

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 351/07
5045914

BETWEEN IT MANIACS LIMITED
 Applicant

AND RONALD FORD
 Respondent

Member of Authority: R A Monaghan

Representatives: Michael Smyth, counsel for Applicant
 Ken Nicolson, counsel (2006) and advocate (2007) for
 Respondent

Investigation Meeting: 2 and 19 March 2007 at Auckland

Additional information
received: 6 and 22 June, 23 July 2007

Submissions received: 23 July and 17 August 2007 from Applicant
 13 August 2007 from Respondent

Determination: 12 November 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] IT Maniacs Limited (“IT Maniacs”) is a recruitment agency specialising in recruiting for the IT sector. At material times it employed Ronald (“Ronnie”) Ford as national sales manager/senior recruitment consultant.

[2] The company says Mr Ford has breached his employment agreement in a number of respects, and seeks damages. The breaches centre on Mr Ford’s alleged attempts during his employment to set up a competing business and to entice another employee to work for him, and various breaches of his obligations in respect of the company’s confidential information. Associated allegations concern breaches of the company’s IT policies.

[3] The effluxion of time means that applications for remedies in respect of restraints contained in the parties' employment agreement have been withdrawn.

[4] Claims for penalties for breaches of the employment agreement and of s 4A of the Employment Relations Act 2000 are also to be determined.

[5] IT Maniacs dismissed Mr Ford because of the breaches of agreement. Mr Ford raised personal grievances on the ground that the dismissal was unjustified, and that an earlier but associated suspension was also unjustified. Further, he seeks the payment of monies (being his final pay) he says were unlawfully deducted from his wages.

[6] Mr Ford, too, seeks a penalty. According to the statement of problem, the penalty is sought in respect of a breach of s 4 of the Act, and relies on an allegation of misleading and deceptive conduct. The conduct relied on in support of that allegation was not identified in the statement of problem. However it appeared to concern the circumstances surrounding the failure to give Mr Ford his final pay.

[7] All of these matters have been heard together.

Contempt of the Authority

[8] Matters arising during the course of this investigation led counsel for IT Maniacs to include in submissions an invitation to the Authority to conclude Mr Ford had wilfully obstructed the Authority's investigation, and was therefore in contempt of the Authority under s 196(1) of the Act. The invitation centred on:

- (a) The background to Mr Ford's attempt to produce in evidence a document entitled 'Ready, aim – Fire'; and
- (b) Mr Ford's failure to produce, when he should have, a CD to which the above document was allegedly copied in or about July 2006.

[9] The background to the production (or not) of the document and the CD will be discussed further in the course of this determination. For present purposes I will say

that the way in which those matters were handled has adversely affected my willingness to accept Mr Ford's explanation of his behaviour, and has adversely affected my view of his credibility. The circumstances might also provide the Employment Court with a reason to consider requesting a report under s 181 of the Act, in the event of a challenge to this determination.

[10] I do not consider it necessary to go further and make a finding in respect of contempt. Moreover I doubt whether it is appropriate to address the matter by way of response to an invitation in submissions, and note that a high standard of proof is required in order to support findings of the kind sought.

The alleged breaches of agreement

[11] The breaches which IT Maniacs said Mr Ford committed were that, during the course of his employment, he:

- (a) set up a competing recruitment agency, including a website, to solicit the same client dollar;
- (b) encouraged customers to conduct business with his competing agency;
- (c) conducted his employer's business by using his home computer;
- (d) had files and records of the employer's at premises under his control; and
- (e) enticed members of the company's staff to leave their employment.

[12] During the course of the investigation there were additional allegations, not set out in the statement of problem, that Mr Ford breached the employment agreement by: disclosing and using IT Maniacs' intellectual property; disclosing the detail of a confidential offer made to him in respect of an IT Maniacs franchise; and not devoting his time and attention to IT Maniacs' business.

1. The competing agency

[13] Mr Ford began his association with IT Maniacs under an individual employment agreement commencing 10 January 2005, nominally in the position of senior recruiter. Since he was bound at the time by the terms of an earlier restraint of trade, he spent his time on non-recruitment activities. The parties then entered into

what was expressed to be a fixed term contract, for the period 1 April 2005 – 31 March 2006. Mr Ford's position under that agreement was described as 'National Sales Manager/Senior Recruitment Consultant'. It appears the parties varied that arrangement for a period commencing in April 2005, so it became a contract for services with Mr Ford invoicing and being paid as a contractor. A further full time permanent employment agreement was signed in or about February 2006. The job title for that position was 'National Sales Manager'.

[14] On 13 April 2005 Mr Ford purchased the domain names 'e2erecruitment' and 'e2econsulting'. He said in evidence he did so because he was planning to use one of those names as his trading entity in the contractual relationship with IT Maniacs. Eventually he traded under the name e2econsulting, although it was not open to him to trade through a limited liability company using that name. E 2 E Consulting Limited had been registered in 2002 by interests apparently unrelated to Mr Ford's.

[15] In the Christmas holiday period 2005 – 2006 Mr Ford went to Singapore with his then-partner. While there he discussed with his partner, and members of his partner's family, the prospect of setting up a business to sell certain specialist computer software. When he returned he advised IT Maniacs of his intentions. The response was that his plan was acceptable provided he did not promote his own company to IT Maniacs' clients, or work on his own company's work during IT Maniacs' time. A company named E 2 E Business Solutions Limited ("E 2 E Business Solutions") was registered on 3 February 2006. Mr Ford, his partner and a relative of his partner's were registered as the directors and shareholders.

[16] Between about February and May 2006 Mr Ford embarked on a number of activities which were associated in part with E 2 E Business Solutions. For example he worked on developing a logo and stationery, arranged a business bank account and business credit card, discussed the purchase of a template for a website, and made arrangements with an internet service provider. In doing so he worked with the names e2econsulting and e2erecruitment (regarding logo, stationery and website design), as well as e2e business solutions. Mr Ford denied ordering any stationery in the name of e2erecruitment, but a series of email exchanges in late March and early

April 2006 indicate he had at least obtained enough material in electronic form to create branded stationery himself. This activity was identified in the course of the forensic examinations I discuss later in this determination.

[17] Meanwhile, in February and March 2006, IT Maniacs' directors Sarah Lee and Sheryl Gavin were concerned about the company's poor sales results for February. They worked on ways to improve these results, and arrived at plans they called 'Top Talent' (a way of 'selling' candidates) and 'Pick'n'Mix' (a pricing model). They also began working on the development of a software application named 'Reality Check', expecting to incur significant costs in the process. They anticipated launching the application in March 2007. It was intended to provide IT Maniacs with an opportunity to match candidates to jobs efficiently and accurately. It would also assist with the possible franchising of the IT Maniacs brand, because it offered a system anyone could utilise to set up a 'Maniacs' recruitment agency.

[18] Mesdames Lee and Gavin wanted to offer Mr Ford a franchise opportunity. The matter had been raised informally before, but on 26 June 2006 they presented Mr Ford with a written business plan and proposal, including a software diagram. The proposal also included a breakdown of sale price and fees, and projected earnings and expenses. It was provided to Mr Ford expressly on the basis that it was confidential. Mr Ford was to consider it and provide his response.

[19] Mr Ford's evidence was that, in order to purchase the franchise, he needed to obtain money through his family in the United Kingdom. He discussed the matter with the family and decided not to proceed.

[20] Meanwhile, on or about 13 June Mr Ford registered a website at www.e2erecruitment.co.nz. In what IT Maniacs thought was an associated activity, on or about 22 June Mr Ford loaded onto his personal laptop a software package named eGrabber. The software is used for sorting and searching CVs. Subsequent forensic examination revealed that Mr Ford had also copied numerous IT Maniacs' client CVs to his laptop. IT Maniacs considered this to be evidence that Mr Ford was attempting to obtain and use its CVs (and therefore its candidates) for his own business.

[21] When giving evidence Mr Ford did not deny his use of eGrabber, or that he had copied CVs to his laptop, or that he had done so using a Virtual Private Network (or 'VPN', which I discuss in more detail later). He said the software IT Maniacs was using for a similar purpose was not efficient and he had discussed this with the HR manager and another person, together with the possibility of using eGrabber instead. Ms Gavin was aware of the discussions, and her view was that she did not agree eGrabber was a better option. Mr Ford went on to say he was testing the software in his own time. In order to carry out the testing, some sample CVs were required.

[22] When asked why he had not merely copied samples to his laptop rather than transferring them through the VPN, Mr Ford gave the less than convincing response that carrying his laptop around could hurt his neck. I would accept, though, that the VPN was more convenient. IT Maniacs saw the use of the VPN as evidence that Mr Ford was trying to conduct his activities covertly.

[23] By email message dated 3 July 2006 Mr Ford formally declined the franchise offer. On the same date he registered E 2 E Recruitment Limited ("E 2 E Recruitment") with the companies office. He was the sole director and shareholder. He said in evidence that he registered the company so he could save the name.

