IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 75
5618929 and 5628717

	BETWEEN	AGGREKO (NZ) LIMITED Applicant
	AND	GRANT MCENERY Respondent
	AND	GRANT MCENERY Applicant
	AND	AGGREKO (NZ) LIMITED Respondent
Member of Authority:	Nicola Craig	
Representatives:	Dean Organ, Advocate for Aggreko (NZ) Limited Michelle Clark, Counsel for Grant McEnery	
Investigation Meeting:	8 and 9 August and 5 and 6 September 2016 at Auckland	
Submissions received:	At the meeting on 6 September 2016 In writing on 12 and 26 September, and 9 December 2016 from Aggreko 19 September, 3 October and 19 December 2016 from Mr McEnery	
Date of Determination:	20 March 2017	

DETERMINATION OF THE AUTHORITY

A. Grant McEnery breached his obligations to Aggreko (NZ) Limited (Aggreko) by sending Aggreko's information in emails to his family's email address without adequate explanation or defence, and by contacting a client and raising the possibility of

undertaking work for the client once no longer employed by Aggreko.

B. Paragraph 4 of the consent determination of 9 June 2016 [1] will continue to apply to Grant McEnery from the date of this determination onwards, unless otherwise ordered by the Authority

C. Within 28 days of the date of this determination Mr McEnery is ordered to pay a penalty of $5,000.00, of which half will be paid to the Crown via the Ministry of Business, Innovation and Employment and half paid to Aggreko.

D. Mr McEnery was subject to an unjustifiable action by Aggreko to his disadvantage in that the company made a decision not to pay Mr McEnery his bonus on the basis of allegations which it did not fully investigate, including meeting with him to discuss:

(i) Mr McEnery is entitled to payment by Aggreko for the remainder of his bonus the quantum of which the parties shall attempt to resolve themselves. In the event that they are unable to resolve this issue they are given leave to return to the Authority; and

(ii) Mr McEnery is awarded $500.00 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 in relation to that grievance.

E. Costs are reserved and a timetable is set to deal with costs.

Employment relationship problem

[1] Aggreko (NZ) Limited (Aggreko or the company) is in the business of hiring out power generation and temperature control equipment.

[2] Aggreko employed Grant McEnery as a Sector Sales Consultant from 20 May 2015.

[1] [2016] NZERA Auckland 185

[3] On 29 February 2016 Aggreko commenced a consultation process regarding the possibility of Mr McEnery's position being made redundant following the loss of a significant client. On 10 March Mr McEnery was informed that a decision had been made to make him redundant. On 15 March he was given one month's notice of his redundancy and not required to work further, with his last day of employment to be 12 April 2016.

[4] Later in the day on 15 March Aggreko became aware that on 2 March 2016 Mr McEnery had removed or copied company information by way of sending emails from his work email address to an email address outside the company. The name on the email address was Jenna.McEnery.

[5] This awareness arose due to bounce back emails received on Mr McEnery's emails address (which was then being checked by his manager) to an email which he had sent to a number of clients on 14 March informing them of his redundancy. That email included Mr McEnery saying that he looked forward to growing their relationship in the near future and that he would be in contact once he had a new mobile number and business cards.

[6] On the day which the emails to Jenna.McEnery were discovered, Aggreko's advocate raised with Mr McEnery's counsel the emails which Mr McEnery appeared to have forwarded to a personal email account. The response through counsel was that Mr McEnery could not think specifically which emails were being referred to but has verbally undertaken that anything sent was not sent with the intention of being forwarded to a third party, and would not be so forwarded.

[7] Mr McEnery had a long standing arrangement to return to his country of origin, South Africa, for a holiday at around this time and was away from 26 March to 27 April 2016.

[8] Whilst Mr McEnery was still employed, Aggreko filed in the Authority [2] claiming that Mr McEnery breached his employment agreement and various other obligations by taking confidential information, contacting clients and not informing Aggreko that he had taken documents.

[2] Case 5618929

[9] Aggreko sought interim directions on the use and return of its information, along with other remedies. Mr McEnery admitted in reply that that he had sent documents to his wife's email address but that he had good reason to do so.

[10] Mr McEnery subsequently filed a claim in the Authority [3] against Aggreko, claiming unjustifiable dismissal and other matters. The parties agreed that both cases would be heard together.

[11] A consent determination[4] was issued on 9 June 2016, The Authority ordered that Mr McEnery (whether as an individual or by his agents or otherwise howsoever) was restrained from destroying, using, copying, transmitting, transferring, altering, deleting or defacing any of Aggreko's confidential information (other than as directed by the Authority for the purposes of this proceeding). The determination records that for the sake of clarity, that order did not prevent Mr McEnery's solicitors from dealing with Aggreko's confidential information for the purposes of this proceeding.

[12] At the investigation meeting I heard from Kellie Whitehead (Organisation Development Manager at Aggreko's Australian parent company), and Aggreko NZ's General Manager Tony Hamilton, Finance Manager Nick Pearson and Area Sales Manager Martin Bowler. I also heard from Mr McEnery and an IT consultant Greg Barber.

[13] Submissions were received for both cases after the investigation meeting. Further submissions then were sought from the parties after the Full Bench of the Employment Court issued its decision in *Borsboom (Labour Inspector) v Preet PVT Ltd & Warrington Discount Tobacco Ltd* [5] *(Preet)* regarding penalties.

[14] Given the substantial overlap in the facts between the two cases, both claims are included in this determination.

[15] 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 the

[3] Case 5628717
[4] [2016] NZERA Auckland 185
[5] [2016] NZEmpC 143 Full Bench

parties 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.

Issues

[16] The issues for investigation and determination in terms of Aggreko's claims are whether Mr McEnery:

(i) breached his employment agreement by removing confidential information and contacting Aggreko's clients;
(ii) breached his duty of confidentiality, loyalty and fidelity by removing documents and failure to disclose removal;
(iii) breached his duty of good faith by removing documents and failure to disclose removal;
(iv) If any of the above are established, should a compliance order be issued;
(v) Should an order for deletion and destruction be made;
(vi) Should exemplary damages be ordered;
(vii) Should penalties be imposed for breaches of terms of the agreement and/or the duty of good faith and should any penalty be paid to Aggreko?

