied to the phrase, which should be read in conjunction with the words 'provide similar products or services to'. Within the context of the business of APS, I believe that the phrase 'competes with' is clear in its meaning.

[69] The other potential uncertainty in meaning with respect to clause 26 concerns the geographical scope. Clause 26.3 states that 'this restraint' shall apply to any city or town where the employer has a physical branch located. It does not specify which of the two preceding restraints (the three month or the six month) it applies to. However, given that clause 26.3 follows on from clauses 26.1 and 26.2, and is numbered as a separate clause, rather than as a subclause of either 26.1 or 26.2, I infer from the overall context that, despite the use of the word 'this' in the singular, it is intended to provide a geographical limitation to both the six month and the three month restraint.

[70] In conclusion, I believe that the meaning of clause 26.1 is clear and unambiguous, although there is a problem with its enforceability, which I address below.

Is there a legitimate proprietary interest requiring protection?

[71] Obviously, a restraint covenant that prevents competition *per se* is unlawful and unenforceable. However, a non-competition restraint covenant can be relied on and enforced in order to protect an employer's legitimate proprietary interest. The onus is on APS to satisfy the Authority that there is a proprietary interest justifying such protection.

[72] The Full Court of the Employment Court in *Transpacific Industries Group (NZ) Ltd v. Harris*[11] cites with approval the words of Lord Denning in *Littlewoods Organisation Ltd v. Harris*[12] in which His Lordship referred to the difficulties of drawing a line between information that is confidential and information that is not, and the difficulty of proving a breach when the information is of such a character that an employee can carry it away in his head, so that the only practicable solution is to take a covenant from the employee preventing him from working for a rival in trade. His Lordship said that such a covenant could be held to be reasonable if limited for a short period.

[73] It is notoriously difficult to prove solicitation of employees and clients, and a non-competition clause properly limited in duration and geographical scope is likely to assist the employing business in preventing damage caused by solicitation of clients in particular.

[74] There is little doubt, on the face of it, that APS does have a legitimate proprietary interest in the connections it has with the individuals it seeks to place with businesses in the Nelson area (as without those individuals, APS would be out of business). Similarly, it has a legitimate interest in protecting its connections with the businesses in Nelson with which it places the individuals for hire.

[75] On balance, therefore, I am satisfied that the non-competition restraints do seek to protect a legitimate business interest of APS, and is not seeking to prevent competition *per se*, contrary to Mr McRae's submission.

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[11] [2013] NZEmpC 97; [2013] ERNZ 267
[12] [1977] 1 WLR 1472' [1978] 1 All ER 1026 (EWCA)

The periods of restraint – the three month restraint

[76] In considering the reasonableness of the duration of the restraints, it is necessary to take into account how long the proprietary interests need to be protected. The question can be answered by considering the following issues:

(a) How long it is likely to take for APS to consolidate its relationship with the individuals that it seeks to place who are already registered with it;

(b) How long it is likely to take to find new individuals who are seeking to be placed;

(c) How long it would take for APS to consolidate its relationship with the clients with which it places individuals.

[77] Addressing these three issues in turn, I understand that the individuals seeking to be placed often get engaged on quite short assignments, and most are probably willing to liaise with any recruitment agent who is able to find them those assignments so they can try to maintain regular income. In other words, I suspect that there is usually likely to be little loyalty between any particular individual and any particular recruitment agent company.

[78] However, the evidence that emerged from the investigation meeting is that there was loyalty between at least some of the temporary workers on APS's books and Mr Pitman while he was employed at APS. Mr Pitman was seen by the workers who gave evidence as someone who would try hard to find them work. This indicates, by the way, that Mr Pitman's connections with the individuals were valuable to APS.

[79] In assessing how long it is likely to take for APS to consolidate any relationship with these individuals, I believe that it would not need three months for APS to re-establish contact with them and to persuade them to include APS amongst the agents the individuals would use. Indeed, most of those individuals would be very happy to stay with APS I suspect as they would be likely to be registered with a number of agencies.

