NOTE: This determination contains an order at [6] prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2025] NZERA 98
3272200

	BETWEEN	AIRTECH NZ LIMITED Applicant
	AND	MICHAEL POOLE Respondent

3288680

	BETWEEN	MICHAEL POOLE Applicant
	AND	AIRTECH NZ LIMITED Respondent

Member of Authority:	Lucia Vincent
Representatives:	Amy Keir, counsel for Michael Poole Gareth Abdinor, counsel for Airtech NZ Limited
Investigation Meeting:	19 and 20 November 2024 in Christchurch
Submissions Received:	20 November 2024 from the Applicant and Respondent
Determination:	20 February 2025

DETERMINATION OF THE AUTHORITY

What is the Employment Relationship Problem?

[1] Airtech NZ Limited (Airtech) alleges Mr Poole breached his employment agreement, duty of good faith and duty of fidelity, when he attempted to use an Airtech document for the benefit of his new employer, deleted documents belonging to Airtech,

emailed Airtech information from his work to personal email address, and did not report issues about workload and mental health, while still employed at Airtech. Airtech seeks a permanent injunction preventing Mr Poole from using any Airtech intellectual property and confidential information. It also seeks a determination that Mr Poole breached the contractual and statutory employment obligations he owed Airtech. It asks for penalties for Mr Poole's breaches of good faith and the employment agreement.

[2] Mr Poole denies the claims. He acknowledges he should not have attempted to use an Airtech document for the benefit of his new employer but ultimately did not do so due to Airtech intercepting his email containing the document and addressing its concerns with him. He says he used his personal email as a work around when working remotely. He says he deleted documents belonging to Airtech he had copies of or access to externally and that he has not retained any copies or access, nor shared anything with his new employer.

[3] Mr Poole says Airtech unjustifiably disadvantaged him by refusing to notify him of what its concerns were prior to meeting him and suspending him, and not giving him enough time to be legally represented at that meeting. Mr Poole asks for compensation for the disadvantage grievances and a penalty for a breach of good faith.

[4] Airtech denies disadvantaging Mr Poole. It says it did not suspend Mr Poole and that Airtech reasonably asked to urgently meet him to discuss its concerns about his conduct - a preliminary discussion. It says it was only after this discussion that it started a disciplinary process with advance warning of the allegations and an opportunity for Mr Poole to explain with legal representation.

[5] The parties were unable to resolve their employment relationship problem at mediation and have asked the Authority to do so.

[6] The parties did agree to a non-publication order for any intellectual property and confidential information referred to in the determination. I have not found it necessary to refer to that information however make the non-publication order permanent for any confidential information and intellectual property submitted in proceedings, for the purposes of any access to or publication of the file including any pleadings and evidence.[1]

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[1] Employment Relations Act 2000 (Act), clause 10(1), schedule 2.

How did the Authority investigate?

[7] Airtech lodged a statement of problem received by the Authority on 8 January 2024. Following a case management conference held on 18 January 2024 the parties were directed to mediation.

[8] Airtech lodged an amended statement of problem on 19 March 2024. Mr Poole lodged a statement in reply to the amended statement of problem on 3 April 2024. Following a further case management conference on 19 June 2024 the Authority scheduled an investigation meeting to deal with both matters on 19 and 20 November 2024 in Ōtautahi / Christchurch.

[9] Airtech asked to add a remedy to the amended statement of problem - a penalty for breaching an employment agreement.[2] The Authority allowed the addition to pragmatically address the substance of the problem with an opportunity for Mr Poole to provide further information or evidence in response.[3]

[10] At the investigation meeting, the Authority heard evidence from witnesses under oath or affirmation. The parties' representatives gave oral and written closing submissions.

[11] As permitted by s 174E of the Employment Relations Act 2000 (Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What were the issues?

[12] The issues determined in this matter were:

(a) Did Mr Poole breach his employment agreement, duty of good faith or duty of fidelity?

(b) If Mr Poole has breached any of his obligations, should the Authority grant a permanent injunction or any penalties under s 4A and s 134 of the Act?

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[2] Act, s 134(1).

[3] At any stage in proceedings, s 221 of the Act enables the Authority to amend or waive any error or defect in proceedings if it will more effectually dispose of a matter according to the substantial merits and equities of the case.

(c) Did Airtech unjustifiably disadvantage Mr Poole? If it did, what, if any, remedies are warranted such as compensation and penalties?

How did the parties get here?

[13] After working for Airtech since 2016, most recently as its Contracts Manager, Mr Poole resigned on 15 December 2023. Mr Poole told Airtech in his resignation letter that he intended to take up a new role with another Christchurch-based company – a company Airtech says directly competed with it. Airtech and he agreed his final working day would be 12 January 2024 – an extension of his notice period of about two weeks.