[24] It was also Mr Ford's evidence that he worked on what, in effect, was a counter proposal to the franchise offer, and set the proposal out in a written presentation. The presentation was entitled 'Ready aim, Fire – (Proposed) Alternative Solutions'.

[25] In essence the document purported to identify issues Mr Ford believed IT Maniacs was facing, and to propose solutions. The first proposal was that Mr Ford return to being a contractor rather than an employee, and trade under the name E 2 E Recruitment Limited. The second was that a new trading entity be established under a brand other than the Maniacs brand. In support of that suggestion the document referred to a temporary website which Mr Ford had prepared, and was located at www.e2erecruitment.co.nz. According to Mr Ford, the website was registered on 13 June 2006. The document asserted that the website was a concept and most of the links did not work. It also suggested the company name could be changed.

[26] At the time Mr Ford did not present, or even mention the existence of, the 'Ready aim, Fire' document to Mesdames Lee and Gavin. Some weeks later he explained his actions, again without producing the document, by saying he was preparing a proposal for IT Maniacs rather than for his own purposes. One of the challenges to the document, when it was eventually produced, was that it had been created after the event in an attempt to manufacture support for the explanation.

[27] For now I record the content of the document I was given, without attributing any weight to it. My comments on the actions giving rise to counsel's invitation to find Mr Ford in contempt of the Authority will be set out later in this determination.

[28] On 3 July Ms Lee and Mr Ford had coffee together. According to Ms Gavin, the intention was to ensure Mr Ford's continued loyalty to IT Maniacs. It seems there was also some general discussion about the state of mind of an IT Maniacs' recruitment consultant, Juana Milton.

[29] On 4 July Ms Lee and Ms Gavin perceived that Mr Ford was 'edgy'. In addition, the HR manager informed them that Ms Milton was taking the day off because she needed to 'get her head straight' as Mr Ford had been saying negative things about the company. At a time and by means that were not clear, Ms Lee and Ms Gavin also came to believe that Ms Milton alleged Mr Ford had offered alternative employment to her.

[30] Because of their perception of Mr Ford, on the night of 4 July Ms Lee and Ms Gavin conducted internet searches using the google search engine. They found E 2 E Recruitment had been registered as a company, and the e2erecruitment website.

[31] The website was professional in design, and its homepage:

- (a) set out the purpose and philosophy of e2e Recruitment Limited;
- (b) referred to a flat fee pricing structure, which Mesdames Lee and Gavin believed reflected IT Maniacs' 'Pick'N'Mix' structure;
- (c) referred to the 'Rising Stars' model for 'selling' candidates, believed to be a reflection of the 'Top Talent' model; and

(d) appeared to identify as vacant positions which Mesdames Lee and Gavin believed were already on IT Maniacs' books.

[32] There were a number of other pages, the most significant of which appeared to be advertising further vacancies.

[33] Ms Gavin was shocked when she saw the website. To her the material comprised IT Maniacs' entire model and services. She suspected the vacancies were being advertised on behalf of major clients and for the benefit of Mr Ford's own business. She planned to suspend Mr Ford pending an investigation.

[34] The remainder of the alleged breaches of agreement have been raised in their own right but were also raised in support of this one.

2. Encouraging customers to conduct business with him

[35] This allegation primarily concerned Mr Ford's dealings with an existing client, "O" and a prospective client "P".

(a) the spreadsheet

[36] IT Maniacs identified a brief spreadsheet apparently prepared by Mr Ford, and obtained in the course of a forensic examination of a laptop Mr Ford used at IT Maniacs' premises. The spreadsheet appeared to show a breakdown of recruitment fees in respect of O and P, in particular advertising costs and time spent in reviewing candidate applications. It was prepared on a time and costs basis, and listed total billable time as \$589.00. IT Maniacs says it has never received this money and asks the Authority to infer that Mr Ford was working for those clients himself.

[37] Mr Ford said he was merely testing the spreadsheet and no-one was charged for the time apparently recorded in it.

[38] There was no evidence at all to support any allegation that the activities listed in the spreadsheet were actually carried out. For example there was no evidence at all

that anyone was ever invoiced for 'billable time' totalling \$589, let alone that Mr Ford or his interests received any payment of that kind. Nor was there any evidence at all that advertisements of the kind noted in the spreadsheet were actually placed. Ms Gavin said Mr Ford could have used an on-line job search organisation such as Seek to place the advertisements, but there was no evidence that Mr Ford had done so. While there are references to Seek in material obtained during the forensic examination, nothing in that material is capable of supporting an inference that Mr Ford had used Seek in association with the items on the spreadsheet.

[39] Accordingly I do not accept that in itself the spreadsheet amounts to evidence of any breach of agreement on Mr Ford's part.

(b) conversation with O

[40] Ms Gavin said in evidence that she had a telephone conversation with a representative of O on 7 July, the day after Mr Ford's suspension. The conversation concerned a candidate whom IT Maniacs, through Mr Ford, had been attempting to place with O. However the conversation was brief and amounted to little more than an attempt to contact Mr Ford. Ms Gavin took from it that Mr Ford's apparent attempts to contact O after his suspension indicated Mr Ford was attempting to divert the client to himself. There was no evidence to support such an inference.

[41] Since the suspension, IT Maniacs has had no further requests from O for placements. Mr Ford said that was because as a matter of policy O has stopped using recruitment agencies. He said that change of policy had been discussed with Ms Lee and Ms Gavin. Ms Gavin did not recall having such a discussion, but nor did she deny that O has moved its recruitment function in-house. Overall there was no evidence about why O has stopped using IT Maniacs, and I am not prepared to infer that any loss of O's business was a result of Mr Ford's actions. Moreover, there was no suggestion that Mr Ford has acquired O's business for himself.

[42] Similarly, there was no suggestion that Mr Ford has acquired P's business for himself. Nor was there any evidence - other than the spreadsheet relied on - to

indicate Mr Ford made any approach to P at all, let alone made any attempt to divert its potential business to himself.

(c) vacancies advertised on e2erecruitment website

[43] A third matter concerns Mr Ford's apparent advertising of vacancies on the e2erecruitment website.

[44] References to vacancies appeared on the website's homepage under the heading 'featured vacancy'. One reference was to an 'application support analyst' and the other was to a 'helpdesk support analyst'. The 'vacancies' page appeared to list a vacancy for a '1st & 2nd level support guru – Auckland', and another for an 'application support engineer – Auckland CBD'. A generalised statement that 'we have a wide range of career opportunities' appeared under the heading 'current vacancies' on the 'contact us' page. There was a 'candidates' page, but it was effectively empty with the exception of a link which did not work.

[45] Mr Ford said in evidence that the roles were not real ones, but were placed on the website as part of a visual presentation of how the website would work. He said he simply thought the items up on the basis of roles he had dealt with in the past. I accept that the positions are of a type commonly advertised in the IT industry and could be described as generic.

[46] IT Maniacs did not investigate whether any of the vacancies apparently listed on the website were also vacancies currently listed with it or otherwise had any connection with it, and nor did it investigate which companies were offering the vacancies. There was no evidence the vacancies were real, or that Mr Ford had diverted them from IT Maniacs' business.

[47] I therefore find no breach of the employment agreement in any of the above respects.

3. Conducted employer's business using home computer

[48] The above heading is derived from the framing in the statement of problem, but was not addressed in that form in submissions. However it seems IT Maniacs' key concern was with Mr Ford's ability to be at work, while at the same time conducting business from his home through a VPN connection. He could also copy IT Maniacs' database through that connection. All of this could be done without detection because the company's proxy server was bypassed. Mr Ford's activities were said to be a breach of express obligations to: diligently and faithfully serve the applicant and protect its interests; carry out his obligations as an employee and obey instructions given to him; devote his efforts exclusively to the discharge of his duties as an employee; maintain confidentiality; and disclose all intellectual property created by him in the course of his employment and not use it for any purpose other than the applicant's benefit. They were also said to have breached the internet and email policies.

[49] There is no express mention of the use of VPN connections in the company's 'IT Policy-E-Mail' ("the email policy") or 'IT Policy-Internet Use (1)' ("the internet policy"). VPN connections can allow direct access to a particular computer system or network from outside the computer or network. Careful management of such access is critical to maintaining the security of the computer system or network in question. Mr Ford's unrestricted ability to access, transfer and copy IT Maniacs' data directly from his home (and, in the normal course of events, undetected) again did nothing to allay IT Maniacs' suspicions about his activities.

[50] The internet policy does, however contain the following provision:

"All internet traffic while in the office must go through the company Proxy at all times."

[51] The forensic reports showed Mr Ford was in breach of that policy.