[80] In relation to the question of APS finding new individuals to be placed, the evidence suggested that there is a significant churn of temporary workers registering

with various agencies. The sorts of individuals who tend to be placed by Mr Pitman include a number of transient or migrant workers and so there is a steady supply of them.

[81] With respect to the third question of how long it would take for the company to re-consolidate its relationship with its clients (the businesses with which individuals are placed), I accept that this is likely to be a longer period, and that a business will need to have trust and confidence in the individual recruitment agent to provide the right sort of individuals, when they are needed. Indeed, the evidence of APS in respect of Mr Poynter, Mr Pitman's replacement, was that it did take considerable effort for him to win new clients to replace those lost to A Temp Limited.

[82] I am willing to infer from the nature of the business that three months is not an unreasonable period of time as, on Mr Pitman's own evidence, he has a close professional relationship with Talley's (or at least, Mr Moses) which APS does not have. Although Mr Moses said that he would continue to use APS on behalf of Talley's, he gave no detail as to how he would split engagements between the two companies, or how the respective arrangements work.

[83] In conclusion, I believe that a period of three months is a longer period than is legitimately necessary to prevent Mr Pitman from soliciting individuals for hire. I believe that a period of one month is likely to be sufficient. However, I accept that three months is no longer than is necessary for APS to legitimately protect its client connections within the Nelson area.

The periods of the restraint – the six month restraint

[84] According to APS's submission, it no longer wishes to argue that clause 26.2 has been breached after employment ended.

The geographical limit of the restraint

[85] Mr Pitman worked for APS in the city of Nelson, and not Christchurch, Invercargill or Auckland. Therefore, the geographical limit of the three month non-competition restraint that would be reasonable is the city (and possibly the environs) of Nelson. However, clause 26.3 does not restrict the geographical scope of the three month restraint to the location where Mr Pitman worked, but instead seeks to restrain Mr Pitman from being a recruitment agent in any city or town where APS has a

physical branch. This is not reasonable as Mr Pitman has not, I understand, ever worked as a recruitment agent for APS in Invercargill, Christchurch or Auckland. The restraint of trade therefore purports to prevent Mr Pitman from working as a recruitment agent in those three cities when he has had absolutely no connection with them as a recruitment agent and so cannot have gained any influence over any of the employees or clients of APS.

[86] In conclusion, this clause is unenforceable as drafted, as it goes beyond a reasonable geographical area in terms of the restraint.

Should clause 26 be modified in accordance with s 83 of the Contract and Commercial Law Act 2017?

[87] Section 162 of the Act provides that, subject to s 163 (which is irrelevant to this matter) and s 164, the Authority may, in any matter related to an employment agreement, make any order that the High Court or the District Court may make under any enactment or rule of law relating to contracts, including Part 2 of the Contract and Commercial Law Act 2017.

[88] Section 83 of the Contract and Commercial Law Act 2017[13] provides as follows:

> **83 Restraints of trade**
> (1) The court may, if a provision of a contract constitutes an unreasonable restraint of trade,—
> (a) delete the provision and give effect to the contract as amended; or
> (b) modify the provision so that, at the time the contract was entered into, the provision as modified would have been reasonable, and give effect to the contract as modified; or
> (c) decline to enforce the contract if the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand.
> (2) The court may modify a provision even if the modification cannot be effected by deleting words from the provision.

[89] Section 164 of the Act provides as follows:

> **164 Application to individual employment agreements of law relating to contracts**

[13] In force from 1 September 2017, s83 replaces s8 of the Illegal Contracts Act 1970, and applies to any contract regardless of whether it is made before or after the commencement of the enactment.