[14] During his time at Airtech, Mr Poole had been involved in a project about software systems, particularly its application to the contracts division of Airtech which he managed. Emails and an attached document were provided that showed Mr Poole liaised with a consultant about this project in September 2023. The three page document attached had been created by Mr Poole on 17 September 2023 with total editing time of under an hour and a half.[4]

[15] Another version of this document was created by Mr Poole on 20 November 2023 with a total editing time across the life cycle of that document of about two hours. This document was considerably longer (ten pages) and contained more of Mr Poole's thoughts about the project. I accept Mr Poole completed this work for Airtech.

[16] At or around 5:35pm on 21 December 2023, using his laptop at home, Mr Poole saved this document again, calling it "Christmas." He added the logo of his new employer with the intention of emailing it to himself from at work (from his personal email address), to print it off and edit it further before providing a copy to his new employer. This did not happen because after he emailed this document at 6:06pm from his personal email address to his work email address, Airtech intercepted it.

[17] Airtech says the document would allow a competitor to maximise its use of a specific software system in any contracts department, providing a material advantage and the benefit of significant time, resources and expertise invested by Airtech in developing the document. Airtech views the Christmas document as its intellectual property and information confidential to it and its staff.

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[4] According to the file properties of the document.

[18] After Airtech's system intercepted the email, Airtech Managing Director Mr Cross called Mr Poole, and told him to come to a meeting at 8:00am the next day. He did not provide any detail but told Mr Poole it was "serious" and to "bring a lawyer." When Mr Poole called Mr Cross back, he would not tell him what the meeting was about. Worried he may not return to the workplace after the meeting (he had seen others "disappeared" from their roles at Airtech before), Mr Poole says he deleted duplicate or obsolete documents, changed his passwords on his personal accounts, and deleted a drop box account he had for work purposes.

[19] Mr Poole asked his brother-in-law Mr Walker to attend the meeting with him at 8:00am the next morning on 22 December 2023. Mr Cross and Airtech Commercial Manager Mr Smith met with Mr Poole and Mr Walker. The parties have different views about how that meeting went. Mr Poole did not return to work after that meeting.

[20] In a letter dated that same day, Airtech wrote to Mr Poole and sought to meet with him on 27 December 2023 as part of the disciplinary process to answer allegations of serious misconduct. Following various emails, this meeting was delayed to 10 January 2024. The meeting did not occur because Mr Poole provided a medical certificate saying he was unfit for work until after his final working day.

[21] The employment relationship ended on 12 December 2023.

What obligations did Mr Poole owe Airtech?

What did the employment agreement say?

[22] Relevant clauses in the individual employment agreement between Airtech and Mr Poole (Agreement) include that:[5]

(a) Mr Poole would honestly, diligently and to the best of his ability, serve Airtech (accepted by Mr Poole to be the duty of fidelity).[6]

(b) Mr Poole would carry out and comply with all reasonable and lawful directions given by Airtech or any person authorised by Airtech to give such directions.[7]

[5] The Agreement was dated 5 February 2016 and signed by the parties on 5 and 9 February 2016.
[6] Clause 4.1.1
[7] Clause 4.1.2.

(c) Any written or oral work produced by Mr Poole during the currency of his employment agreement relating to his responsibilities and duties belonged to Airtech.[8]

(d) The email, intranet and internet policy clause said that Mr Poole must comply with all systems established by Airtech regarding email, that email, intranet and the internet were business resources to be used for business purposes and that email messages became part of the employer's computer system and were Airtech's property, and that Airtech could intercept and read any messages being sent or received.[9]

(e) The Agreement included terms implied by law or incorporated by statute or otherwise (such as the duty of good faith).[10]

[23] Clause 33 dealt with confidentiality:

> The employee shall not, during the term of this contract or any time thereafter, except as may be necessary for the proper performance of the employee's responsibilities and duties or as may be required by law:
>
> 33.2.1 Directly or indirectly disclose to any person any official information whatsoever relating to any contract with any client of the employer, the employer's business, affairs or its undertaking whatsoever.
>
> 33.2.2 Use or attempt to use any such official information for the employee's own personal benefit, or for the benefit of any other person or organisation or in any manner whatsoever other than in accordance with the employee's responsibilities and duties.

[24] Clause 35 allowed Mr Poole to carry out activities similar to Airtech's in his own time subject to obtaining prior consent on each and every occasion from Airtech and provided no equipment or materials belonging to Airtech were used for non-work related tasks without Airtech's written permission.

[25] Airtech has relied on other clauses in the Agreement about health and safety which I refer to where relevant.

Duty of good faith

[26] In addition to express clauses in the employment agreement Mr Poole owed a duty of good faith, as did Airtech, in the employment relationship.

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[8] Clause 38.1.
[9] Clause 26.
[10] Clause 32.1.

[27] Section 4 of the Act requires parties to an employment relationship to deal with each other in good faith which includes not directly or indirectly doing anything that could mislead or deceive the other. It is wider in scope than the implied mutual obligations of trust and confidence and requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative.