[17] Several claims were withdrawn by Aggreko at the investigation meeting. This included deletion of confidential information from the work laptop computer, and compensatory damages. Later in the investigation meeting after Mr McEnery had given his evidence, Aggreko sought to resurrect the claim about deletion of confidential information, but that was denied by the Authority.

[18] The issues for investigation and determination in terms of Mr McEnery's claims are:

(i) Was he unjustifiably dismissed by Aggreko, regarding redundancy or for serious misconduct, and if so what remedies should he receive;
(ii) Was he subject to an unjustified action by Aggreko to his disadvantage, regarding Aggreko treating confidential information removal as serious misconduct, so a bonus was not paid and consideration for other positions was put at risk;

(iii) Was Aggreko in breach of its good faith obligations regarding the same grounds;

(iv) On the basis that enforcement of the restraint of trade in Mr McEnery's employment agreement was unreasonable, is he entitled to a declaration to that effect and damages?

AGGREKO'S CLAIMS

Employment agreement

[19] Mr McEnery's employment agreement with Aggreko dated 20 April 2015 contains the following clauses:

> **13 Conduct**
>
> The company expects all of its employees to behave with the highest integrity at all times. …
>
> **25 Confidentiality**
>
> Confidential information …means…figures…costings, developments…
>
> …any Confidential Information…will be treated as confidential, and may not be divulged to any third party without express written authorisation during your employment or at any time after your employment is terminated
>
> …you agree to respect the confidentiality of information, and not to divulge such confidential information to any other party. Failure to comply with this condition may result in legal action.

Confidential information

[20] I will deal with Aggreko's claims first. The company claims that Mr McEnery breached express and implied terms in his employment agreement by sending emails with attached documents. It relies particularly on clauses 13 and 25 of the employment agreement, and on the implied duties of loyalty and fidelity, and confidentiality.

[21] Mr McEnery admits having sent Aggreko documents to the email address which he and his wife use on 2 March 2016. Although the address has his wife's name on it he says that he has no other personal or family email address.

[22] Aggreko suggested that it did not know who the documents had been sent to, which was particularly worrying. However, Mr McEnery's evidence, which was not disputed, was that at least some of the Aggreko managers involved in dealing with this claim knew that his wife's name was Jenna.

[23] The documents (referred to as the three emails) which were sent by forwarding, by email, existing emails which had the documents attached, were:

(a) A proposal to Client A from Aggreko dated 24 February 2016;

(b) An email dated 25 November 2015 from Mr McEnery to Mr Hamilton the General Manager, outlining a meeting with Client B; and

(c) A proposal to Client C dated 20 February 2016.

[24] Aggreko raised a concern that there may have been more documents which had been copied by Mr McEnery, either physically or electronically. However, it was not able to identify any further evidence of this nor did it arrange for any forensic testing of Mr McEnery's work or home computer/s.

[25] Aggreko says that all these documents sent were its confidential information. They contain information vital to Aggreko's business. Certainly the two proposals contain tender responses, including proposed solutions to clients' requirements, pricing, product specifications. The meeting notes with client B contained information about the client's product requirements and its own clients.

[26] Mr McEnery did not dispute that the information was confidential, however he says that he has an affirmative defence to their copying and sending to his family's email address. Thus he denies breaching express or implied terms of his employment agreement.

[27] I accept that all of these documents were Aggreko's confidential information. They contained sensitive information about their business, including pricing information and their client's business requirements.

[28] Mr McEnery accepts that he sent copies of them his home email address for his personal use. He says that he has not disclosed them to anyone else or used them.

Disclosure or use of information

[29] Although Aggreko referred to removal of its confidential information, as the documents were sent by way of forwarding a company email with the documents attached, they were copied rather than being completely removed as such. They remained on Aggreko's system.

[30] Mr McEnery says that he did not send the information to a third party. He says that that email address is the only one he has for personal use. There was no evidence that he uses any other personal email address. When Mr McEnery was leaving Aggreko he asked to forward to himself photographs of his children. Mr Bowler confirmed that the photos were sent to Mr McEnery's wife's email address (the one which he sent the documents on 2 March to).

[31] Aggreko argues that Mr McEnery did disclose the information to a third party, namely his wife, through the email to their joint email address. On Mr McEnery's behalf it was argued that the situation is the same as if he had put a hard copy of the documents in a briefcase and took them home with them.

[32] No forensic testing of computers was sought or arranged by Aggreko. Greg Barber had been sought by Mr McEnery to copy the three emails from Mr McEnery's iPad, as part of a response to the orders or assurances sought by Aggreko in their confidential information claim.

[33] Mr Barber's evidence was that Mr McEnery's iPad showed that the three emails had not been forwarded, in that they did not appear in the sent items and the forward icon was not showing by the messages themselves in the inbox.

[34] It was evident that Mr Barber's assessment was relatively low level, compared to some of those undertaken today and did not go to the extent of a detailed forensic examination.

[35] The evidence of Mr Bowler was that Mr McEnery had difficulty sending the photos of his children to himself, and is not particularly IT savvy.

[36] The situation is therefore that (other than his wife) there is no evidence that Mr McEnery forwarded or provided the emails to any third party, but it cannot be definitely established that that did not occur.

[37] Aggreko says that Mr McEnery's explanation as set out below, at least in part, indicates an intention to disclose the information. I took this to refer to disclosure to a court, or possibly other parties to a court action, for the purposes of defamation action.

[38] Aggreko says that there is no need to establish that Mr McEnery disclosed the information for there to be a breach of clause 25 of his employment agreement, or implied terms of fidelity or trust and confidence.