> Where the Authority, has, under section 69(1)(b) or section 162, the power to make an order cancelling or varying an individual employment agreement or any term of such an agreement, the Authority may make such an order only if—
>
> (a) the Authority (whether or not it gave any direction under section 159(1)(b) in relation to the matter)—
>
> (i) has identified the problem in relation to the agreement; and
>
> (ii) has directed the parties to attempt in good faith to resolve that problem; and
>
> (b) the parties have attempted in good faith to resolve the problem relating to the agreement by using mediation; and
>
> (c) despite the use of mediation, the problem has not been resolved; and
>
> (d) the Authority is satisfied that any remedy other than such an order would be inappropriate or inadequate.

[90] In the Court of Appeal case of *Cooney v Welsh*[14], the Court stated[15]

> Section 8(1)(b)[16] has the term "modify". This can mean moderate or limit or confine; but it can also simply mean vary or change in part. As a matter of jurisdiction we see no reason why it should not bear the latter and broader meaning, but no doubt normally the Court will be slow to alter any part of a covenant so as to make it more restrictive on the employee. Nevertheless there may be cases where that is appropriate, particularly when accompanied by other changes which make the revised covenant as a whole less onerous for the employee.

[91] I am satisfied that it is appropriate to modify clause 26.3 so as to reflect properly the likely intentions of the parties at the time they entered into the agreement, which would have reflected a less onerous obligation upon Mr Pitman. Appropriate wording is

> These restraints shall apply to any city or town where the employer has a physical presence and where the employee has worked while employed by the employer.

[92] I cannot effectively modify clause 26.3 without complying with the mandatory requirements of s.164 of the Act. That includes identifying the problem in relation to the agreement (namely, that clause 26 is drafted too widely to protect the legitimate proprietary interests of APS), directing the parties to attempt to resolve that problem in good faith, and the parties having attempted to do so by using mediation. If the parties cannot resolve the problem, and the Authority is satisfied that any other remedy other than an order varying the clause 26.3 is inappropriate or inadequate, only then may I make the order.

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[14] [1993] 1 ERNZ 407
[15] At 410
[16] Of the Illegal Contracts Act 1970.

[93] I am satisfied that these requirements have been satisfied. The Authority identified the problem of enforceability of clause 26 at the interim injunction proceedings on 27 October 2016 (amongst others) and orally directed the parties to attempt in good faith to attempt to resolve that problem (amongst others). The parties entered into an agreement in relation to Mr Pitman's future activities which was recorded in a Consent Determination, but they did not reach an agreement with respect to liability for alleged past breaches, nor in respect of quantum. Those unsuccessful negotiations continued up to a few days before the liability investigation meeting I understand.

[94] In conclusion, as drafted, the geographical limit on the restraint of trade is too wide, but the Authority is able lawfully to modify the scope of the restraint clause so as to narrow that geographical limitation to reflect the terms agreed by the parties when the employment agreement was entered into.

The scope of the restraint

[95] The scope of sub-clause 26.1 seeks to restrain Mr Pitman from being involved in any capacity with a business that competes with APS. "Being involved" is not defined, so it could prevent Mr Pitman from providing other services to A Temp which do not compete with APS. For example, if Mr Pitman decided to turn his hand to web design, as drafted the clause would prevent him from providing web design services to A Temp Limited, even though that activity would not damage APS's proprietary interests. I do not believe that was the intention of the parties when they entered into the agreement and I do not accept APS's submission that Mr Pitman was so senior he should be restrained from undertaking any work for a competing business.

[96] In addition, the restraint is wider in scope than one which would prevent Mr Pitman from dealing only with clients and employees of APS with which he had had dealings when he was employed by that business. As drafted, the clause prevents Mr Pitman from:

a. placing for-hire employees of APS with whom he had no dealings during his employment with it, and over whom he cannot have had any influence,

b. to clients of APS with which he had no dealings during his employment with it and over whom he cannot have had any influence.

[97] Again, I do not believe that this was ever the intention of the parties when they entered into the employment agreement. To modify the clause to address these two issues is less straightforward than modifying the geographical aspect of it, and requires the addition of wording which narrows the effect of clause 26.1.1. This would have to follow clause 26.1.1 as a continuation of clause 26.1. It would have to read as follows:

> 'provided that this clause does not prevent the employee from being involved in activities in which he was not involved during his employment with the employer, and further provided that it does not prevent him providing similar products and services to any individual, organisation or other entity with whom or which he was not involved during his employment.'