[28] A penalty may be imposed for a breach of the duty of good faith under s 4A. The threshold is specific - even a serious breach will not attract a penalty if it is not met.[11]

Duty of fidelity

[29] The Court of Appeal has described the duty of fidelity:[12]

> The duty of fidelity and loyalty which an employee owes to his employer is broken when there is conduct which undermines the relationship of trust and confidence which must exist between employer and employee.

[30] Breaching the duty of fidelity may include an employee emailing for personal use confidential information intended for the use of a competing company such as information about targets, profitability spreadsheets, quoting templates, contracts and price lists.[13]

[31] The Employment Court has said the boundaries of the duty of fidelity must be decided on the facts of each case.[14] Obvious examples described by the Court include "… where an employee uses an employer's infrastructure to assist in establishing a post-employment business, or where an employee directs the employer's custom to a proposed business." The Court has described "subtle" examples like an employee who informs suppliers and staff they are intending to depart and compete and the associated risk of staff following their manager.

Confidentiality

[32] Although the duty of good faith is wider than the duty of fidelity, circumstances may overlap. In the context of contractual provisions about confidentiality, the

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[11] See for example, the Employment Court's finding in *Bourne v Real Journeys Ltd* [2011] NZEmpC 120 at [167].
[12] *Big Save Furniture v Bridge* [1994] 2 ERNZ 507(CA) at [517].
[13] In *Smith City (Southern) Limited (in Rec) v Claxton* [2021] NZEmpC 169 the Employment Court found an employee had breached the duty of fidelity by emailing to himself from a work computer, this information immediately before his employment ended, at [105].
[14] *Caffe Coffee (NZ) Limited v Farrimond* [2016] NZEmpC 65 at [36] to [41].

Employment Court has referred to the duty not to disclose confidential information as being more restricted in scope than the duty of good faith:[15]

> I refer also to that aspect of the case which relates to alleged breaches of obligations relating to confidential information. Again, Caffe Coffee relies on specific contractual provisions on that topic; however, reference should be made to the well-known discussion in *Faccenda Chicken Ltd v Fowler*, which suggests that the duty not to disclose confidential information contrasts with the duty of good faith:
>
> > The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes a general duty of good faith. It is clear that the obligation not to use or disclose information may cover secret processes of manufacture such as chemical formulae … or designs or special methods of construction … and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret. The obligation does not extend, however, to cover all information which is given to or required by the employee while in his employment, and in particular may not cover information which is only 'confidential' in the sense that an unauthorised disclosure of such information to a third party while the employment subsisted would be a clear breach of the duty of good faith.
>
> The concept of "confidential information" is assisted in this case by the broad definition which the parties adopted in the IEA, at cl 9.2. Some of the terms used in that definition require a consideration of what the parties themselves understood was confidential information in the particular circumstances.
>
> But guidance on that topic is again available from the authorities. In *Faccenda Chicken*, the English Court of Appeal stated that in determining whether any item of information is protected after termination of employment, all circumstances need to be taken into account; in particular there were four factors which were "helpful guidelines as opposed to strict tests".
>
> > (a) The nature of the employment. Thus, employment in a capacity where 'confidential' information is habitually handled may impose a high obligation of confidentiality because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally.
> > (b) The nature of the information itself. In our judgment the information will only be protected if it can properly be classified as a trade secret or as material which, if not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret eo nomine …
> > (c) Whether the employer impressed on the employee the confidentiality of the information. Thus, though an employer cannot prevent the use or disclosure *merely* by telling the employee that certain information is confidential, the attitude of the employer towards the information provides evidence which may assist in determining whether or not the information can properly be regarded as a trade secret. …
> > (d) Where the relevant information can be easily isolated from other information which the employee is free to use or disclose … the fact that the alleged 'confidential' information is part of a package and that the remainder of the package is not confidential is likely to throw light on whether the information in question is really a trade secret.

[15] *Caffe Coffee (NZ) Limited v Farrimond* [2016] NZEmpC 65 at [43] to [45], numbering and footnotes omitted.

How does Airtech say Mr Poole breached his obligations?

[33] Airtech alleges Mr Poole breached his employment agreement, duty of good faith and duty of fidelity, by:

(a) Working on and then emailing the Christmas document from his personal email address to his work email address using Airtech systems and resources, with the intention to provide it to his new employer, which would have compromised information Airtech considered confidential and intellectual property.

(b) Emailing Airtech information from his work email account to his personal email account, including at times outside his normal working hours, some of which appeared unrelated to his role, then deleting that information.

(c) Putting a significant amount of project-specific information such as costing templates, quotes, quoting templates, project management templates, etc in a Dropbox account linked to his work email account, restricted with access only to himself and then deleting it before the end of his employment.

(d) Resetting his personal passwords (which Airtech became aware of because he used his work email address as a recovery address for his personal accounts).

(e) Failing to tell Airtech about concerns for his workload and mental health, also breaching his obligations under the Health and Safety at Work Act 2015.