[52] Regarding the obligations in the employment agreement, I do not consider that the use of the VPN connection overall is consistent with Mr Ford's obligations to diligently and faithfully serve IT Maniacs and protect its interests, or devote his efforts exclusively to the discharge of his duties as an employee. In those respects he

was in breach of his employment agreement. Otherwise the alleged breaches were very broadly stated and I am unable to make any further findings.

4. Had company files and records at home

[53] Again, this heading is derived from the framing in the statement of problem and was not addressed in that form in submissions. I understand the reference to be to electronic material Mr Ford transferred and copied to his home computer, and the apparent extent of the transfers. I was not addressed separately on which, if any, obligations were breached in this respect.

[54] IT Maniacs seeks a payment in the nature of reimbursement or damages for one aspect of this conduct in its own right. Its records revealed that in February and March 2006 the amount of data uploaded and downloaded from its network was 1.5 – 2 times normal usage. It believes Mr Ford was responsible for this. It says that its bill for the month was \$1,897.00 and wants Mr Ford to reimburse it for that amount.

[55] Mr Ford suggested that another employee was the culprit. According to Ms Gavin that employee's internet activity was checked, and the amount of usage did not support Mr Ford's allegation.

[56] I accept in general that Mr Ford made extensive use of the VPN connection, including for the transfer and copy of data from IT Maniacs' premises to his home. However there was no evidence that Mr Ford was responsible for the spike in February and March 2006. Indeed there was very little evidence about any investigation into what caused the spike, beyond general material relating to Mr Ford's activities and Mr Ford's allegation that another person was responsible for the spike. The forensic investigators could probably have shed further light on the matter, but it appears they were not instructed to address it.

[57] I do not believe the evidence is sufficient to hold Mr Ford accountable for the \$1,897.00.

5. Enticed members of staff to leave employment

[58] Ms Milton gave evidence that she and Mr Ford often travelled to and from work together. It was obvious that both she and Mr Ford would take this opportunity to exchange negative views of their employer among other things, and generally gossip and confide in each other.

[59] In her written statement of evidence Ms Milton said that on an unspecified occasion Mr Ford told her he was going to set up another recruitment company in opposition to IT Maniacs, that she should 'hang on in there' for three months, that he would employ her as a recruiter when he left, and he would pay a salary of \$65,000.

[60] However her oral evidence suggested the account in her written statement was an amalgamation of several conversations, many of which were mutually confiding in nature. Ms Milton even characterised the conversations as general chit chat between friends, and nothing serious. For example comments that she should 'hang in there' were Mr Ford's response to wider ranging discussions about aspects of her life with which Ms Milton was unhappy. Further, Ms Milton said she did not understand the discussion about a salary of \$65,000 to be an 'official offer', but rather that it formed part of a generalised conversation about future possibilities. She said there was no associated discussion about a recruitment business.

[61] In evidence tending to support Mr Ford's account of his activities, Ms Milton mentioned a discussion when Mr Ford suggested, in effect, that clients who did not wish to deal with IT Maniacs might be prepared to deal with an associated company with a different style. The company would be a 'front company' for IT Maniacs.

[62] Ms Milton also said that on Friday 30 June 2006 Mr Ford told her about the offer of an IT Maniacs franchise, including the purchase price and his views on where he might obtain finance. Mr Ford did not dispute that. Further, Ms Milton said Mr Ford told her he had identified potential premises in a particular city building. She said he told her that if the offer of a franchise 'panned out' he could set up there in a week or two. Mr Ford denied mentioning the building Ms Milton referred to, but I consider it more likely than not that he spoke as Ms Milton said he did. Whether or not his statements were true is a different question.

[63] I also consider it likely that Mr Ford raised with Ms Milton the possibility of hiring her, both during the previous generalised discussions and during discussions about the franchise offer. Indeed Ms Milton said that Mr Ford told her he would take her with him if he took on the franchise.

[64] Ms Gavin's comment on that evidence was to say there would not be a problem with Ms Milton working for an IT Maniacs franchise, subject to suitable discussions. The problem was with Ms Milton going to work for a company such as E 2 E Recruitment. However the evidence did not persuade me that Mr Ford offered Ms Milton a position in his own business other than to the extent he was referring to an IT Maniacs franchise. The generalised discussions were not persuasive in themselves.

[65] I therefore find no breach of the employment agreement.

6. Disclosure of intellectual property

[66] Clauses 30, 31 and 32 of the employment agreement refer to IT Maniacs' rights in respect of its confidential information and intellectual property rights respectively. I was not addressed in any detail on the application of the clauses, or on which provisions were breached. However I set out what appear to be the relevant provisions.

[67] Clause 30 defines 'confidential information' as:

“... all company information and know-how which is not in the public domain.”

[68] 'Know-how' is defined in the clause as:

“... all trade secrets, technical data and formulae, technical analyses, pricing information, computer programmes, know-how, research records, market surveys, market analyses, client and supplier lists and similar data, competitor information and all derivations, developments or representations of such material, including without limitation, know-how in the form of designs, design rights, copyright and similar intellectual property rights.”

[69] Clause 31 sets out the following obligations in respect of confidential information:

- . to treat as confidential all confidential information unless required to disclose it by law;
- . to use confidential information only in the performance of duties and for the benefit of IT Maniacs' business;
- . not to divulge or disclose confidential information to a third party;
- . not to remove, copy or distribute confidential information from IT Maniacs' premises without its consent;
- . not to use confidential information to harm the company, including by giving someone else a springboard for development;
- . not to make statements to the media; and
- . to return all confidential information on termination of employment.

[70] Clause 32 obliges Mr Ford to disclose to IT Maniacs any know how or confidential information made or discovered by him during his employment, and in connection with its business, and declares that such information is IT Maniacs' property. It is not to be used or disclosed for any purpose other than for IT Maniacs' benefit.

[71] I assume from submissions that reliance was being placed on Mr Ford's removal and copying of candidates' CVs, in breach of clause 31. I accept that Mr Ford breached the clause in that respect.

[72] Considerable reliance was placed on the references on the e2erecruitment website to the flat fee pricing structure and 'rising stars'. It was submitted that this was a breach of clause 31, although the relevant provision in the clause was not identified.

[73] The evidence in support of the alleged breach amounted to the bare references on the e2erecruitment website to a flat fee pricing structure and to 'rising stars'. This, it was alleged, replicated the Pick'n'Mix pricing model, and the Top Talent system.

[74] Such references may be sufficient to raise a concern about the possibility of a breach of the employment agreement, but do not in themselves prove the breach.

[75] Further, while flat fee pricing structures may or may not be commonly used in the recruitment industry, there is nothing inherently new or unusual about them. Their existence in general is in the public domain and the question is no more than one of whether a particular organisation chooses to use them or not. To show there had been a breach of its rights in respect of confidential information or intellectual property in this respect, IT Maniacs would have to point to far more than a bare reference to flat fee pricing. For example, it could question the extent to which the competing flat fee structure drew on IT Maniacs' data and methods in setting and implementing the structure itself.

[76] Mr Smyth submitted, and he may be correct, that the pricing model behind Pick'n'Mix was confidential information. There was no evidence that the model itself was used or disclosed. I do not accept that a bare reference to a flat fee on a website named 'e2erecruitment' amounts to a disclosure of confidential information or a breach of an intellectual property right. There is nothing confidential about the bare reference, and no intellectual property in it.

[77] Similarly there was too little evidence to support a finding that the bare reference to 'Rising Stars' involved a breach of any intellectual property rights associated with 'Top Talent', or otherwise amounted to a breach of IT Maniacs' rights in respect of its confidential information. There was simply no information at all about what 'Rising Stars' comprised, how it worked or how it had been put together. Nor was there any evidence that the underlying model was used or disclosed.

[78] There was discussion in the evidence about Mr Ford's involvement in the development of 'Pick'n'Mix' and 'Top Talent', and no dispute that Mr Ford was aware of their development. Further, there were allegations that he considered them to be his own ideas. Even if I accept that Mr Ford simply changed their names for the purposes of his website, such disclosure as there was still amounts to no more than the bare references and the evidence of use is no more than the material on the website. While that evidence could acquire some significance in the context of a more

compelling body of evidence than was available here, I do not find it compelling in itself.

[79] That the website was live was also considered significant. I might have accepted that submission if the website was operating as an active and completed recruitment tool, as IT Maniacs thought it was. However for the reasons such as those discussed in my consideration of whether candidates and clients were diverted to e2erecruitment's business, I do not believe the website was operating to that extent. There was nothing behind the pages available for viewing, and no evidence they were accessed or used by any candidate or client.

[80] With the exception noted, I am not persuaded there was a breach of the confidentiality or intellectual property provisions.

7. Failure to devote time and attention to IT Maniacs' business

[81] Clauses 1(a) and (c) and clause 34 of the employment agreement embodied Mr Ford's obligation to devote his full time and attention to IT Maniacs' business.