[39] The better approach is to regard the implied duty of confidentiality as being part of an employee's implied duty of fidelity rather than being a separate obligation. [6]

[40] I am not satisfied that the sending of emails to his family's home email address is sufficient to count as disclosure to a "third party" for the purposes of clause 25 of the employment agreement. There is no evidence of any wider disclosure than that by Mr McEnery.

[41] However, I find that without adequate explanation or defence Mr McEnery's forwarding of the three emails was a breach of his duty of fidelity to Aggreko.[7] He was still employed at the time that the emails were sent and his conduct in sending them, in the absence of a satisfactory explanation, was not within the acts which a faithful employee.

Mr McEnery's defence regarding the three emails

[42] Mr McEnery says that he copied the documents for his own protection and raises this as an affirmative defence to Aggreko's claim.

[43] Mr McEnery says that he was worried that if, after he left, the company went back to clients and offered them a lower price than that which Mr McEnery had

[6] *Korbond Industries Ltd v Jenkins* [1992] 1 ERNZ 1141 at pp 1151-2

[7] *Above at n 6*

offered, it would damage his reputation and he would be blamed for incorrect pricing. He says that he wanted proof about what Mr Bowler had instructed him to quote.

[44] In terms of why he believed that that might happen, he described a situation where that had occurred with another person who had moved jobs. He also says that since his departure from the company it had been suggested to him by two former clients that the same thing had occurred with him.

[45] At the investigation meeting Mr McEnery's motivation and explanation was explored further. He was asked what use the documents taken would be in terms of defending himself. He repeated several times that the only reason that he had removed the documents was to pursue a claim for defamation, in the event that someone from Aggreko suggested that he had set the wrong prices.

[46] Adecco says that it was not Mr McEnery's role to set the pricing. That was largely done by Mr Bowler, or in some cases, other senior managers. It denied any practices of discrediting former staff in order to gain further business.

[47] I accept that Mr McEnery's evidence must be considered in the light of his situation in the sense that he had just been informed that his positon may be made redundant, due to the loss of an important contract which he had been involved with. However, the rejected proposal for a replacement contract with that client was not among the three emails sent to Mr McEnery's home address.

[48] I accept that Mr McEnery may well have been worried about how he would be seen in the marketplace after the loss by Aggreko of a major contract and his redundancy.

[49] Aggreko questioned Mr McEnery's only taking information concerning 'live' projects, suggesting that these were the ones where there was an existing possibility of a competitor getting awarded the business rather than Aggreko. Mr McEnery's response was that these were the situations where he could be blamed and a new price submitted, whereas for projects which had been won by Aggreko or won by a competitor there was no prospect of going back with another price and blaming him for the earlier one.

[50] The email regarding the meeting with client B does not contain pricing information and therefore does not seem to relate to Mr McEnery's explanation of trying to establish that he had been authorised to provide particular prices.

[51] Mr McEnery's explanation simply does not match the nature of the emails. The documents attached to, or contained in, the three emails simply would not assist Mr McEnery to establish what he says he might need to establish. The documents show the final product which went out to clients, not how or who worked out the pricing. The email to client B does not even refer to pricing. The three emails and their attachments do not establish who set or approved a price.

[52] The fundamental problem is that the documents which he took do nothing to assist with his stated aim, and therefore I find that Mr McEnery's explanation was not credible. He therefore sent the three emails containing confidential information without satisfactory explanation or affirmative defence.

Contact with Client C

[53] On 10 March 2016 Mr McEnery advised his contact from Client C by email that he was being made redundant. The contact expressed sympathy, and Mr McEnery responded by email:

> Thank you, yes I am working on something which may be in a similar industry so if it is ok with you I would like to keep contact and possibly look at some options for your project, is it still going to proceed even though the site is for sale

[54] Client C had put its possible contracting for a solution (which Aggreko had sent the proposal in for) on hold due to the sale. Mr McEnery's explanation for his comments in the email was that he was referring to a different type of option for the project, one which Aggreko did not offer, in light of the client looking at selling the site. The nature of the project looked likely to change

[55] Aggreko says that this email shows a clear intention by Mr McEnery to seek the same business opportunity post-employment, as Aggreko might continue to seek.

[56] Aggreko says that the contact with Mr Heggerty was in breach of clause 27.4 of the employment agreement, regarding conflict of interest but I consider that this is a matter better dealt with under the duty of fidelity.

[57] I found Mr McEnery's explanation unconvincing when his evidence was also that he did not know at that point who he was going to work for. He therefore would not know whether any future employer offered the kind of alternative solution he says that he was envisaging.

[58] I conclude that Mr McEnery's email of 10 March 2016 to client C was a breach of his duty of fidelity to Aggreko.

Contact with competitor

[59] Mr McEnery was in communication with the owner of a business which was a direct competitor to Aggreko. Aggreko described this communication as regular however, the evidence was that there were at most around four calls of any substantial length over less than a week.

[60] Five other Aggreko staff had in recent times moved to work for that company, including three sales staff. That company had recently won the large contract which Aggreko had lost. Mr McEnery says that these contacts were so that he could find out about obtaining employment with the competitor, having been told that his job at Aggreko may be made redundant.

[61] It was disturbing for Aggreko managers to find out after his employment that Mr McEnery had been in contact with the competitor whilst he was still employed by Aggreko. However, there was no evidence that confidential information had been disclosed in the course of those dealings or that Mr McEnery breached his obligations to Aggreko in any other way. His explanations for the contact were credible.

Loss or damage

[62] I accept that Aggreko were very concerned about the possibility of the documents in the three emails being handed on to others. However, there was no

evidence that that had occurred. The company has not been able to establish that it suffered any actual loss from Mr McEnery sending the emails to his home address.

[63] Mr Bowler's evidence was that the circumstances of all three projects or clients are the same as when Mr McEnery left Aggreko.

[64] In any event I record that the company had had issues previously with confidential information being disclosed, including before the time when Mr McEnery worked for them.