Alleged breach: Christmas document email

What happened?

[34] As noted above, at 6:06pm on 21 December 2023, Mr Poole emailed a document he had changed the name of to "Christmas" from his personal Gmail email address to his Airtech email address. He had opened the document, resaved it, and added his new employer's logo to it, with the intention to print it at work and edit it further in his own time before using it for the benefit of his new employer.

[35] Mr Cross received a copy of the email because he had set up a forward for incoming email traffic on Mr Poole's Airtech email address after he resigned – a

practice he adopted following the resignation of any senior team member at Airtech. When Mr Cross opened the document, he became immediately concerned because it appeared to be a summary of information about how it could get the most out of the software system Airtech intended to adopt with a focus on the contracts division, with Mr Poole's new employer's logo on it. Mr Cross called Mr Poole that evening to set up a meeting the next day at 8:00am.

[36] The parties met the next day as agreed. The handwritten notes of Mr Smith from the 22 December 2023 meeting record:

(a) Airtech explained it had called the meeting to ask why Airtech information had been found on Mr Poole's new employer's letterhead in his email.

(b) Mr Poole said his new employer asked him to come up with ideas and he put his thoughts on paper to save time at his new role.

(c) Mr Poole said sending the email to his work account was "a mistake."

(d) Mr Poole assured Airtech nothing else had been downloaded or taken.

(e) After a break, Mr Smith summarised as follows:

(i) Airtech had checked emails and found what it considered to be Airtech intellectual property on his new employer's letterhead.

(ii) This had been done during work hours.

(iii) Airtech had concerns it could breach the Agreement and was a potential leak of significantly important/ commercially sensitive information.

[37] Airtech wrote to Mr Poole later that day requiring him to attend a formal disciplinary meeting. It summarised its understanding of what had happened including that:

(a) It appeared from the properties of the document that Mr Poole had created the document on 20 November 2023 (an Airtech workday) and last saved it on 21 December 2023 before emailing it.

(b) The content of the document appeared to have confidential Airtech information that had been copied and pasted into a document with Mr Poole's new employer's logo on it.

(c) Mr Poole had said at the meeting earlier that day that he had sent the email as a mistake and had prepared the document as his new employer had asked him to come up with ideas and put his thoughts on paper to save time at his new role.

(d) Mr Poole had deleted all his sent emails from his Airtech account.

(e) Airtech was concerned it appeared as though Mr Poole had:

(i) prepared a document for his new employer while still working for Airtech and during work hours;

(ii) provided or intended to provide his new employer with Airtech intellectual property and confidential information;

(iii) given the document a misleading titled to avoid detection; and

(iv) tried to hide his tracks by cleaning out his work account.

[38] Mr Poole emailed Mr Smith the same day he got Airtech's letter. Among other things, he disputed the allegations, said the meeting should be rescheduled to early January 2024 to enable him to seek advice, and that:

> … as I endeavoured to explain when we met today, no material, including the document you refer to, has been sent outside of Airtech, to (my new employer) or anyone else. You should be well aware of this given you have full access to my email account on the Airtech server. The document has been deleted and I have not retained a copy.

[39] Mr Smith emailed Mr Poole on 3 January 2024 again summarising what he understood Mr Poole had said including that his new employer had asked him to collate thoughts and ideas regarding improvements to their business once he commenced work for them, that Mr Poole acknowledged preparing the document during Airtech work time, and that emailing the document to his work account was a mistake. It observed that a review of Mr Poole's email account showed email traffic from his Airtech account to his personal account during and outside normal working hours. Airtech required Mr Poole to provide assurances and explanations including that Mr Poole return all emails and associated attachments and assure Airtech he had not downloaded or otherwise retained Airtech information such as documents, spreadsheets, templates etc.

[40] Mr Poole responded promptly that day providing the assurances sought including that other than the email train with Mr Smith, he had no emails, attachments or documents relating to Airtech in any format – anything he did have had been deleted

or destroyed. He assured Airtech he had not forwarded nor provided any Airtech documents to any external party (aside from Airtech clients or subcontractors in the course of his employment). He disagreed with Mr Smith's account of what he had said during the meeting. He also explained he emailed his home email address at times to work productively out of hours, particularly when the remote log in failed.

[41] Mr Smith sent a further email on 4 January 2024 asking for Mr Poole to recover deleted emails. He also asked him to explain what appeared to be emails with information unrelated to his role, and a deletion of Mr Poole's Dropbox account containing substantial information belonging to Airtech.

[42] Mr Poole responded promptly that day saying he did not know how to recover emails or other files he had permanently deleted from his home computer. He was unsure what more he could do to reassure Airtech beyond the assurances already provided.

[43] Mr Smith sent a further email on 4 January 2024 requesting Mr Poole attend a rescheduled disciplinary meeting on 10 January 2024.