[98] Having thus modified the clause, it reflects what I believe to have been the likely intentions of the parties when they entered into the agreement, which would have been far less onerous on Mr Pitman.

Did Mr Pitman breach clause 26.1?

[99] I am satisfied that Mr Pitman did breach clause 26.1, as modified. There is ample evidence to show, on a balance of probabilities, that Mr Pitman was "involved" in A Temp Limited, a competing business of APS by:

a. Contacting workers for hire who were registered with APS and with whom he had dealings during his employment, with a view to enlisting them for hire by A Temp Limited;

b. Meeting with workers for hire who were registered with APS, and with whom he had dealings during his employment, to register them with A Temp Limited;

c. Making arrangements for the placing of those workers with clients of A Temp Limited; and

d. Dealing with organisations which were clients of APS, and with which he had dealings during his employment.

[100] Mr Pitman stated in evidence essentially that he "assisted" Ms Smith with the above tasks, and so had no direct involvement. However, even if Mr Pitman was only assisting Ms Smith, he was still 'directly or indirectly involved' in the business of A Temp during the period of restraint.

[101] There is a conflict of evidence in respect of whether Mr Pitman contacted the four clients or whether they just followed him. However, it is not necessary to resolve this conflict in respect of clause 26.1. Again, by being involved with the provision of recruitment services to the four clients for A Temp during the restraint period, Mr Pitman was in breach of clause 26.1.

[102] There is no doubt that senior managers of the four clients had established relationships with Mr Pitman, some going back many years. Each of the four clients could have legitimately chosen to stop using APS in accordance with the terms of its respective agreement with APS. It seems that each of the four clients did this because of the relationship it had with Mr Pitman.

[103] However, those relationships with Mr Pitman were what caused APS to recruit Mr Pitman in the first place and pay him an agreed salary and commissions in return for, inter alia, bringing in new clients such as the four. Having done so, APS had a legitimate reason to protect itself from losing those clients for a reasonable but limited period while it attempted to persuade them to stay or at least find new clients to lessen the effect of the loss of such clients. It was the connections with those clients that it had a legitimate proprietary interest in protecting.

[104] In conclusion, I find that Mr Pitman breached clause 26.1 of his employment agreement, as modified.

Did Mr Pitman breach clause 26.2?

[105] According to APS's submissions, it no longer seeks to argue that clause 26.2 has been breached by Mr Pitman.

The non-solicitation clause

[106] The non-solicitation clause 27 is simply drafted, but does not define the words 'employee' or 'client'. The term 'employee' could refer to those individuals who are permanently employed by APS, such as Mr Pitman, or to for-hire individuals who are

assigned to clients, or to both. Clearly, in seeking to enforce this clause, APS intends that the word includes the latter category of people, but the clause does not indicate whether they are individuals who are protected from solicitation only during the period of an assignment, or whether they also include individuals who were once on assignment. If so, during which period?

[107] The agreement that was entered into by for-hire workers with APS states expressly that they are employees of APS only during an assignment, and that each assignment is a new and separate period of employment. This indicates that, even if the term "employee" does include for-hire individuals, the non-solicitation period would exist for the period of their assignments only.

[108] In addition, the clause does not restrict the non-solicitation to 'employees' with whom Mr Pitman has had dealings, as opposed to all other employees of APS, even if Mr Pitman has never had any dealings with them (and so, had no influence over them). In my view, this issue makes the clause too wide, and unenforceable, as it goes further than is necessary.

[109] Mr Goldstein and Ms Ryder argue that the term 'clients' should be construed to include the for-hire workers. However, I do not accept that this would have been the intention of the parties, as that would mean that a six month non-solicitation restraint would have applied to each for-hire employee. The value to APS of a for-hire worker simply does not equate to the value to it of an organisation to which APS hires those workers. Indeed, it is arguable that even three months is too long a restraint in respect of not soliciting these workers, as I have examined above.