[82] Ms Gavin conducted a performance review with Mr Ford in April 2006. One of the matters she raised during that review was a concern a client had communicated regarding Mr Ford's attempts to sell e2e Business Solutions' products to the client. Ms Gavin also noted that Mr Ford was not always transparent about his time management. The overall assessment included a comment that:

"It has been brought to our attention that Ronnie has been promoting his own company's product to different clients while visiting on IT Maniacs' business. This is in breach of his contract and appears unprofessional to the client. Should there be any further indication of such we will have no alternative but to follow disciplinary procedures."

[83] Mr Ford did not dispute having raised with an IT Maniacs' client a matter relating to e2e Business Solutions, although in evidence he attempted to minimise the exchange. His approaching the client as he did was a breach of his employment agreement, but IT Maniacs did not take it any further at the time. There was no

evidence that Mr Ford continued to make such approaches after the matter was raised with him in April.

[84] Mr Smyth submitted further on behalf of IT Maniacs that the reason for Mr Ford's poor sales performance in the early part of 2006 was because he was promoting his own interests during work time. I accept that the incident with the client, together with Mr Ford's activities in respect of matters such as the logo and website design, amounted to the pursuit of his own interests during work time. However there was not enough evidence to support a finding that the time so spent caused the poor performance. Moreover IT Maniacs acknowledged at the time that Mr Ford had been ill, although it did not accept that the illness adequately explained his lack of performance. Again, there was not enough evidence to establish that its view was justified.

[85] In conclusion, while Mr Ford was in breach of his agreement in respect of his activities during work time there was no evidence to suggest the breach was more than minor in relation to the promotion to clients of e2e Business Solutions' products.

[86] It is not possible to quantify the extent of the offending internet and other activity, other than to say the activities occurred frequently during work time in 2006. While that is a breach of the agreement, I cannot take it any further.

8. Disclosure of confidential franchise offer

[87] IT Maniacs says Mr Ford disclosed the franchise offer to Ms Milton in breach of his contractual obligations. It was also concerned about the allegation that Mr Ford told Ms Milton not to repeat his conversations with her because he was subject to obligations of confidentiality to IT Maniacs.

[88] There was no real dispute that Mr Ford disclosed certain terms of the offer to Ms Milton, although again Mr Ford tried to minimise his action. I found his effort unconvincing. He was in breach of his obligation to keep confidential the terms of the offer.

The suspension

[89] The employment agreement Mr Ford signed in February 2006 provided:

“6.3 If at any time during the employment, an allegation of serious misconduct is made against you, which in our opinion requires proper investigation, we may suspend you from normal duties while an investigation is carried out. During any such period of suspension you shall not attend at the workplace unless directed to do so by us but shall be entitled to be paid for the period of the suspension.”

[90] On 6 July 2006 Ms Lee asked to speak to Mr Ford. She and Ms Gavin sat in an area of the office reserved for ‘team chats’ and presented Mr Ford with a letter of suspension. The letter referred to the registration of E 2 E Recruitment, the e2erecruitment website, possible breaches of confidentiality, solicitation of clients and staff, and use of the company’s intellectual property. It said an investigation would be conducted, and if the company was satisfied the employment agreement had been breached in the ways identified, that would constitute serious misconduct. A disciplinary meeting was sought for Monday 17 July 2006.

[91] The letter ended by saying Mr Ford was suspended from work on full pay until the company gave him notice to return.

[92] Mr Ford left the premises.

The employer’s investigation

[93] On 7 July 2006 IT Maniacs instructed Computer Forensics (NZ) Limited (“CFL”) to analyse the hard drive on the computer Mr Ford used at IT Maniacs’ premises. CFL was to: recover email data and attachments; check for and recover Skype and MSN message data that may be of interest; recover and compile a report relating to internet browsing; determine the use of removable media or external storage devices; and check for and create a report relating to VPN access.

[94] The resulting report was dated 14 July 2006. It recorded: the recovery of a number of email messages which had been deleted from their original folders as well as from the 'deleted' folder¹; no relevant items relating to Skype or MSN message services; numerous instances of access to 'e2e' websites (including the e2erecruitment website) during business hours; and no evidence that removable media or external storage devices were used to copy company data, although there was evidence that the computer was accessed on numerous occasions using a VPN connection.

[95] By letter dated 16 July Mr Ford offered his resignation, effective 14 July 2006. The letter included an assertion that Mr Ford had been offered another position.

[96] Mr Ford did not attend the disciplinary meeting scheduled for 17 July.

[97] By letter to Mr Ford also dated 17 July, Ms Lee pointed out that the parties' employment agreement required four weeks' notice of resignation. Mr Ford's employment would therefore end on 14 August 2006. Meanwhile Mr Ford would remain on suspension, and the investigation into his conduct would continue. The letter asserted further:

"Your failure to attend the disciplinary meeting this morning means that I will have no option other than to conclude our investigation without the benefit of your explanations."

[98] I do not agree that IT Maniacs had no option but to continue without the benefit of Mr Ford's explanations. Depending on the circumstances, the conclusion might have been warranted if Mr Ford had, for example, refused to attend the meeting. However that was not quite the case. If IT Maniacs wished to pursue a disciplinary investigation it should have informed Mr Ford that, resignation or not, it wished to hear from him and it should at least have sought to convene another meeting to that end.

[99] On 24 July 2006 IT Maniacs applied to the Authority for orders in respect of: Mr Ford's resignation and the date on which his employment would end; the restraint

¹ Much of this material concerned Mr Ford's exchanges with the providers of website templates and a designer of logos, and material concerning the purchase of stationery.

of trade and confidentiality provisions in the current employment agreement; and the delivery up for examination of computers that Mr Ford or his servant or agent had used outside his employer's premises for the conduct of business similar to that carried on by the employer.

[100] The parties attended mediation on 26 July 2006 but the problem was not resolved. On the same day the parties' representatives met with the Authority to discuss the request for an order that Mr Ford produce for analysis computers he used other than those on the employer's premises. Mr Nicolson, who was counsel at the time, advised that Mr Ford had a laptop computer of his own which would be delivered up for analysis. There was an order by consent that Mr Ford do so.

[101] A second forensic investigator, Computer Forensic Investigations Limited ("CFI") conducted the analysis of Mr Ford's personal laptop. In a report dated 1 August 2006 CFI identified that the laptop had been connected to three or four other network computers, three of which appeared to be servers. One had a host name of 'e2e'. The report said there was also evidence that the laptop had been backed up at around midnight on 25 July 2006, and the report commented that the backup should be made available. Next, there was evidence that the laptop had been connected to a mass storage device on 25 July, and that on 26 July CD/DVD burning software had been used on the laptop. Finally, there was evidence that on 25 July a software application known as eraser was installed on the laptop, and utilised so that almost every document file on the computer was deleted in such a way that access was no longer possible.

[102] The report also noted that the laptop connected to the internet regularly to access gay pornography, and internet dating sites. It said that none of this material appeared to breach the Films, Videos and Publications Classifications Act 1993.

[103] Attached to the report was a list of the link files and Word documents found on the laptop. Among other things the list included the CVs of concern, and a number of file names consistent with the operation of a business.

[104] Inevitably IT Maniacs' suspicions were heightened by Mr Ford's apparent failure to make available all of the computers to which he was connected or which he used, and the apparent large-scale copying and deletions from his laptop. Moreover, the copying and deletions were carried out after Mr Ford became aware of the application for an order that his computers be delivered up for analysis. Accordingly IT Maniacs sought orders that Mr Ford produce the servers, computers, data storage devices, and CDs/DVDs referred to in the CFI report. Mr Ford was summoned to produce that material to the Authority on 8 August 2006.

[105] The Authority met with the parties on 8 August to allow Mr Ford to answer the summons. Mr Nicolson provided a memorandum of counsel in which Mr Ford's responses to the CFI report were set out. It was not appropriate to purport to present what was likely to be crucial evidence in that way, so I had Mr Ford formally affirm the contents of the memorandum and adopt it as part of his own evidence.

[106] As far as the answer to the summons was concerned:

- (a) Mr Nicolson's memorandum/Mr Ford's evidence detailed the use to which the servers and computers identified had been put, denying they were used for any activity connected with IT Maniacs;²
- (b) The memorandum/evidence also explained that the 'data storage devices' comprised a PDA mobile phone and an iPod, both of which had been attached to the laptop for charging only, and I was told arrangements to provide them had been made;³
- (c) I was told the CDs had already been provided, and my belief at the time was that they had been provided to Mr Smyth.

[107] I was told, too, that arrangements had been made in respect of the backed up material, which was being held at a storage facility. I was told subsequently that a promised letter of authority to access the material was not provided.

² I understand that the relevant drives were subsequently made available and clones made, but cost concerns meant no further forensic examination of them was undertaken.

