

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 341
3028054 & 3032035

BETWEEN	PHILIPA JOHNSON Applicant
AND	FOURTH ESTATE HOLDINGS (2012) LIMITED Respondent

Member of Authority:	Jenni-Maree Trotman
Representatives:	Catherine Stewart, Counsel for the Applicant Phillip Ahern, Counsel for the Respondent
Investigation Meeting:	20 & 21 September 2018
Submissions from both parties:	25 September 2018
Additional documents received:	03 October 2018
Determination:	5 November 2018

DETERMINATION OF THE AUTHORITY

[1] Fourth Estate Holdings Limited is the publisher of the National Business Review (“the NBR”). The NBR is a weekly national newspaper and online publication available to paid subscribers. Philippa Johnson was employed by Fourth Estate Holdings as a senior advertising account manager for the NBR, and later a partnerships executive, from 30 May 2016 until her termination on 27 October 2017. For the purposes of convenience I refer hereafter to the Respondent as the NBR.

[2] Mrs Johnson has brought a claim against the NBR alleging that she was unjustifiably disadvantaged and was unjustifiably dismissed. Mrs Johnson also claims the NBR breached its good faith obligations under s 4 of the Employment Relations Act 2000 (the Act). She asks the Authority to order the NBR to pay her lost

wages, compensation for hurt and humiliation, and to order the NBR to pay penalties for breaches of good faith.

[3] The NBR has brought a separate claim against Mrs Johnson. It claims that Mrs Johnson breached the terms of her individual employment agreement (IEA), her duty of fidelity and her good faith obligations, by taking the NBR's confidential information. It asks the Authority to order a penalty for breach of confidentiality and a penalty for the breach of good faith.

[4] Mrs Johnson and the NBR claims against each other were consolidated and heard together.

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

The issues

[6] The issues requiring investigation and determination were:

- a) Was Mrs Johnson unjustifiably dismissed?
- b) Did Mrs Johnson suffer an unjustified disadvantage to her employment?
- c) If Mrs Johnson was unjustifiably dismissed, or suffered an unjustifiable disadvantage, what remedies should be awarded?
- d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mrs Johnson that contributed to the situation giving rise to her grievance?
- e) Did the NBR breach its duty of good faith? If so, should a penalty be ordered?
- f) Is the NBR estopped from pursuing its claim against Mrs Johnson, or does an issue of res judicata arise?
- g) If not:

- i. Did Mrs Johnson breach her individual employment agreement by taking confidential information belonging to Fourth estate? If so, should a penalty be imposed?
 - ii. Did Mrs Johnson breach her duty of good faith? If so, should a penalty be ordered?
- h) Should either party contribute to the costs of representation of the other party?

Background against which issues are to be determined

[7] In or about June 2016 the NBR took steps to increase the NBR's advertising revenue. These steps initially involved engaging an external consultant, Mr Lowe, to undertake weekly sales meetings and one-on-one meetings with the advertising team. Despite Mr Lowe's attempts some members of the advertising team, including Mrs Johnson, continued to fail to meet their budgets.

[8] In April 2017, the NBR engaged Mr Salim Khan to implement a review of its advertising strategy so as to increase its advertising revenue. At the time of Mr Khan's appointment, the advertising team had reduced from six executives to three. Two of those executives did not give evidence and therefore I shall refer to them as Mr S and Mr C. Each of the executives had client portfolios at that time of upwards of 700, having taken over the portfolios of those staff that had left.

[9] Mr Khan decided that it was important that his team identify which of their clients would generate income over the forthcoming year and then focus their attention on securing this work. He therefore instructed them to each identify 300 clients from their portfolio who they could obtain at least one advertisement from in the coming year.

[10] Mr S and Mr C duly attended to this. However, after considering her list for a week, Mrs Johnson could only identify 104 clients. After discussions with her, Mr Khan decided to ask each executive to focus on 200 active clients in their portfolios instead of 300. By doing so he was able to move some of the active clients from Mr S and Mr C's portfolios to Mrs Johnson.

[11] It was also discussed and agreed that the individual team member's budgets would increase. The NBR needed to meet at least the advertising revenue that it had

achieved when it had six advertising executives. It therefore divided the revenue it had achieved in the previous financial year by the three staff members that remained. This resulted in the executives' previous budget roughly doubling. Mrs Johnson, Mr S and Mr C agreed the increased budget was fair and necessary to achieve the sales revenues from the previous financial year.