[44] Mr Smith sent an email to Mr Poole on 8 January 2024 with instructions on how to recover deleted emails from his Gmail account. That same day Airtech lodged proceedings asking for an urgent instruction to Mr Poole to do what it had asked, although the nature of the substantive application at that stage was unclear.

[45] On 9 January 2024, whilst unfit for work, Mr Poole provided screenshots of having followed the process requested by Mr Smith to try to recover the deleted emails but had been unsuccessful. To support the assurances he had already made, Mr Poole offered to swear an affidavit making the same assurances or submitting his (personal) laptop to an agreed independent expert for scrutiny to confirm he had not retained any Airtech emails. Mr Poole confirmed he was unable to attend the scheduled disciplinary meeting due to being unfit for work (as set out in the medical certificate provided).

[46] On 16 January 2024 Mr Poole's legal representative wrote to Airtech's legal representative to propose an alternative approach to the proceedings in the Authority. This included a summary of what had happened from Mr Poole's perspective. Mr Poole repeated the offer to provide an affidavit or submit his laptop for analysis by an appropriate IT expert.

[47] Airtech's legal representative responded by letter the next day calling the offer to submit Mr Poole's laptop for analysis hollow given Mr Poole's Gmail account was cloud based. The letter recorded Airtech's concerns and different perspective of matters.

Did Mr Poole breach his obligations? If yes, should the Authority issue an injunction or award penalties?

[48] Mr Poole accepts he intended to use the Christmas document for the benefit of his new employer. But he did not end up doing that because his email was intercepted. Mr Poole says he put his new employer's logo on it as a visual prompt, together with the title Christmas, to remind him to work on the document over Christmas. He acknowledges he should not have attempted to do this. He says he did not provide the Christmas document to his new employer, nor did he provide it with any other Airtech information. He has provided several written assurances and evidence under oath or affirmation to that effect.

[49] I agree with Airtech that Mr Poole's actions in attempting to use the Christmas document for his new employer breached his duty of good faith because the document belonged to Airtech and it was inconsistent with Mr Poole's duty of good faith as an employee of Airtech to try to use it for another employer. I accept Mr Poole at least indirectly attempted to avoid detection by calling the document something innocuous (Christmas), rather than it solely being a reminder to work on the document over Christmas.

[50] I do not accept Airtech's assertions about further steps alleged to have been taken by Mr Poole, or that he has breached his obligations in all the ways alleged. For example, I do not accept Airtech's assertion that Mr Poole has any Airtech information and has shared the Christmas document and other Airtech information with his new employer. There is insufficient evidence to support that.

[51] The evidence establishes Mr Poole attempted to use the Christmas document for the benefit of his new employer, not that he did. There is little, if any prospect, Mr Poole could attempt and succeed in doing so now that his employment has ended, and he has no access to Airtech information. In these circumstances, a permanent injunction is not warranted. That is not the end of the matter however because Airtech has also asked for penalties for a breach of the Agreement and the duty of good faith.

[52] Mr Poole's legal representative submitted that the Christmas document was not truly confidential information. The clause about confidentiality in the Agreement refers to "official information."[16] Mr Poole accepted this clause meant he could not use or attempt to use confidential information for his own benefit or for the benefit of any other person (other than in accordance with his responsibilities and duties). I did not read the clause to expand on what confidential information means to the parties beyond usual principles.

[53] After reviewing the Christmas document, considering the context, and listening to the explanations about Airtech's views about what aspects of the Christmas document were confidential, I have difficulty accepting it fell within the definition of confidential / official information in the Agreement. Although I accept it may have had some value to Mr Poole's new employer (even if only because it would help jog Mr Poole's memory in his new role), that does not mean it was confidential information in terms of the principles described by the Employment Court. It follows that I find Mr Poole has not breached the confidentiality clause.

[54] That does not mean Mr Poole could try to use the document as he wished – it belonged to Airtech. Mr Poole agreed Airtech owned written work produced by him during his employment related to his responsibilities.[17] He could not then try to share that written work with his new employer. Attempting to do so was inconsistent with his duty of good faith, but as noted below, not to the level warranting a penalty under s 4A.

[55] I also address other aspects of the Agreement Airtech alleges Mr Poole breached. Airtech says Mr Poole breached clause 27.1 by removing the Christmas document from its premises. Mr Poole accepted that the Christmas document could be considered "materials" that could not be removed from Airtech's premises without its prior consent.[18] What happened is not a comfortable fit for the clause - it reads as focussed on physically removing documents or sending them externally, not to oneself. Mr Poole had a practice of using his home computer for work purposes when the IT login failed, requiring him to email documents to his personal email address. I do not consider he has breached this clause.

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[16] Clause 33.
[17] Clause 38.1.
[18] Clause 27.1.