³ I understand these were subsequently made available, but there was no forensic examination of them.

[108] Mr Ford did not deny carrying out the deletions and copying identified in the CFI report. He said he had made the deletions because of the pornographic and sometimes personal material present on the computers, and was embarrassed about it. He copied to CDs the material he wanted to keep.

[109] The memorandum/statement of evidence also addressed some of Mr Ford's use of other software identified in the CFI report, and denied any inappropriate activity on Mr Ford's part. Those responses were left to be addressed in the course of the Authority's investigation meeting in respect of the substantive claims.

[110] Finally, on 8 August certain orders were made by consent, and undertakings were given, in respect of restraint of trade and confidentiality matters.

The dismissal

[111] The decision to dismiss was confirmed and acted upon later that day, some time after the meeting with the Authority.

[112] In her written statement of evidence, Ms Gavin said this about the decision:

“63. After we received the report of [CFI] we considered that there was sufficient evidence to suggest a serious breach of the employment agreement by [Mr Ford] and justify dismissal. Whilst, [Mr Ford] had declined to attend his disciplinary meeting we had the benefit of explanations provided both in mediation and through counsel. We considered [Mr Ford's] suggestion that he had set up the company and website to show us a new concept which he was about to suggest for the future direction of the company. However weighing that against the weight of evidence as available to us as set out in this statement, Sarah and I decided to dismiss [Mr Ford] with immediate effect on 8 August 2006.”

[113] I understand the reference to Mr Ford's 'declining' to attend his disciplinary meeting as a reference to his failure to attend the meeting scheduled for 17 July.

[114] The 'evidence available ... as set out in this statement' included obvious matters such as the existence of the company and the website, as well as the allegation

that Mr Ford had offered Ms Milton a job and the allegations that Mr Ford was diverting or soliciting work from IT Maniacs' customers.

[115] There was also considerable reliance on material identified during the forensic examinations. Some has already been discussed in this determination, such as the exchanges about website and logo design, discussions about stationery, the spreadsheet, and the copying of data including the CVs. The use of the VPN connection was also relevant.

[116] Further, Ms Gavin listed in her statement of evidence a number of .lnk files, the names of which suggested to her that Mr Ford was operating his own business. I accept that the names themselves are consistent with business and recruitment activity,⁴ but the difficulty is they are no more than names. The contents of the files at the end of the links were not produced so that there is no evidence of what they contained or to which business they related.

[117] Finally, it appears reliance was placed on documents including the forensic investigators' reports and the memorandum discussed in the Authority on 8 August.

[118] The reasons for dismissal, as set out in the letter of dismissal dated 8 August 2006, were that Mr Ford had:

- (a) competed with IT Maniacs' business by setting up the rival company E 2 E Recruitment;
- (b) approached Ms Milton with the intention of enticing her away from IT Maniacs; and
- (c) breached IT Maniacs' IT policy, and the obligations of confidentiality, in that he had worked off his own computers using a VPN and had copied IT Maniacs' files to his own laptop.

[119] The policy provisions said to have been breached were not specified. Ms Gavin referred in her statement of evidence to Mr Ford's email activity during the

⁴ For example some appear to relate to terms of trade, cashflow, sales and PNL projections, while some appear to refer to clients, vacancies and interviews.

period February – May 2006, which was indicative of work on non company matters during company hours, and his use of the VPN connection to his own home. She asserted that these amounted to a breach of the company’s IT policy.

[120] When Ms Gavin was asked at the investigation meeting to point to the provisions of the policy which were breached in these respects, she pointed to a provision requiring email sent over the IT Maniacs network to be sent via IT Maniacs-provided email services (found in the email policy), with the concern being that Mr Ford had set up another outlook email account of his own. Mr Smyth questioned Mr Ford about his avoidance of IT Maniacs’ proxy server and there was no denial the server had been bypassed.

[121] Also of relevance in the decision to dismiss was Mr Ford’s:

- (a) mass deletion of data from his laptop prior to surrendering it for forensic examination;
- (b) false assurances regarding the laptop being his only computer; and
- (c) inadequate explanation of those assurances.

[122] The dismissal was to take effect immediately.

Moneys deducted from Mr Ford’s wages

1. Liability for payment

[123] The letter of dismissal included the following comments:

“Whilst I acknowledge [the termination] triggers an obligation for my client to pay your client’s final pay ... clause 7.5 of your client’s employment agreement ... permits my client to deduct from your client’s final pay money which he owes it. ... you will appreciate that my client is alleging a substantial damages claim. Accordingly, whether any money is owed to your client for unpaid salary is a matter to be determined by the Authority at the investigation meeting.”

[124] It was common ground that Mr Ford did not receive his final pay, and that the amount owed is \$9,382.57 (gross) inclusive of holiday pay.

[125] Clause 7.5 of the employment agreement reads:

“Deductions from final pay: On termination of the employment for any reason we will be entitled to deduct from any moneys owing to you by way of unpaid wages or salary, holiday pay or otherwise, any amount you may then owe us, including the value of any items of property belonging to us which have not been returned.”

[126] In effect, payment was withheld on account of damages in circumstances where neither liability nor quantum had been established. I do not accept that clause 7.5 can be read so widely.

[127] I therefore deal with this matter immediately by ordering IT Maniacs to pay to Mr Ford the sum of \$9,328.57 (gross) in respect of his final pay and holiday pay. It is further ordered to pay interest at the rate of 8.6% from 8 August 2006 to the date of payment.

2. Mr Ford's application for a penalty

[128] No penalties were sought in relation to what was an unauthorised deduction from or withholding of Mr Ford's wages in terms of the Wages Protection Act 1983, and probably a breach of his employment agreement. Instead the application for penalty relied on an allegation of misleading and deceptive conduct in respect of the making of the payment, being a breach of s 4 of the Act.

[129] The withheld payment concerned the period during which Mr Ford was suspended. The suspension was supposed to have been on pay. According to Mr Nicolson's submissions, Mr Ford was deceived into withdrawing his resignation on receipt of a promise to pay the wages that had been withheld. The wages were then not paid.

[130] Mr Nicolson alleged further that Mr Ford declined an offer of alternative employment in reliance on the promise of an ongoing relationship and the payment of the withheld wages. That allegation was not Mr Ford's evidence and I do not accept it. Mr Ford's evidence to the Authority was that he was offered alternative employment but did not accept it because he was unable to start work immediately. While it is open to Mr Nicolson to make submissions on what Mr Ford's evidence meant, the submissions must be directed at the evidence as it was given.

[131] As to whether Mr Ford withdrew his resignation at all, no details of any express agreement to withdraw the resignation appeared in any of the written material. I was unable to obtain a clear account of the details. The facts are that Mr Ford purported to offer a resignation which did not contain the requisite notice, IT Maniacs required that the appropriate notice be given and later sought an order to that effect from the Authority, then in circumstances that were not clear Mr Ford acquiesced in IT Maniacs' requirement that he remain in its employ until the contracted notice period expired. The request for an order from the Authority in that respect was withdrawn.

[132] As to whether there was an associated promise to pay the withheld wages, Mr Ford's statement of problem alleged that the resignation was not accepted (which overlooks the relevance of the requirement that the notice period be observed) and alleged further:

“... Mr Ford remained as an employee of IT Maniacs on pay from the 6th July 2006. Thus there was no break in the continuity of service and pay was confirmed on the 2nd August 2006 and an agreement made, so counsel and the applicant believed, that payment of salary would continue.”

[133] I heard no evidence about any discussion on 2 August, although the intended reference may have been to 8 August. Mr Ford's brief of evidence merely said: “I was not paid for my time during suspension even though this was promised in the suspension letter dated 6 July 2006.” I do not consider the letter of suspension amounts to a promise to pay, rather it amounts to a statement of Mr Ford's entitlement. If there was some other discussion involving a promise to pay then, again, I was unable to obtain a clear account of it.

[134] Matters were not made any clearer by submissions of Mr Nicolson's which appeared to be based at least to some extent on what occurred during the 8 August meeting with the Authority. He submitted that, when offered the opportunity to accept Mr Ford's resignation, IT Maniacs refused to do so but promised to pay his outstanding wages and continue to do so. The submission went on to say: 'this was confirmed at the Authority where the Authority pointed out the unlawfulness of withholding pay and the respondent then agreed. On this basis Mr Ford withdrew his resignation.'

[135] At the meeting of 8 August 2006, and in the hope that matter at least could be resolved promptly, I raised the likelihood that the withholding of pay was unlawful under the Wages Protection Act. Initially Mr Smyth did not appear to contest that, but he moved to a position in which he declined to abandon any reliance on clause 7.5. Accordingly I would not go as far as to say Mr Smyth 'agreed' the withholding (or deduction) was unlawful, or that any promise to pay was made or confirmed in front of the Authority.