Good Faith

[65] Aggreko claims that Mr McEnery breached his duty of good faith to it by removing the information, concealing that fact, not telling his employer that he had removed it, and failing to advise Aggreko that he had already secured employment no later than 10 April 2016 (prior to his termination date of 12 April 2016).

[66] Mr McEnery denies that he was in breach of his duty of good faith and says that he has been upfront about having sent himself the three emails.

[67] The removal of the information has already been dealt with and I have found Mr McEnery to be in breach of his duty of fidelity.

[68] I accept that Mr McEnery did not inform Aggreko that he had removed the information whilst he was still an employee. However, I see that failure as simply part of the removal of information without the employer's consent, rather than a separate aspect of a breach of good faith.

[69] Although Aggreko suggested that Mr McEnery had concealed his sending of the emails to his family's email address, the evidence did not support this proposition.

[70] I am not satisfied that Mr McEnery breached his obligation of good faith by not advising Aggreko that he had already secured employment no later than 10 April 2016 (prior to his termination date of 12 April 2016). The employment which Mr McEnery obtained was not with a competitor company to Aggreko and did not raise the possibility of him breaching the restraint of trade clause in the employment agreement.

[71] Aggreko seems to have expected Mr McEnery to have told his employer that he was in what it described as "regular" communication from 7 March with the competitor attempting to obtain employment, that he had removed CI, that he thought that there was a lack of trust between the parties and that he was disgruntled.

[72] Mr McEnery says that he was legitimately attempting to find other employment having had his position declared surplus by Aggreko, without disclosing confidential information from Aggreko in the process. Other former employees of Aggreko had gone to work for the competitor.

[73] It may be arguable that Mr McEnery was obliged not to mislead Aggreko regarding his future employment whilst still employed by Aggreko. However, there is no evidence that Mr McEnery did that and to put a positive obligation on him to inform Aggreko goes too far in this instance.

[74] Aggreko argues that Mr McEnery acted in a deceptive way subsequently, but that cannot be covered by the duty of good faith as that duty ends with the termination of the employment agreement.

[75] In *Xu v McIntosh* [8] the Employment Court described the inappropriateness of double dipping where penalties were sought for the same matters as were being covered by other claims, unless there were some special facets to the situation. I could not identify any special facets in the present case.

Compliance Order

[76] Aggreko has sought a compliance order regarding the various express terms and implied terms of the employment agreement which it alleges that Mr McEnery breached.

[77] A consent determination[9] was issued on 9 June 2016. The Authority ordered that Mr McEnery (whether as an individual or by his agents or otherwise howsoever) was restrained from destroying, using, copying, transmitting, transferring, altering, deleting or defacing any of Aggreko's confidential information (other than as directed by the Authority for the purposes of this proceeding). The determination records that

[8] [2004] 2 ERNZ 448 at [43] and [45]
[9] [2016] NZERA Auckland 185

for the sake of clarity, that order did not prevent Mr McEnery's solicitors from dealing with Aggreko's confidential information for the purposes of this proceeding.

[78] The consent determination was ordered to apply until such time as a determination was issued on Aggreko's substantive claims.

[79] Given the parties agreed to the terms of the earlier consent determination, I now order paragraph 4 of the consent determination of 9 June 2016 [10] will continue to apply to Grant McEnery from the date of this determination, unless otherwise ordered by the Authority.

Penalty

[80] Aggreko says that penalties are warranted because of the seriousness of Mr McEnery's breaches and as a deterrent on future breaches by others. It relies on *TAG Oil (NZ) Ltd v Watchorn*.[11] It seeks a penalty of $10,000 for each of the breaches, namely $10,000 for each of the three pieces of confidential information removed, $10,000 for each breach of good faith alleged, $10,000 for the breach of the duty of fidelity and $10,000 for the breach of the duty of trust and confidence. I take this to amount to $100,000 in total.

[81] Aggreko claims that any penalties awarded should be paid to it under s 136 (2) of the Act. However, there were no reasons are given for this claim.

[82] Mr McEnery says that the sums sought are not reasonable and not support by existing case law. He also relies on *TAG Oil (NZ) Ltd v Watchorn* [12] as involving a large amount of data[13] copied with "incalculable value to a competitor". In that case, as in this, there was no evidence of disclosure. In terms of penalties the Authority awarded a penalty of $3,000 for each day that copying occurred, resulting in a penalty of $12,000.

[83] I accept that in the present case the information would be of value to a competitor, but not in the nature of such a large value as in the *TAG Oil* case.

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[10] Above n 9
[11] [2014] NZERA Wellington 58.
[12] Above n 3
[13] Approximately 350,000 electronic company files

[84] I have found that Mr McEnery breached his obligations to Aggreko regarding the three emails and as regards the contact with Client C.

[85] Under s 133 (1)(a) of the Act the Authority may impose a penalty for any breach of an employment agreement. The maximum penalty in the case of an individual is $10,000 [14]

[86] In *Xu v McIntosh* [15] the Employment Court provided some guidance for the Authority, in deciding whether or not to impose a penalty, and if so, in what amount:

> [47] … A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?
>
> [48]The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach. … ”

[87] Later in *Tan v Yang & Zhang*[16] the Court suggested a non-exhaustive list of relevant factors to be considered in penalty applications, which included:

- The seriousness of the breach;
- Whether the breach is one off or repeated;
- The impact, if any on the employee/prospective employee
- The need for deterrence;
- Remorse shown by the party in breach; and
- The range of penalties in other comparable cases.

[88] Aggravating and mitigating factors also need to be considered, and the penalty should be proportionate to the breaches found.

[89] Similar factors are now listed in s 133A of the Act, although this section only came into force on 1 April 2016.

[90] A Full Bench of the Employment Court in the *Preet* [17] case recently considered the approach to be taken by the Authority in dealing with penalties for

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[14] S 135 (2)(a) of the Act
[15] [2004] 2 ERNZ 448
[16] [2014] NZ EmpC 65 at [32]
[17] Above n 2

breaches of minimum employment entitlements. Although the present case does not relate to minimum entitlements, aspects of the Court's decision are still of relevance.