[56] Airtech also alleges Mr Poole breached clause 35 of the Agreement by working on the Christmas document during work hours for the purposes of preparing the document for his new employer, without its prior consent. Mr Poole accepts he worked on the Christmas document (or previous iterations of it) for Airtech during working hours. The evidence shows he did so during September and November 2023. What the evidence also shows is that Mr Poole opened the document on 21 December 2023, added his new employer's logo, renamed and saved it, then emailed it to himself to edit it at a later point in time. I do not accept that amounts to carrying out activities for his new employer except in the most minor way. Mr Poole planned to use Airtech's document for the benefit of his new employer, but never actually did.

[57] Airtech also alleges Mr Poole breached the clause requiring that email only be used for business purposes.[19] I understood that Airtech considers Mr Poole breached this clause by emailing the Christmas document to his work email because he intended to print it and edit it for his new employer's benefit, then email it back to himself from his work email. Given what transpired (Mr Poole's email was intercepted by Airtech) Mr Poole did not send it externally to others, only to his work email address on 21 December 2023. I do not accept Mr Poole breached this clause either.

[58] Finally, Mr Poole agreed terms were implied into the Agreement that included terms implied by statute.[20] I accept this included the duty of good faith. As noted above, I agree Mr Poole breached the duty of good faith by attempting to use the Christmas document for the benefit of his new employer. The way he went about it may not have been intentionally misleading, but I find he at least attempted indirectly to do something likely to mislead Airtech. If Mr Cross had not opened the Christmas document email attachment forwarded to his email address, he would have been none the wiser. This breached the duty of good faith. Having found a breach of the duty of good faith incorporated into the Agreement, I have also considered whether a penalty should be awarded, and decided not to for the following reasons.

[59] Ms Keir says the Authority should not penalise Mr Poole for something that is essentially a disciplinary matter, relying on comments from the Employment Court that an employer may not seek to recover damages from an employee arising from acts of negligence during their employment.[21] Whilst Airtech reasonably raised its concerns in

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[19] Clause 26.4.
[20] Clause 32.1.
[21] *George v Auckland Council* [2013] NZEmpC 179 at [147].

a disciplinary context, and could have potentially taken disciplinary action following a fair and reasonable process, that is not an issue I am asked to determine.

[60] I have reservations about imposing a penalty for a breach of good faith that goes beyond the statute-imposed standard set out in s 4A of the Act. If clause 32 of the Agreement incorporated the statutory duty of good faith in s 4, then it also incorporated s 4A. To award a penalty, s 4A requires a failure to comply with the duty of good faith to be "deliberate, serious, and sustained" or intended to undermine an agreement or relationship. I do not accept the evidence establishes the failure meets that threshold.

[61] I also have reservations about imposing a penalty for any breach of the duty of fidelity as it was expressed in the Agreement, where any breach relates to an attempt only, there are no damages sought and there is insufficient evidence to support a breach beyond an isolated act at the minor end of the scale of the sorts of cases brought to the Authority or Court about breaches of the duty of fidelity. I do not view an attempt to use the document constitutes a breach of the duty of fidelity sufficient to warrant a penalty for a breach of an employment agreement in all the circumstances.

Alleged breach: use of personal email address and Dropbox deletion

[62] Airtech says Mr Poole's actions in relation to work related information he sent to his personal address and saved to his Dropbox account (that only he had access to), subsequently deleted and then failed to recover and return to Airtech, breached his obligations by:

(a) Not obtaining prior consent from Airtech to remove materials from the premises;[22]

(b) Failing to carry out and comply with Airtech's reasonable and lawful instructions to recover and return information;[23] and

(c) Destroying Airtech property, breaching the duty of fidelity and good faith not to do so.

Emailing practice

[63] Mr Poole says he used to email work documents from his work email to his personal email to work on them remotely particularly when his remote login failed. He

[22] Clause 27.1.
[23] Clause 4.1.2.

says that when he did this he would work on the document and then email it back to his work email and then delete the copy on his laptop on a regular basis to keep it tidy. He says he also deleted Airtech information after resigning and when Airtech addressed its concerns with him. I accept he tried to recover the information when asked, by following Airtech's instructions, but was unsuccessful.

[64] Although there was some uncertainty about the extent of Airtech's knowledge of any IT issues, I accept Mr Poole used his personal email address as a workaround, and used his home laptop when working remotely, and that this was practice was at least impliedly agreed to by Airtech.

[65] When Airtech asked Mr Poole to recover and return emails and documents, he did his best to follow the instructions. Airtech was unhappy that his attempts to recover and return the information were unsuccessful. That is different to failing to comply with Airtech's instructions. I find Mr Poole did follow instructions.

[66] I note not every deletion of an email or document could be reasonably considered capable of breaching an employee's obligations. Mr Poole understood Airtech had copies of all of the information he had deleted. It was unforeseeable that due to an IT error, not all emails from Mr Poole's work account were recoverable (for reasons unrelated to Mr Poole's actions).

[67] I also note that it appeared Airtech thought Mr Poole had deleted emails from his work email account, but Mr Poole gave evidence emails should still be there and arranged in folders within his inbox. There was insufficient evidence to establish otherwise.