[110] In my view, the term 'clients' is unambiguous, and refers, I infer, to the organisations with which APS places individuals for hire. However, again, the clause does not restrict the non-solicitation to clients with which Mr Pitman has had dealings. The fact that Mr Pitman had unfettered access to APS' confidential information does not cure this defect, as implied by Mr Goldstein and Ms Ryder, as Mr Pitman would have had no personal relationship with every for-hire worker and client on APS's records, and so he would have had much less influence over them.

[111] Clause 27 is therefore also too wide as it seeks to prevent Mr Pitman from soliciting employees and clients with whom or which he has had no dealings. It also

does not catch employees for hire within its scope unless they are on an assignment. When they are not on assignment, they are not, by definition, employees.

[112] Should this clause be modified? In my view, it is not possible to do so in a way that enables the Authority to know on a balance of probabilities that it would reflect the intentions of the parties. This is because it would have to be redrafted to separately prevent the solicitation of for-hire workers, but a restraint period of six months would be too long. However, it is not clear what period of restraint the parties would have agreed to in respect of for-hire workers. I therefore decline to modify this clause.

The confidentiality clause

[113] The confidentiality clause at clause 16 of the employment agreement is a standard clause, which defines what is meant by confidential information, and carves out information that is already in the public domain. Its meaning is, in my view, clear and unambiguous. The declaration of confidentiality, however, does not define what confidential information is, although the declaration is arguably redundant as its scope is subsumed within the scope of clause 16.

[114] Clause 16 is enforceable in my view, and its meaning is clear.

Did Mr Pitman breach the confidentiality clause?

[115] I am satisfied that Mr Pitman directly contacted for-hire workers who were registered with APS in order to place them with the four clients after he left the employment of APS. In order to do this, he must have had information relating to these individuals' contact details.

[116] Mr Pitman argues that the for-hire individuals were registered with multiple agencies, and therefore implies, I believe, that their contact information was not confidential. While I accept that many of the individuals were registered with other agencies in Nelson, that fact does not put their contact details in the public domain. Indeed, I suspect that some of those individuals would have been unhappy if they had believed that that was the effect of registering with other agencies.

[117] I am satisfied that these contact details did constitute confidential information belonging to the respective workers and APS. Furthermore, I find that Mr Pitman

took those details away with him and misused them to the benefit of A Temp Limited and to the detriment of APS.

The conflict of interest/commercial risk clause at 14

[118] Again, this clause is clear in its meaning and is clearly enforceable, as it relates to Mr Pitman's duties during his employment.

[119] When, during his employment, Mr Pitman reached the decision to take steps to assist Ms Smith establish A Temp Limited, a business he knew would compete with APS, a conflict of interest arose between his own interests (his future employment by A Temp) and the interests of his employer APS. I am satisfied that Mr Pitman would have become aware of that conflict.

[120] At that time he was obliged to advise APS of the conflict pursuant to clause 14. However, he did not do so. Instead, he took positive steps to assist in the establishment of A Temp. Mr Pitman therefore acted in breach of clause 14.

The return of property clause at 25

[121] APS argues that information that Mr Pitman sent to himself by email was not returned by him to APS upon his termination. I find this a problematic proposition, as I cannot envisage how electronic information can be 'returned'. Even if Mr Pitman had emailed back to APS the documents he had emailed to himself, he would have retained a copy of that information. The truth is, clause 25 needs to be updated so as to additionally require a departing employee to delete permanently all information that he or she may have on their personal devices.

[122] I therefore cannot find that clause 25 has been breached as alleged.

The Consent Determination

[123] APS rely upon an email to Mr Pitman's replacement at APS from a manager at Goldpine Group Limited dated 14 December 2016 to show that Mr Pitman was working with A Temp servicing Goldpine's needs after the Consent Determination had been issued. When I read this email, however, there is nothing in it that shows cogently that Mr Pitman was working for A Temp in Nelson after the Consent Determination was issued, but before the expiry of the period of restriction.