[91] Although it might be suggested that breaches of minimum standards are more serious than breaches of employment agreements, the Court in *Preet* found that some breaches of agreements could be more egregious than those of minimum standards.

Factors considered and outcome on penalty

[92] In *Preet* the Court outlined a four step process for assessing penalties. Step one is to identify the nature and number of breaches, and consider whether global penalties should apply.

[93] I accept the submission that the instances of the emails being sent are almost instantaneous and should be seen as attracting one global penalty. The maximum for this is $10,000.

[94] Mr McEnery also breached his obligations in relation to Client C and as that is a somewhat different nature of breach than the three emails, I consider that it can be subject to an additional penalty. The maximum penalty is again $10,000.

[95] Although I accept there was potential for harm, there is no evidence of Aggreko suffering any actual harm as a result of this breach.

[96] The breach was deliberate, in the sense that Mr McEnery did not accidentally send the documents to his family's email address. There was no evidence that Mr McEnery intended to use the documents to harm Aggreko. On the other hand, I have not found his explanation to be a satisfactory defence for taking them. Likewise the contact with Client C was deliberate and I have not accepted Mr McEnery's explanation for it.

[97] The three emails concerned a modest amount of documentation, compared to a list of various dealings which Mr McEnery had had with clients, provided during his redundancy process.

[98] Mr McEnery's position is that there is no need for a deterrent as Aggreko has already taken its own punitive measures, particularly specifying that the company was

enforcing the restraint of trade clause and not paying Mr McEnery's bonus. However, he has raised those as part of his personal grievance claims and I will deal with those below.

[99] I now consider means and ability to pay. Mr McEnery's current salary, although above the average wage, is not particularly high. Submissions on his behalf emphasised that he is the principal earner in a family with two children, who have relatively recently arrived in New Zealand. I accept that he has a limited ability to pay.

[100] I accept that the need for deterrence for Mr McEnery himself is not large. After an initial expression of lack of clarity regarding which emails Aggreko was aggrieved about, he has admitted to his involvement in sending the three emails. However, I must also consider the need for deterrence on other employees.

[101] In conclusion I consider that the appropriate penalties on Mr McEnery are $3,000 in relation to the three email breach and $2,000 in relation to the contact with Client C, making a total of $5,000.

[102] The next question is whether any of the penalties should be paid to Aggreko. In *Preet* [18] the Court emphasised that the determination of whether payment of a penalty is to be made other than to the Crown depended on the particular facts of the case. Further, where loss and cost can be compensated there may be no need for payment to others, whereas with non-compensatable loss, especially where the case is brought as a public duty, there may be a good argument for it.

[103] In the present case I am not satisfied that this can be seen as a case brought as a public duty. However, I do accept that Aggreko's position is made more precarious by the breaches and so it is entitled some of the penalties for that.

[104] I order that within 28 days of the date of this determination Mr McEnery pays a penalty of $5,000, of which half to the Crown via the Ministry of Business, Innovation and Employment and half to Aggreko.

Destruction order

[18] Above at n 2

[105] Aggreko seeks an order that Mr McEnery destroys all copies in every form (electronic or otherwise) of the company's confidential information in his possession or under his control (including those in the possession of his counsel). It further seeks a statutory declaration by Mr McEnery that he has destroyed all copies and complied with the terms of the consent determination of 9 June 2016.

[106] Aggreko did not provide any basis on which it considered that the Authority had jurisdiction to make such orders and I am not satisfied that such an order is within my powers to make. I therefore decline to make the order.

Exemplary damages

[107] Having withdrawn its claim for compensatory damages, Aggreko maintains its exemplary damages claim of $15,000 against Mr McEnery.

[108] There is a question about the Authority's jurisdiction to award exemplary damages, which may depend on the nature of the cause of action which the damages are sought under.

[109] However, I am satisfied that in any event Aggreko should not be entitled to be awarded exemplary damages when it is also seeking penalties against Mr McEnery. I accept the statement of the Authority in *TAG Oil (NZ) Limited v Watchorn* [19] that it would be inequitable to award two separate punitive remedies for the same behaviour. I therefore decline to award exemplary damages.

MR McENERY's CLAIMS

Redundancy and subsequent departure from the workplace

[110] On 29 February 2016 Aggreko gave Mr McEnery a letter asking him to a meeting on 2 March 2016. The letter informed Mr McEnery that his role may not be

[19] [2014] NZERA Wellington 58 at [80]

required as a result of the current downturn, and included reference to the situation with a client. Aggreko had recently lost a major contract with this client, although the current contract was not to end until May 2016.

[111] Mr McEnery was offered the opportunity for legal representation at the meeting but declined. By agreement the meeting was brought forward to 1 March 2016.

[112] The company's proposal to restructure by removing his position was discussed at the 1 March meeting. From the company's perspective, Mr McEnery did not express any concerns about the proposal. He agreed to provide feedback to the proposal in writing.

[113] Mr McEnery's written response included an emphasis on his projects, other work and customer base during his time with Aggreko. He suggested that there might be suitable Australian or Pacific opportunities for him with Aggreko. He also mentioned the possibility of relocating out of Auckland.

[114] It was agreed that the parties would meet again on 7 March. At that meeting there was some discussion on Mr McEnery's response feedback was discussed and he was invited to discuss any other matters which he wanted to address.

[115] A further meeting was held on 10 March, when Mr McEnery was advised that his position was being made redundant, and that there were no alternative positions. Aggreko said that it had gone through Mr McEnery's response document, but that a large client would be needed to replace the client they had lost.

[116] The relatively brief notes of the meeting that Mr McEnery's reply was "that's all good", repeated on two occasions. The parties had some discussion on a farewell morning tea and Mr McEnery's departure. He said that it was the company's decision about when he finished work. Further, there were no hard feelings, that he understood it was business. The company's impression through the series of meetings was that Mr McEnery accepted and understood the company's position.