[68] In these circumstances I find there was no breach.

Dropbox deletion

[69] Mr Poole explained that he had a Dropbox account set up by one of Airtech's employees to ensure that he had access to copies of relevant documents for the purposes of working remotely. He deleted this, including any access he had, before his employment ended. I understood Airtech had copies of the documents that were in the Dropbox. I understand Airtech was also able to restore at least aspects of the Dropbox.

[70] Although Mr Poole could not recall reasons for saving each document in his Dropbox account, that was unsurprising given how long he had worked at Airtech.

There was insufficient evidence to show he deleted these documents and the Dropbox account for any untoward reason. I do not accept he retained any documents from it or deliberately deleted the Dropbox to cover his tracks because he was or had been using the information for the benefit of his new employer.

[71] In these circumstances I do not find there were any breaches as alleged.

Alleged breach: resetting personal passwords

[72] I do not accept that resetting his personal passwords for your personal accounts breached Mr Poole's employment obligations. This point was not pursued in submissions.

Alleged breach: health and safety obligations

[73] Airtech says Mr Poole breached his obligations by failing to raise concerns about his workload and mental health with it, including:

(a) Under the section 45 of the Health and Safety at Work Act 2015 which requires a worker (Mr Poole) to take reasonable care of their own health and safety and cooperate with any reasonable PCBU policy (Airtech);

(b) Clause 21 of the Agreement that required Mr Poole to immediately report any hazard to Airtech and clause 24.2 that required Mr Poole to report to work in a condition able to perform his duties properly and safely; and

(c) The duty of good faith and fidelity.

[74] Mr Poole's obligations must be considered in context. That context includes Airtech's primary duty of care to ensure, so far as is reasonably practicable, that the health and safety of others (including workers) is not put at risk from work carried out as part of Airtech's business.[24] Airtech did not provide any policy documents about how it managed psychosocial hazards and the workload of its staff. Airtech acknowledged being aware Mr Poole worked weekends and outside normal working hours however put this down to flexibility allowed during the work day for personal matters. Mr Cross acknowledged he could be direct when communicating.

[24] S 36, Health and Safety at Work Act 2015.

[75] Mr Poole says he did not feel able to raise concerns about his workload and mental health with Airtech given unhelpful responses he had previously received when he had raised operational issues as well as dismissive responses received at times from Mr Smith and Mr Cross. Because of these factors, as well as the difficulty for someone struggling with mental health to proactively raise such issues, Mr Poole chose instead to look for another job (which he found) and resigned. Mr Poole did raise concerns about his mental health with Mr Smith in an email dated 5 January 2024, subsequently providing a medical certificate saying he was unfit for work. Until then, I understood Mr Smith was fit for work and able to perform his duties, and that any concerns he raised about safety were in the wider context for why he felt unable to approach Mr Smith and Mr Cross about his concerns regarding workload and mental health.

[76] In these circumstances, I find Mr Poole has not breached his obligations.

Did Airtech unjustifiably disadvantage Mr Poole? If it did, what (if any) remedies should be awarded?

[77] Mr Poole alleges Airtech unjustifiably disadvantaged him on 21 December 2023 when Mr Cross called him and told him to attend a meeting at 8:00am the next day about something "serious" and to "bring a lawyer." When Mr Poole called Mr Cross back and asked what the meeting would be about, Mr Cross refused to tell him, repeating that it was "serious" and to "bring a lawyer." At end of the meeting the next day at 8:00am, Mr Poole says Airtech told him to go home – Mr Walker confirmed this. Mr Poole says Airtech not only unjustifiably disadvantaged him, but also breached the duty of good faith when Mr Cross deliberately refused to describe the subject matter of the meeting when asked. Mr Poole seeks compensation and penalties.

Urgent meeting

[78] Mr Smith described the 22 December 2023 meeting as a "preliminary explanation meeting" after which Airtech could consider and advise him of next steps, which occurred later that day (in the 22 December 2023 letter inviting him to a further meeting). Mr Cross says he called Mr Poole after he received a copy of the Christmas document. He did not want to discuss detail, preferring to do so in person, but noted it was serious and to bring a lawyer. Airtech contacted Mr Poole later that day outlining what the allegations and possible consequences were, with an invitation to a further meeting where Mr Poole could provide his explanations with representation present.

Given the time of year it became difficult to do so. Further delays occurred due to Mr Poole becoming medically unfit to do so.

[79] Although I appreciate the 21 December 2023 calls between Mr Cross and Mr Poole, and the meeting on 22 December 2023 about the Christmas document, would have been stressful and difficult for Mr Poole, I do not think it was unfair or unreasonable in the circumstances, when the matter was urgent, and Airtech proposed a fulsome disciplinary process following. Mr Cross indicated he hoped Mr Poole would have an innocent explanation that could put the matter to bed (without any need for a disciplinary process). When that was not possible, further steps were taken to commence a process that would have afforded Mr Poole an opportunity to explain with representation and relevant information beforehand. As events unfolded, this did not happen before the employment relationship ended.