[124] Furthermore, Mr Pitman says that the Goldpine sawmill is located in Golden Downs, near St Arnaud, and that area does not come within the Nelson Regional Council, but rather the Tasman District Council. This assertion is correct according to the Tasman District Council website.

[125] In the Consent Determination, reference is made to Nelson. It is not defined, but it can safely be distinguished from the area governed by the Tasman District Council. I accept Mr Pitman's argument in this respect.

[126] However, there is evidence to suggest that Mr Pitman contacted another client of APS, Sims Pacific Metal, after the Consent Determination was entered into. However, this client rejected the approach, and so no loss would have flowed from this breach of the Consent Determination.

Summary

[127] I find that Mr Pitman acted in breach of clauses 13, 26.1, 26.2, 16, 7 and 14 of the employment agreement, as well as the duty of fidelity and good faith during his employment, and the Consent Determination, although no loss flows from that breach.

The assessment of damages

[128] APS claim that they have sustained a loss of revenue, and hence, a loss of profit as a direct result of Mr Pitman's breaches. Mr Goldstein and Ms Ryder submit that the most appropriate and sensible method of calculating this loss is by averaging the weekly income achieved from the four companies over Mr Pitman's employment. They then extrapolate the income that would have been earned from the four companies over the period of six months following Mr Pitman's departure. Using a profit margin of 18%, they calculate that APS has lost $42,313, which it claims from Mr Pitman as special damages.

[129] As I stated during the investigation meeting, this methodology is potentially flawed because it ignores fluctuations of demand from the four companies caused by the seasonal nature of their enterprises. An alternative method is suggested by APS, which is to deduct from the actual sales made to the four companies during Mr Pitman's employment the sales it actually made in the six months following Mr Pitman's departure, which results in a loss of profit of $38,101. This methodology

still suffers from an assumption that the same level of sales would have obtained in the six months after Mr Pitman's departure as prior to it.

[130] Both suggested methodologies also suffer from the assumption that six months' loss is appropriate. APS assumes that it is because it assumed that clause 27 would be upheld. I do not accept that it can be. My findings indicate that loss of profit may be limited to three months' loss at most.

[131] In addition, the Authority and the parties have not explored an alternative approach for assessing loss, which would be to find out what sales A Temp made to the four companies during a specified period from the date of it starting trading. As A Temp was a brand new company, it is likely that all sales to the four companies at its commencement were as a direct result of the springboard effect it enjoyed from Mr Pitman's breaches. That revenue could therefore be assumed to otherwise have been APS's revenue, but for the breaches.

[132] APS submit that this methodology would not be safe because A Temp may not have been able to have completely fulfilled the requirements of the four companies because it would not have had enough for-hire workers on its books. There is some merit to this argument. However, if A Temp were ordered to disclose to the Authority copies of all communications with the four companies showing their requirements for workers during a specified period, an analysis could be done as to whether APS could have fulfilled those requirements, and if so, a calculation made of what it would have charged and the profit achieved.

[133] What would then remain would be to assess what that specified period should be in the light of the Authority's findings on liability. I believe that further submissions would assist in that.

Direction to mediation

[134] Having established that Mr Pitman did breach his contractual obligations, his duty of fidelity and a term of the Consent Determination, I believe that further mediation between the parties could assist in settling the matter of quantum and costs. I therefore direct the parties to participate in mediation in good faith in respect of those matters.

[135] If the parties cannot settle their remaining differences within six weeks of the date of this determination, Mr Goldstein is to advise the Authority, and a case management conference will take place in which further directions will be discussed with an aim of the Authority assessing and determining what damages and costs should be awarded to APS, and whether penalties should be imposed.

Costs

[136] I reserve costs until the conclusion of the investigation meeting into quantum, unless the parties achieve a settlement of their remaining differences.

David Appleton
Member of the Employment Relations Authority