[117] Later that day a letter was sent to Mr McEnery. It confirmed that his position is declared redundant due to the current downturn (in the business) and the loss of a

significant client. Aggreko did not consider that the current business demand warranted the continued employment of a full-time salesperson.

[118] The letter proposes that he works out two weeks of the one month notice period and is paid for the remaining two whilst being on garden leave. He would be paid a bonus of a specified figure less PAYE as per his employment agreement. He was also offered an excellent reference and verbal confirmation of the same. There was a proposal for an additional payment to do various things, largely comply with obligations already in the employment agreement and participate fully in the handover. The proposal was offered in full and final settlement of all employment matters.

[119] Mr McEnery's counsel indicated in writing that the proposal was acceptable except that he also sought to be paid for the restraint periods.

[120] On 11 March Aggreko issued an internal announcement of Mr McEnery's impending redundancy, which included positive comments regarding his significant contribution to the business.

[121] On 15 March 2016 Mr McEnery was called to a meeting at Aggreko. He was given a letter which stated that the proposal presented by the company had not been accepted and acknowledged that there was no obligation on him to accept. The letter also says that the company was cognisant of Mr McEnery's request for the company not to delay matters. Mr McEnery was given notice of termination effective 12 March 2016 and advised that he was not going to be required to work out his notice but that he would be provided with his company car during the notice period.

[122] Mr McEnery went to pack up his things. He was asked for his phone and Mr Bowler sat with him while he sent some pictures of his children home. Mr Bowler assisted him with that as Mr McEnery was having technical issues.

[123] Mr Bowler then walked Mr McEnery to his company car. Although Mr McEnery's evidence was that he found this highly embarrassing, there were at most only a few other staff members present.

[124] Later that day Aggreko discovered that the three emails had been sent on 2 March. It appears that the company's focus was then on the confidential information

and the prospect of bringing a case in the Authority, rather than on Mr McEnery's employment. A request for a breakdown of Mr McEnery's final payment to Mr McEnery was not provided, despite requests, until late April, over two weeks after his employment had finished. His final pay was not authorised for payment until almost a week after his employment finished.

[125] The issue of the possible confidential information disclosure was raised with r McEnery's lawyer but Aggreko took no steps to meet with Mr McEnery to discuss the confidential information allegations or his contact with Client C, as he considers that a fair and reasonable employer should have done.

Unjustified dismissal claim

[126] Mr McEnery claims that he was unjustifiably dismissed. This was raised alternatively as relating to his redundancy, or subsequently when he was asked to leave on 12 March. It initially appeared that the company found out about the three emails on 15 March and that was what resulted in the company saying that was Mr McEnery's last actual day of work. However, subsequently it became apparent that that discover was only made later in the same day. I will look firstly at the redundancy.

[127] Mr McEnery criticises a number of aspects of the process and decision-making regarding his redundancy. However, it is clear that Mr McEnery did not adopt such an approach during the redundancy process itself. Whilst it is not up to an employee to make all the running in such a process, I accept Aggreko's submission that processes can be adapted if an employee raises concerns or questions issues. There can be further discussion or information provided. That did not happen here.

[128] Mr McEnery's written response to the proposed redundancy, focused on his working outside Auckland, either elsewhere in New Zealand or overseas. Aggreko's witnesses emphasised that the company was not in the process of expanding at that time, and in fact had not been replacing some staff when they left.

[129] Although Mr McEnery considered that with time he may have been able to achieve more revenue from other sources for the company, Aggreko decided that it did not want to take that chance.

Redundancy procedure

[130] In many ways, the company's procedure was fair. Mr McEnery was informed in advance of what the issue was before he was called to a meeting with Aggreko representatives to discuss it and he was given the opportunity to have representation at the meetings. He was offered and took up the opportunity to provide feedback on the company's proposal. Some time was then taken before the final decision. The procedure was carried out over a relatively short time, but then there were not the complexities of, for example, selection issues which arise in some redundancy situations.

[131] Mr McEnery was not provided with a great deal of information in terms of the company's proposal to restructure. On the other hand the company had lost a client which took up an approximate 40% of his work. Mr McEnery already had at least some information regarding the significance of that client and its income to the company and his effect on his role in particular. In these particular circumstances, I do not consider that the company was required to offer him more, unless he asked for it. The evidence was clear that he did not seek more information while he was going through the process. Overall I am satisfied by a fine margin that Mr McEnery was supplied with sufficient information.

[132] The company did consider Mr McEnery's response but decided that it was not prepared to take the chance of another major client being found some time in the future, in order to justify creating an alternative role for Mr McEnery. That was within its prerogative to decide.

[133] Although criticism was made of Mr McEnery's departure on his final day of work, I accept that he had expressed a willingness to go when the company wanted, and was going to be on holiday overseas for the last portion of the notice period.

Redeployment

[134] Mr McEnery claims that he was not offered redeployment positons by Aggreko which should have been offered. I deal below under the next personal grievance claim below with job prospects after Mr McEnery's three emails of 2 March were discovered.

[135] I look here at redeployment prospects available before Mr McEnery's actions regarding the confidential information were discovered.

[136] Ms Whitehead's evidence was that nothing was offered to Mr McEnery in terms of redeployment as there was nothing of a like nature available at the time. Any roles available were of significantly less pay rate. The company had a system in place to send out all positons available internally as announcements.

[137] During the period from 29 February to 10 March (when Mr McEnery was informed of the decision to make his position surplus) there were no sales positions available within Aggreko nationally.

[138] The question is then whether there were other roles which Mr McEnery could have moved into. There is a distinction between roles which employees can be required to redeploy into and those which may be the subject of discussion as possible redeployment options if the employee is capable of undertaking them and agreeable.

[139] The only possible role at the time before the three emails were discovered by Aggreko was a yard hand position.