[136] I find there is no reliable evidence that Mr Ford withdrew his resignation in reliance on a promise to pay his outstanding wages. I might accept there was some kind of discussion about the terms on which Mr Ford would work out his notice period but that is as far as I could go. Accordingly I do not accept as proved this key element of the allegations of fact relied on in support of the application for a penalty.

[137] There was a further allegation that Mr Ford's dismissal was carried out in breach of s 4, in order to avoid the statutory obligation to pay wages. That allegation is unreasonable and unfounded. I do not accept it.

Determination – breach of employment agreement

1. The competing agency

(a) the 'Ready aim – Fire' document

[138] The 'Ready aim – Fire' document, if accepted as genuine and prepared in or about mid-2006, could lend support to Mr Ford's response to the allegation that he

was setting up an agency to compete with IT Maniacs. The contents - again if accepted - are consistent with his oral explanation that the activities which had caused such concern were simply carried out in the course of work on a proposal for a recruitment agency either associated with or run by IT Maniacs, but not under the IT Maniacs brand.

[139] I have already noted that no reference was made to the document during the parties' exchanges in mid-2006. Nor was it mentioned in, or attached to, any of the statements of problem or statements in reply filed in the Authority. It appeared for the first time as an annex to Mr Ford's written brief of evidence filed on 12 September 2006.

[140] At the investigation meeting Mr Smyth questioned where the document had come from and when it was prepared. Mr Ford said he had been working on it in or about June or early July 2006. In its electronic form, it was part of the material he had deleted on 25 and 26 July 2006. That fact alone left Mr Ford highly vulnerable to a refusal to take the document into account. However Mr Ford went on to say it would have been copied to a CD in the course of the copying he carried out at the same time as making the deletions. That fact exacerbated his vulnerability to a refusal to take the document into account.

[141] Despite this I asked the parties to provide the relevant CD for forwarding to a forensic examiner, so the relevant document file could be identified, the dates of its creation and any subsequent editing could be tracked and the authenticity of the contents confirmed. Mr Ford provided the CD to the Authority.

[142] Mr Nicolson has criticised aspects of the approach taken by the CFI investigator. I accept that in some respects the investigator's comments went too far, although I do not otherwise accept Mr Nicolson's allegations regarding him. I have relied only on the investigator's factual accounts of what he found, and such objective indications as he gave concerning what could be achieved by further investigation. Since Mr Nicolson also raised concerns at the time, I record that I put it to the parties that they each instruct their own forensic investigator in respect of the 'Ready, aim -

Fire' document and the associated CD. Eventually by agreement the CFI investigator (who had by then commenced his own business) was again instructed.

[143] The resulting report was filed in the Authority on 5 June 2007. The investigator had identified on the CD a document substantially similar to the one Mr Ford had filed, but raised a question about whether the document found on the CD was the document originally created. The report recommended further action if the true authenticity of the document was required.

[144] I sought a response from Mr Ford. He and Mr Nicolson both filed affidavits saying Mr Ford had given the CD to Mr Nicolson on the day after Mr Ford's suspension, on 7 July 2006. Oddly, that was before the deletions and copying of 25 and 26 July. Those circumstances raise more questions than they answer. Aside from that Mr Nicolson's explanation that he was the one who had overlooked the CD, and did so for the length of time he has, is not adequate and is itself of concern.

[145] The next matter of concern is that, according to their respective affidavits, when addressing my request for the production of the CD Messrs Ford and Nicolson first viewed the CD at Mr Nicolson's office, then Mr Nicolson gave the CD to Mr Ford to take away and 'do a check' on it. Mr Ford took the CD away, and deposed that he looked at it before returning it to Mr Nicolson. Mr Nicolson deposed that he did not want any suggestion of tampering, but actions just set out left Mr Ford exposed to precisely that suggestion. Leaving aside any difficulties arising out of the original deletions and copying, the failure to produce the CD in 2006 and the length of time during which it was apparently in Mr Nicolson's possession, there is a further question mark over whether the CD Mr Ford returned to Mr Nicolson is the CD Mr Nicolson gave to Mr Ford.

[146] Mr Ford was attempting to rely on a document that he had sought not just to delete but to erase from its electronic origin in the course of an ill-judged response to the knowledge that he would be required to produce certain material to the Authority. Despite this, I gave him an opportunity to authenticate the document. Then, among other difficulties, the chain of custody of the CD where the original document was said to reside was compromised to an extent that beggars belief. All of these concerns

meant I was not prepared to investigate the authenticity of the document any further, and I give it no weight.

(b) whether breach established

[147] IT Maniacs' primary concern was its view that Mr Ford had set up his own recruitment business in competition with it, and in breach of his obligations as its employee. Many of the remaining allegations of breach of agreement are connected with that concern. For that reason I have dealt with what I will call supplementary breaches earlier in this determination, and now turn to the key breach. In this context I take into account the facts associated with the supplementary breaches for the purpose of assessing the cumulative effect of Mr Ford's activities.

[148] Those activities included:

- (a) purchasing the domain name e2erecruitment in April 2005;
- (b) working on the preparation of a logo and website design and making enquiries about stationery including business cards, all using the name e2erecruitment, in the period February – May 2006;
- (c) transferring large quantities of IT Maniacs' information, including candidate CVs, to his home server;
- (d) registering the e2erecruitment website in June 2006;
- (e) testing eGrabber software, used with CVs, in June 2006;
- (f) registering E 2 E Recruitment Limited on 3 July 2006.

[149] The duty of fidelity does not prevent employees from taking some action in preparation for a business of their own, provided they do so without undermining the current employer in a way that breaches the duty of trust and confidence.⁵ On its own, the registration of a company and low-level preparatory action such as the simple opening of a bank account would probably not breach the duty.

⁵ See Mazengarb's Employment Law, Vol 2, [1028] and the authorities cited therein

[150] Undermining actions commonly include going further and soliciting the employer's clients or customers, soliciting other employees to leave the employer's employ, diverting business opportunities away from the employer or attempting inappropriately to compete with the employer, impairing the employer's goodwill, or misusing or disclosing confidential information.

[151] The allegations against Mr Ford in respect of his soliciting or transacting business with O and P, and his soliciting of Ms Milton as an employee, amount to allegations of such undermining conduct. However I have found there was no evidence in support of the allegations regarding O and P, and that at best any real offer of employment to Ms Milton concerned a position in an IT Maniacs franchise. That was not of itself considered a breach of obligation, subject to suitable arrangements being made.

[152] Mr Ford's diverting candidates of IT Maniacs' to his own business would also undermine the employer and breach the duty of trust and confidence. However I have not been persuaded Mr Ford acted in that way.

[153] The allegations in respect of confidential information and intellectual property also amount to allegations of conduct capable of undermining the relationship of trust and confidence. However I have found only limited breaches of the relevant provisions in the employment agreement, and do not consider the breaches sufficient in themselves to amount to undermining conduct.

[154] Even in the absence of conduct of the kind just set out, it remains arguable that the cumulative effect of: the registration of E 2 E Recruitment; the setting up of the website; the development of a logo and discussions regarding stationery; the availability of banking facilities; generalised testing of the ground with Ms Milton; and the extent of the development activity on which Mr Ford embarked in respect of the website and associated tools is sufficient to undermine the parties' relationship of trust and confidence if all of these actions were taken to further Mr Ford's own planned business.

[155] Mr Ford's explanation was that his activity was for the purpose of preparing a presentation to IT Maniacs, and not for the purposes of a business of his own. Unfortunately he has profoundly dented his credibility by acting to prevent IT Maniacs and the Authority from identifying the extent of his activities when he deleted material from his personal laptop, but nevertheless attempted to retain the material himself by copying it to discs. I have also commented on the utterly unsatisfactory treatment of the CD allegedly containing the original electronic history of the 'Ready, aim – Fire' document.

[156] That leaves me with evidence against Mr Ford which in many respects I do not consider to be as compelling as IT Maniacs believes it is, yet with subsequent conduct on Mr Ford's part which is strongly suggestive of a guilty conscience. Mr Nicolson's repeated assertions that Mr Ford was willing to be co-operative are not consistent with Mr Ford's conduct.

[157] Further, by the time he declined the offer of a franchise Mr Ford had reached a reasonably advanced stage in his planning and testing of the e2erecruitment website and had other business interests under the e2e banner. Although he had not expressly asked Ms Milton to work for him other than in an IT Maniacs'-related business, he had in effect prepared the ground for such an approach. He had something of a springboard from which he could take his own interests further.

[158] Mr Ford could have told IT Maniacs on or about 3 July that, although he was declining the offer of a franchise, he was working on something else to put to IT Maniacs. He did not do so. Instead, on 3 July he registered his own company E 2 E Recruitment with himself as sole director and shareholder.

[159] That action tips the balance in favour of a finding that that Mr Ford was preparing to establish his own business in breach of his duty of fidelity to his employer. I find accordingly.