[80] Mr Poole's claim regarding the first aspect of his unjustified disadvantage does not succeed.

Suspension?

[81] Mr Smith says Airtech did not suspend Mr Poole at the end of the 22 December 2023 meeting. He says he told Mr Poole he did not need to attend work. Mr Smith also says Mr Poole never asked to return to work, although acknowledged if Mr Poole had returned to work, he would have told him to sit in the boardroom.

[82] Mr Smith's recollections differ somewhat from the handwritten notes of the 22 December 2023 meeting. These notes refer to Airtech advising Mr Poole that: "we require him <u>not</u> to attend work for remainder of day & next week (had been scheduled to work), until we contact him, probably Wednesday, after we had time to consider his response."[25] It also records that Airtech asked Mr Poole for his PC password and keys/security tag for the building.

[83] The 22 December 2023 letter refers to Airtech requiring Mr Poole to attend a formal disciplinary meeting at 10:00am on 27 December 2023, but did not say whether Mr Poole could or should return to work. Mr Poole emailed the same day saying he could not attend the meeting scheduled as he needed to find representation (difficult

[25] Underlining in original notes.

given the time of year) and suggested early January 2024. He also sought to revoke his agreement to his extended notice period.

[84] Mr Smith emailed Mr Poole back on 26 December 2023 saying among other things, "confirming from our meeting last week, you are not required to attend the office or any work site tomorrow (the 27th Dec)." Mr Smith sent a further email on 27 December reiterating the agreed final working day of 12 January 2024.

[85] A few days later on 29 December 2023 Mr Poole emailed Mr Smith asking, "whether you want me to go directly to site to help the guys on 3rd January." Mr Smith responded by email that same day saying "You are not required to attend site or the office on the 3rd. I will contact you on the 3rd and advise from there." In a further email from Mr Smith on 3 January 2024 addressing aspects of the allegations, he says "In the Interim, please refrain from attending the office or any Airtech work site, or communicating with any Airtech employee other than myself."

[86] After several emails regarding assurances sought by Airtech about various documents, Mr Poole again suggested in an email on 4 January 2024 that the parties go their separate ways and regard his employment as at an end from 29 December 2023 – a reason for his was that Airtech had asked him not to attend the office. Mr Smith responded requesting Mr Poole's attendance at a meeting on 10 January 2024, reiterating 12 January 2024 was his final working day.

[87] On 5 January 2024, Mr Poole emailed saying the approach by Airtech had impacted on his mental health, that he would be "… seeking medical assistance but it is very unlikely I will be in a position to return to the office in the short term." On 8 January 2024 Mr Smith emailed again about documents and asking for a medical certificate. Mr Poole later provided a certificate dated 9 January 2024 confirming he was unfit for work from 2 January 2024 until after his final working day.

[88] The above communications made it clear to Mr Poole he must remain away from the workplace. Starting with a verbal instruction during the meeting on 22 December 2023 that Mr Poole was required "not" to attend work, Airtech then reiterated this requirement in several written communications to Mr Poole. When Mr Poole asked if he should show up to work on 3 January 2024, Mr Smith said no. Mr Poole was also told not to attend any office or Airtech site and not to communicate with any Airtech employees except for Mr Smith. Attempts by Mr Poole to bring his end date forward

and his later sick leave do not alter the decision Airtech made to suspend Mr Poole prior to this without his agreement and no input from him through consultation.

[89] I find Airtech suspended Mr Poole without consulting him about that decision before doing so. A fair and reasonable employer could have consulted in the circumstances and taken any responses from Mr Poole into account. Failing to do so was inconsistent with the duty of good faith. This unjustifiably disadvantaged Mr Poole.

Remedies

[90] Mr Poole's sudden and premature departure from the workplace because of his suspension tarnished the end of Mr Poole's time with Airtech. I accept that the way he was suspended created further unnecessary stress and embarrassment for Mr Poole at a time when he had attempted to leave with dignity. Even though Airtech paid Mr Poole, the impact of being suspended was more than financial. Mr Poole did not contribute to the lack of process in suspending him. He did however acknowledge that some of the stress he felt arose from his own actions.

[91] After considering the circumstances and evidence, what has been awarded in other cases and trends generally,[26] I award Mr Poole $7,000 under section 123(1)(c)(i) of the Act.

[92] Although I accept Airtech breached its good faith obligations under s 4 in relation to his suspension, I do not consider the failure meets the threshold warranting a penalty under section 4A of the Act.

Costs

[93] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[94] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the party who believes they are entitled to costs may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the other party will then have 14 days to

[26] For example, *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [161] to [162].

lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[95] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[27]

Lucia Vincent
Member of the Employment Relations Authority

[27] For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1