[140] Company witnesses said that the yard hand position was not raised with Mr McEnery as the role had significantly less status and pay then the role which he was being made redundant from. They had knowledge and impressions about Mr McEnery's ambition and need for money to support his family. He had previously applied for an Aggreko role in Fiji but on discovery of that the salary was less than his current role, and that local knowledge was required, he said that he was looking for another opportunity where he could earn more money and asked for his application to be withdrawn. Aggreko representatives thought that Mr McEnery would not be interested in the yard hand role. He says that he would have considered it if it was offered but did not go so far as to say he would have accepted it.

[141] The company should have raised that role with Mr McEnery as part of the discussions about his role being made redundant and whether there were any redeployment options. Although they did not consider that it was likely that he would accept it, that was not clear until they asked.

Conclusion on redundancy

[142] I accept that this is a genuine redundancy situation where Aggreko had lost a major client with a resulting loss of revenue. This was part of a picture of down turn in the utilities sector countrywide. The company made a business decision not to create an alternative role as it did not consider that it was financially worthwhile.

[143] Generally Aggreko undertook a fair procedure when dealing with Mr McEnery's redundancy. I accept that the impression which he gave them through the process was that he was fairly accepting of the company's assessments and decisions, probably on the basis that he understood the significance of the loss of the major client.

[144] However, I do consider that ideally the prospect of the yard hand role would have been mentioned to Mr McEnery. Employees being made redundant may sometimes consider roles which are not usually what they would be looking for.

[145] Turning to the test for justification under s 103 A of the Act, were the employer actions what a fair and reasonable employer could have done in all the circumstances. I must not determine that a dismissal is unjustifiable solely because of defects in the process followed by the employer which were minor and did not result in the employee being treated unfairly.[20] I am satisfied that the failure to raise the prospect of the yard hand role, in the circumstances of the company's knowledge of Mr McEnery's approach to the previous internal job opportunity, is minor and did not result in Mr McEnery being treated unfairly.

[146] Mr McEnery's dismissal for redundancy was not unjustified.

Dismissal or disadvantage by Aggreko's actions after discovery regarding confidential information

[147] Mr McEnery made claims regarding the company's actions, or lack thereof, once they discovered the emails which he had sent to his family email address. He says that if Aggreko was taking any action based on that issue it should have it was obliged to carry out a fair investigation process. It is submitted that that process must always include notifying the employee of its concerns and providing him or her with an opportunity to comment. This was never completed.

[20] S 103A(5) of the Act

[148] Aggreko did not carry out a process which involved meeting with Mr McEnery and investigating the emails to his family email address. He remained an employee for over three weeks after the initial discovery was made.

[149] This claim was framed initially as a dismissal and/or disadvantage claim. However, the evidence established that Aggreko's decision on 15 March 2016 was made before, rather than because of, its discovery of the three emails which Mr McEnery sent.

[150] If Aggreko had summarily dismissed Mr McEnery once it found out about the emails, then there is the potential for an unjustified dismissal claim regarding that, even though he was already working out his notice for redundancy. However, it chose not to summarily dismiss him. Rather it continued with its plan for him to continue to have his notice period, but not to be required to work during that period. Under the redundancy clause in the employment agreement Aggreko is entitled to give Mr McEnery salary in lieu of notice [21]. There is also an entitlement [22] for the company to put the employee on garden leave rather than work out their notice period.

[151] If an employer discovers alleged serious misconduct during a notice period (whether given by it for redundancy, or by the employee as resignation), it may not necessarily be obliged to take action on it, although the duty of good faith may suggest that the issue should be raised with the employee. If, however, the employer is going to treat the employee adversely to his disadvantage in some way, then it should raise the issue with the employee and hear their explanation.

[152] Mr McEnery claims that he was disadvantaged regarding Aggreko treating the sending of the three emails as serious misconduct, resulting in the bonus not being paid and consideration of other positions being put at risk.

Mr McEnery's Bonus

[153] The bonus was referred to in the proposal which was made to Mr McEnery in connection with his redundancy, but the company made a decision not to pay it once it

[21] Clause 28
[22] Clause 26.1

discovered the three email issue. Aggreko said that Mr McEnery was not entitled to the bonus.

[154] On the last business day before the investigation meeting Aggreko informed Mr McEnery that it would pay the bonus, which was stated to be "for pragmatic reasons only to avoid such matter having to be dealt with by the Authority".

[155] Clause 6 of the employment agreement starts that Mr McEnery is eligible to participate in the company's incentive scheme. The clause also notes that there is no "inherent right" to a bonus or to participate in the scheme should management decide to change the rules for eligibility.

[156] Initially at the investigation meeting Ms Whitehead was uncertain about Mr McEnery's eligibility due to a lack of material on his file,. However, Mr Hamilton, as the senior manager in New Zealand, said that Mr McEnery did qualify for the bonus scheme. The bonus was based on past performance. Mr McEnery's understanding was that he qualified and that the bonus was paid on 25% of his salary. The company says that it was paid pro rata as Mr McEnery had not completed a full second year.

[157] The company made a decision not to pay Mr McEnery the bonus based on its perception of his conduct regarding the confidential information. The non-payment to him was a disadvantage which lasted for some months until payment was made some months later. Aggreko did not discuss with Mr McEnery the confidential information issue and the possibility that a bonus might not be paid because of it. I find that Aggreko did subject Mr McEnery to a disadvantage regarding his bonus. That action was not justified as there was no discussion directly with him on the cause of the non-payment (sending of confidential information) whilst he was an employee, nor has the company shown that the bonus was dependent on good conduct or the like.

[158] Notes of the 10 March meeting show Mr McEnery asking for payment of his bonus without any suggestion from Aggreko that he was not entitled to a bonus.

[159] No documentary evidence regarding the nature or terms of the bonus scheme was provided by Aggreko to the Authority despite Mr McEnery's inclusion of a claim for the bonus in his statement of problem. This absence was significant regarding the company's initial suggestion that Mr McEnery was not entitled to the bonus but also to the quantum of the bonus.