2. Remedies

[160] IT Maniacs quantified the damages sought as follows:

- (a) reimbursement of the salary it paid to Mr Ford (having paid him in reliance on an assumption that he was complying with his duty of fidelity) commencing from at least April 2006;
- (b) the equivalent of 3 months' salary for Mr Ford, in respect of the cost of replacing him;
- (c) reimbursement of the costs of the forensic examinations in the sum of \$14,166.54;
- (d) \$589 in respect of the spreadsheet referring to O and P;
- (e) \$1,897 in respect of the excessive bandwidth usage; and
- (f) interest.

(a) reimbursement of salary paid to Mr Ford commencing April 2006

[161] Mr Smyth submitted that, had Mr Ford complied with his duty of fidelity and devoted his whole time and attention to his work, IT Maniacs would have generated more profit and revenue. As the relevant amounts are not easily determined, Mr Smyth submitted that IT Maniacs should be reimbursed the salary which it paid to Mr Ford (in reliance on the assumption he was complying with the duty of fidelity). He submitted that, otherwise, Mr Ford would have been unjustly enriched as a result of his breach. The further submission was that IT Maniacs is entitled to be reimbursed on this basis from at least April 2006.

[162] I have found that Mr Ford breached his duty to his employer. I also accept that IT Maniacs suffered a significant drop in turnover during 2006, but even Ms Gavin acknowledged that other factors could have contributed to the drop. Overall, in a damages context, the nature of my findings about Mr Ford's breaches of duty mean little more than at times he was being paid his salary during periods in which he was not carrying out IT Maniacs' work but rather his own. There might be some scope for ordering him to repay the salary paid to him during those periods, but I am not satisfied there is enough evidence to warrant that action here.

[163] In conclusion, while I have found Mr Ford was in breach of his employment agreement, I am not persuaded that loss was suffered as a result.

(b) reimbursement of the cost of replacing Mr Ford

[164] IT Maniacs dismissed Mr Ford. I am not prepared to consider an award of damages in its favour in respect of the cost of replacing him.

(c) reimbursement of the cost of the forensic examinations

[165] Mr Ford's breaches of duty caused IT Maniacs to incur costs in an attempt to identify the nature and extent of the breaches. Mr Ford was aggravated matters by his deleting and copying of material after he became aware of IT Maniacs' concerns about these activities.

[166] Mr Ford is therefore ordered to reimburse IT Maniacs for the cost of the forensic examinations, in the sum of \$14,166.54. This sum is calculated as the total amount of the invoices IT Maniacs has produced.

(d) \$589 in respect of the spreadsheet

[167] I have already found there is not enough evidence to support this claim.

(e) \$1897 in respect of bandwidth use

[168] I have already found there is not enough evidence to support this claim.

Determination – the suspension

[169] In assessing the justification for Mr Ford's suspension, I adopt the following approach:

“[104] Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of an employer's proposal to suspend with a view to giving the employee an opportunity

to persuade the employer not to do so. ... Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others, it may not."⁶

[170] The basis of Mr Ford's grievance was that the decision to suspend was neither fair nor reasonable, with particular reference to the fact that Mr Ford was not given an opportunity to be heard on the matter beforehand.

[171] That argument requires a balancing of Mr Ford's interests in being able to continue to report for work, against IT Maniacs' interests in protecting its business and proprietary information.

[172] The open-ended nature of the suspension counts against its justification. Overall, however, I find there was enough in the material IT Maniacs had discovered to justify its move to protect its interests by suspending Mr Ford without first giving him an opportunity to be heard on the suspension. Its action was justified.

[173] Therefore I do not accept Mr Ford's claim that he has a personal grievance on the ground that his employment was affected to his disadvantage by an unjustified action of his employer's.

Determination – the dismissal

[174] In assessing the justification for a decision to dismiss, the Authority must apply s 103A of the Employment Relations Act. The provision reads:

“... the question of whether a dismissal ... was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.”

[175] A decision of the Employment Court in **Air New Zealand Limited v Hudson**⁷ said this about how s 103A should be applied:

⁶ **Graham v Airways Corporation of New Zealand** [2005] ERNZ 587, 613

⁷ [2006] 1 ERNZ 415

“[118] ... the effect of s 103A is to separate out the employer’s actions for consideration. It requires the Authority or the Court to consider those actions against what a fair and reasonable employer would have done. Although the amendment does not expressly prevent employers from having recourse to a range of options from which it can choose, Parliament has legislated for the Authority or the Court to evaluate this choice against a specified objective standard: what would a fair and reasonable employer have done in the circumstances?”

...

[132] The section does not differentiate between aspects of the dismissal process but, because it refers in general to the employer’s actions, the test for justification applies at all stages including the employer’s decision that misconduct has occurred and the employer’s decision to dismiss.”

[176] Further to the question of whether misconduct has occurred, the court referred to a leading case on the approach to that question, namely **Airline Stewards & Hostesses of New Zealand IUOW v Air New Zealand Limited**⁸ and said:

“[135] ... the focus was on whether the employer had reasonable grounds to believe and did honestly believe that there had been misconduct by the employees or whether it had honest belief on reasonable grounds. In such circumstances under s 103A the Court has to examine whether the actions of the employer which led to that honest belief were those that a fair and reasonable employer would have taken.”

[177] Broadly speaking, and within that context, the approach to determining whether a dismissal is justified is to consider: the nature of the allegations of misconduct, and whether, if established, the conduct in question is capable of amounting to misconduct or serious misconduct; what information relevant to the allegations did the employer have when it decided to dismiss, and was the employer justified in reaching the conclusions it did about the what the information showed; did the employer follow a fair process in obtaining and forming conclusions about the information, and in particular did it put the information to the employee and obtain a response to it in a fair way; was the approach to all of the above that of a fair and reasonable employer; and was the decision about the disciplinary action to be taken as a result one which a fair and reasonable employer would have made.

⁸ (1990) ERNZ Sel Cas 985; [1990] NZLR 549 (CA)

1. The process leading to the decision to dismiss.

(a) reliance on discussions during mediation

[178] The Authority needs evidence about the process leading to a decision to dismiss, including evidence about what was put to the employee and the employee's responses. Ms Gavin said the decision to dismiss relied in part on explanations provided in mediation. It appeared from a line of questioning which developed during the investigation meeting that detailed discussions of Mr Ford's activities had occurred during mediation, although not outside mediation. I emphasise that my comments have nothing to do with whether such discussions are appropriate in mediation – no doubt they occur frequently. Nor do my comments have anything to do with whether or how the employer may make use of information it obtains during mediation. The difficulty to which I sought to draw attention was whether, since the discussions had occurred in mediation, I could hear any evidence about them at all. I observed at the same time that it appeared the mediation had doubled as the disciplinary meeting.

[179] The primary difficulty arose out of s 148 of the Employment Relations Act, which provides:

“(1) Except with the consent of the parties or the relevant party, a person who –

- (a) ...; or
- (b) is a person to whom mediation services are provided; or
- (c) ...
- (d) ... -

must keep confidential any statement, admission or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation.

..

(3) No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document or information that, by subsection (1) is required to be kept confidential.”

[180] I asked the parties to address me on the point. Mr Smyth relied on a decision of the full court of the Employment Court in **Jesudhass v Just Hotel Limited**⁹ to say that the information was not provided for the purposes of the mediation (namely the purpose of settling litigation or potential litigation) so that no issue of admissibility arises. However IT Maniacs had already commenced litigation in respect of essentially the behaviour later relied on as justification for the dismissal, so I have difficulty with the submission that the information was not provided for the purposes of the mediation. I would also be in some difficulty if I found the information was provided for the purposes of the mediation as it related to IT Maniacs' claim for damages, but not for the purposes of the mediation as it related to the dismissal which followed the mediation.

[181] Accordingly I did not consider the Authority was in a position to address what explanations were sought and given in mediation occurring prior to the dismissal, and what was made of them.

(b) other matters relied on

[182] Ms Gavin also said the decision to dismiss was based on evidence contained in the CFI report. That report was dated 1 August and was received after the mediation. It was not put to Mr Ford in a disciplinary context prior to the decision to dismiss, and the explanations referred to are the explanations provided in Mr Nicolson's memorandum/Mr Ford's statement. It was not appropriate to use the material in that way. As far as the Authority was concerned it was to be addressed in detail during the substantive investigation, and it was not addressed in detail at the time. If it was to be relied on in support of a dismissal it should have been addressed separately as part of a suitable disciplinary procedure.

[183] Ms Gavin was still able to say why Mr Ford's explanation regarding a proposed alternative business arrangement for IT Maniacs was rejected. She relied on the matters set out in her statement, as already traversed here, and on IT Maniacs' view of the significance of its conclusion that the e2erecruitment website was live and trading.

⁹ [2006] 1 ERNZ 173, at [56] and [59]. The decision is currently under appeal to the Court of Appeal.

[184] Even so IT Maniacs should have sought to convene a separate disciplinary meeting outside the mediation and before deciding on and advising Mr Ford of his dismissal. Its reasons for not doing so appear to be that: Mr Ford did not attend the disciplinary meeting originally scheduled for 17 July; Mr Ford had failed to properly answer the Authority's summons and had sought to avoid service of the summons; by 8 August relevant matters were already before the Authority; and dismissal was warranted on the basis of the material already available. Bearing in mind my disagreement with IT Maniacs' conclusion on 17 July that there was 'no option' but to conclude its investigation without the benefit of Mr Ford's explanations, I do not accept any of those as valid reasons for not attempting to reconvene a disciplinary meeting.

2. The grounds for dismissal

[185] I now turn to the grounds given for the decision to dismiss.

(a) Competing in business by setting up the rival company E 2 E Recruitment

[186] I have already found that Mr Ford was guilty of something less than actually operating a competing business through E 2 E Recruitment. His breach of the duty of fidelity reflected the extent to which he was in a position to commence a competing business. When it made the decision to dismiss, IT Maniacs read more into the material available to it than was warranted and its resulting conclusions were flawed.

[187] That means the ground relied on, namely that Mr Ford was actually competing with IT Maniacs' business, cannot be substantiated. Accordingly that ground of dismissal cannot be justified. The lesser breach can be taken into account in assessing remedies.

(b) Approaching Ms Milton with the intention of enticing her away from IT Maniacs

[188] I have found this allegation was not established on the evidence. At best any enticement was to a position in an IT Maniacs' franchise, which was not in itself considered exceptional, and there was scope to proceed with a further approach.

[189] As for whether IT Maniacs was entitled at the time to reach the conclusion in respect of Ms Milton which it did, it may be that Ms Milton described the circumstances to IT Maniacs differently from the account she gave the Authority. Not least of my reasons for that conclusion is the difference between Ms Milton's written statement of evidence and her oral evidence. However there was no unequivocal evidence that a statement was obtained directly from Ms Milton at the relevant time at all. The evidence suggested information was obtained in a relatively ad hoc way both indirectly through the HR manager and in a series of informal conversations with Ms Milton.

[190] There were references to IT Maniacs' attempts to ensure Ms Milton remained its employee, and a suggestion, later abandoned, that IT Maniacs was entitled to damages in respect of the cost of those attempts. In the light of Ms Milton's apparently emotionally fragile state, and IT Maniacs' deeply-held sense that Mr Ford had set up a competing business, I have some doubts about whether discussions with Ms Milton were suitably dispassionate for the purposes of a disciplinary investigation.

[191] Finally there was no evidence that such statement as had been obtained from Ms Milton was put to Mr Ford for explanation prior to the decision to dismiss.

[192] For these reasons I am not persuaded that the conclusion regarding Ms Milton was adequately founded. This ground of dismissal cannot be justified.

(c) Using of the VPN and the copying of files to his own laptop

[193] These allegations were said to have been in breach of IT Maniacs' IT policy and in breach of the obligations of confidentiality.

[194] I have already referred to the lack of clarity about which specific IT policy was being relied on. Neither the evidence nor the submissions focussed in any detail on

the breaches of policy. Moreover, there was no evidence that any alleged breach of policy was put to Mr Ford for his response prior to the decision to dismiss. This makes it very difficult to justify the decision.

[195] I would have no difficulty with the general proposition that Mr Ford's use of the VPN connection from his home server posed a problem for IT Maniacs, not least because of the threat posed to the security of its network. That was a breach of policy. However the risk to security was not expressly relied on as a reason for dismissing Mr Ford.

[196] At the same time Mr Ford had set up his VPN connection so that IT Maniacs' proxy server was avoided, and set up an alternative email address on Outlook. These were breaches of policy. However because of the way this matter has been put to me I take them into account in assessing remedies, rather than finding they amount to justification for the dismissal.

[197] As for whether copying material to Mr Ford's laptop amounted to a breach of policy, I was not directed to a specific breach but the reference to confidential information suggests a breach of that kind may have been relied on.

[198] Turning to the obligations of confidentiality contained in the employment agreement, I was not addressed on which particular obligations were taken into account, and how, in making the decision to dismiss.

[199] I have, however, accepted that Mr Ford breached clause 31 in his removal and copying of candidates' CVs. Again I take that into account in assessing remedies, rather than with reference to the justification for the dismissal.

(d) Additional relevant factors

[200] IT Maniacs also took into account Mr Ford's mass deletion of data from his laptop prior to surrendering it for examination. It heard Mr Ford's explanation in the course of the 8 August discussions before the Authority and did not accept it.

[201] The explanation was not sought and obtained in circumstances where Mr Ford was aware that the matter could be taken into account in a decision to dismiss. It should have been. Having said that, the explanation was weak and the conduct was anything but supportive of a relationship of trust and confidence between the parties.

[202] IT Maniacs also took into account 'false' assurances regarding the laptop being Mr Ford's only computer. Again that was not put to Mr Ford in a proper disciplinary context, when it should have been.

[203] Nor, in any event, am I persuaded that the assurances were 'false' in the sense that they were known to be untrue and were intended to deceive. Mr Ford's 'cleaning' of the laptop he used at IT Maniacs, and the contents of the CFI report in respect of the connections to his own laptop were more than capable of raising that suspicion, but further forensic examination of the remaining servers would be necessary to shed light on what they were used for, and hence on the persuasiveness of Mr Ford's explanations.

(e) Conclusion

[204] For the reasons set out above I find the dismissal unjustified. Mr Ford has a personal grievance.

3. Remedies

[205] Mr Ford obtained alternative employment promptly. He seeks the reimbursement of wages lost since his dismissal, in the sum of \$2,884.62. He also seeks compensation for the injury to his feelings arising out of his personal grievance.

[206] The Authority must, in assessing remedies for a personal grievance, consider the extent to which the employee's actions gave rise to the grievance, and if those actions so require, reduce the remedies that would otherwise have been awarded.

[207] I have found a number of breaches of agreement in Mr Ford's conduct. They would have supported a reduction in remedies in their own right. However Mr Ford's

response to IT Maniacs' efforts to investigate his conduct means I consider him largely the author of his own misfortune. Probably from the minute he was suspended, the best that can be said is that he lost his head and acted in a way that was anything but in his own best interests. He reacted to circumstances that might have been resolved, in a way that prevented their resolution.

[208] There will be no order for a remedy.

Determination – penalties

1. IT Maniacs' application

[209] Section 133 of the Employment Relations Act gives the Authority jurisdiction to deal with actions for recovery of penalties for any breach of an employment agreement, or for a breach of any provision in the Act which also provides for the imposition of a penalty.

[210] Section 4A provides for penalties for breach of the duty of good faith contained in s 4 in the following terms:

“4A. A party to an employment relationship who fails to comply with the duty of good faith in s 4(1) is liable to a penalty under this Act if –

- (a) the failure was deliberate, serious, and sustained; or
- (b) the failure was intended to undermine –
 - (i) ...; or
 - (ii) an individual employment agreement ...; or
 - (iii) an employment relationship; or
- (c) ...”

[211] Thus there is a high threshold to be reached before a penalty can be awarded under s 4A. For reasons discussed at some length, although I consider Mr Ford's approach during the course of his employment to his employer's electronic information was irresponsible, I am not satisfied that he was guilty of a breach of good faith to the extent that he should be penalised. The same goes for any penalty

for breach of the employment agreement. Instead I have reflected my view of Mr Ford's conduct by declining to award any remedy in respect of his personal grievance.

[212] In what I understand to be a reference to Mr Ford's deleting material from his laptop, as well as the procedure regarding the provision of the CD containing the 'Ready – aim, Fire' document, Mr Smyth also submitted that Mr Ford acted in bad faith towards the Authority. That matter was not itself part of the present investigation and I leave it for full argument in an appropriate forum if necessary.

[213] For these reasons there will be no order for penalties.

2. Mr Ford's application

[214] I have already addressed this matter in the findings of fact. The evidence did not support the allegation of misleading and deceptive conduct made on behalf of Mr Ford. Accordingly I dismiss this application for a penalty.

Summary of orders

[215] IT Maniacs is ordered to pay to Mr Ford the sum of \$9,382.57 (gross) plus interest at the rate of 8.6% from 8 August 2006 to the date of payment.

[216] Mr Ford is ordered to pay to IT Maniacs the sum of \$14,166.54 plus interest at the rate of 8.6% from the date of this determination to the date of payment.

Costs

[217] Costs are reserved. The parties are invited to reach agreement on the matter. If they are unable to do so and seek a determination from the Authority they are to file and serve memoranda on the matter within 28 days of the date of this determination.

R A Monaghan

Member of Employment Relations Authority