[160] The amount paid to Mr McEnery was subject to a pro rata exercise by the company. In the absence of the company documentation regarding the bonus scheme I find that Mr McEnery's understanding that there was no pro rate element should prevail.

[161] Mr McEnery is entitled to be paid the remainder of his bonus. I will leave the parties to attempt to resolve the quantum of that remainder between them. In the event that they are unable to so I grant them leave to return to the Authority on this matter.

[162] In terms of remedies for a personal grievance of disadvantage there is no suggestion that Mr McEnery lost wages as a result of the grievance except to the extent that the bonus is calculated based on wages, and I have dealt with this in the paragraph above.

[163] In terms of whether Mr McEnery suffered humiliation, loss of dignity or injury to feelings as a result of the non-payment of the bonus for some months, I accept that there was some evidence that the failure to make the payment was distressing to him, particularly when he was taking his family back to their home country on holiday. I order that Aggreko pay Mr McEnery $500 under s 123(1)(c)(i) of the Act.

Consideration for other positions

[164] Mr McEnery claims that there were jobs which he could have taken up with Aggreko by way of redeployment after he was given notice of termination for redundancy. As part of the Authority's process Aggreko supplied spreadsheets showing its outstanding recruitment activities in New Zealand and the Pacific.

[165] I accept that after Mr McEnery had actually left the workplace but was still employed, a small number of roles at Aggreko, or the resignations of staff leading to possible vacancies, arose. Mr McEnery argues that he should have been given consideration for redeployment into those roles and that this did not occur as the company did not carry out a full investigation, including hearing his response, to the allegations regarding the three emails.

[166] I accept that there may be an on-going obligation on employers to consider redeployment possibilities for an employee while the employee's notice period is

running. However, in this case Aggreko did not consider that because of its discovery of the three emails. Aggreko did not go through a process of providing Mr McEnery with details of the emails, and call him to a meeting about them whilst he was still in employment, as would usually be part of an investigation or disciplinary process.

[167] However, it seems extremely unlikely that Aggreko and Mr McEnery would have agreed on a redeployment position after 16 March 2016. Having heard Mr McEnery's explanation or defence to emailing the documents and seen Aggreko's witnesses, I do not consider that there is any realistic prospect of Mr McEnery having gained another position with the company even if he had been given the opportunity for a full discussion after the emails with confidential information were discovered.

[168] I consider this to be a situation where there is such significant contribution by Mr McEnery, by way of his sending the three emails, to the situation of the lack of redeployment, that it cannot be said that he has a grievance at all.[23]

Good faith

[169] Mr McEnery claims that Aggreko breached its duty of good faith to him, on similar grounds to those advanced above regarding his redundancy and departure from employment and disadvantage. Aggreko says that it was Mr McEnery who mislead and deceived it rather than the other way around.

[170] I have dealt with Mr McEnery's claims above and do not consider that the good faith claims bring anything additional.

Restraint of Trade

[171] Mr McEnery claimed that he was subject to an unreasonable restraint of trade and this restricted his ability to find work. He seeks a declaration and damages for

[23] *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 at [216]

that of $12,000. This figure was said to be based on his loss of earnings, although the evidence on that was limited.

[172] The employment agreement includes post termination restrictions on soliciting clients or employees. It also requires in clause 27.3 that for three months from termination the employee shall not be interested or engage (including as an employee) in:

> any enterprise carrying on business within a generator, hire industry or similar to or in competition with any business carried on by the Company.

[173] Mr McEnery had requested at the 10 March 2016 that all the restraints be removed. In the company's notice of redundancy letter a proposal was included which required Mr McEnery to comply with various obligations in his employment agreement including the restraint of trade clause. There was subsequently some correspondence between his counsel and Aggreko's advocate on the restraint of trade issue. The final position from the company, as set out in its' advocate's letter of 24 May 2016 was that:

> "The restraint of trade provisions are valid and enforceable, particularly in this situation where your client has conducted himself in such a way dated 2 March 2016.

[174] During the investigation meeting some Aggreko witnesses said that although the restraint clause in Mr McEnery's agreement on the face of it prevented Mr McEnery from working for a business in competition with Aggreko, the company's practice was that it did not attempt to enforce that restraint or full prevention from working. Rather it only attempted to prevent former employees from contacting clients or using confidential information. They did not attempt to prevent them from working in the industry altogether.

[175] The evidence was not clear as to how if that was the position, the correspondence from the company and its advocate set out above appeared to reflect a different practice.

[176] Restraints of trade, such as that in clause 27.3, are prima facie unlawful and thus unenforceable but may be upheld if it is considered reasonable in the interests of the parties to the agreement and with reference to the public interest.[24]

[177] However, regardless of whether this restraint was reasonable or not, Mr McEnery has difficulties with his claim. He claims that it was entirely reasonable of him to seek payment for the three month period of the restraint, as he had been made redundant and the company had refused to remove it. Whilst it is possible to have sympathy for that position, particularly where the agreement provides for no redundancy compensation payment, Mr McEnery must still establish some legal basis for his claim.

[178] I am unable to ascertain a cause of action for an employee to seek damages after they have complied with an unenforceable restraint of trade clause. There was some attempt to frame the Applicant's claim as an unjustified disadvantage personal grievance claim. However, in general unjustified disadvantage claims must relate to employer's action whilst the employment exists.[25] Mr McEnery's claim concerns his post employment period and so I do not accept that it can be an unjustified disadvantage claim.

Costs

[179] Costs are reserved. The parties are invited to resolve the matter. Both parties have had a degree of success in this determination, although Aggreko's could be seen as more substantial. This is likely to be reflected in any decision on costs.

[180] If the parties are unable to reach agreement Aggreko shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr McEnery 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.

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[24] See for example, *Gallagher Group Ltd v Walley* [1999] 1 ERNZ 490 at [20]CA
[25] *Able Owl XL Limited v Gladden* [2015] NZEmpC 166 at [29]

[181] 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

Nicola Craig
Member of the Employment Relations Authority