[12] Over the next few months, Mrs Johnson struggled to meet her increased budget. Although she was initially happy with her reconfigured portfolio, she said she soon discovered that a number of the established clients that she had been provided with did not want to advertise with the NBR or did not want to spend the level of advertising that the NBR considered necessary to achieve the client's expectations. She shared her concerns with Mr Khan who then assisted her with obtaining work from these clients. This resulted in success in terms of obtaining work from some of the clients who had previously declined to advertise but not with others.

[13] Despite Mrs Johnson's struggles to meet her budget, she continued to assure the NBR verbally and in writing that she was on track to achieve her budget.

The Lead-up to the Dismissal

[14] In early September 2017 Mr C resigned. Mrs Johnson approached Mr Khan and asked him if she could take over Mr C's portfolio. This request led to a conversation between Mr Khan and Mr C. Mr C expressed concern about Mrs Johnson taking over his portfolio. This was because he was aware that she was looking for another job.

[15] Following this discussion, Mr Khan spoke with Mrs Johnson. He told her he was aware that she was looking for another job. He didn't have a problem with this so long as she continued to apply herself to her job. Mrs Johnson assured him that she would give the NBR her full commitment.

[16] Mr Khan was not convinced. He raised his concerns with Todd Scott. Mr Scott is a director of the NBR. This led to a meeting in September 2017 between Mrs Johnson, Mr Khan and Mr Scott to discuss Mrs Johnson's budget. The parties spoke about various leads and about a particular client where Mrs Johnson was unable to achieve a sale. Mrs Johnson reassured Mr Khan and Mr Scott that she would have signed contracts by the end of September 2017 that would enable her to meet her budget in that final quarter.

[17] By early October 2017 Mrs Johnson had not provided the promised signed contracts. With advertising revenue continuing to decline, Mr Khan decided that something radical had to be done. He considered that Mrs Johnson had been given significant opportunity to obtain sales, particularly with the significant restructuring he had undertaken to the portfolios and the assistance he had provided to her.

[18] A discussion then took place between Mr Khan and Mr Scott. The key matters discussed were, firstly, that the NBR would prefer not to go through a disciplinary process with Mrs Johnson where there was no guarantee that the process would be successful in improving her performance. Secondly, the NBR could not sustain the decline in its advertising revenue over the period the performance process would take. Thirdly, Mr Khan would meet with Mrs Johnson and put an exit offer to her.

The termination

[19] On 26 October 2017 Mr Khan spoke to Mrs Johnson and asked her how she was getting on looking for another job. He said he was hopeful that he could avoid the conversation he and Mr Scott had agreed if she had found something. Not receiving the answer that he hoped for, Mr Khan asked Mrs Johnson if she would attend a coffee meeting with him the following day. She agreed. This was the first time she had met with Mr Khan outside the workplace.

[20] I pause here to note that, prior to attending this meeting, Mrs Johnson was aware of a practice at the NBR where, when it wished to terminate an employee, it offered the employee an option of either resigning and receiving a sum of money or being terminated. Mr Scott provided the Authority with six occasions where this had occurred.

[21] The following day Mr Khan and Mrs Johnson attended the meeting at a coffee shop. Mrs Johnson recorded the meeting and I have reviewed the transcript. The meeting took place over an hour. During this meeting Mr Khan advised Mrs Johnson that the NBR wanted to put two options to her. The first was that she would resign and be paid three months' remuneration. The second was they would go through a performance management process with her that would result in her employment being terminated. Mrs Johnson asked for the options to be put in writing.

[22] Following this meeting Mr Khan returned to the office and spoke with Mr Scott about what had happened. He also spoke with Anna Chan, the NBR's accountant. Ms Chan then prepared a termination letter.

[23] Later that afternoon, Mrs Johnson was called into a meeting with Mr Khan and Ms Chan. On the desk in front of her was a sealed envelope with her name on it. She asked if she could read the letter and was told she could. The letter advised:

Earlier this year, the company went through a review of the sales performance, and find that our Partnerships Executives are not reaching their sales targets as expected.

Over the past 6 months, we have held team meetings and one-on-one meetings, with the aim to improve the company's performance as well as individual performances. We have listened and assessed suggestions you provided as well as those from other Partnerships Executives, and have implemented a number of changes including a redistribution of client portfolios.

We have provided guidance and training with the aim for you to learn and understand how clients should be approached, and advise them how our service could assist them.

However, despite the changes and additional support we provided, your individual budgets have not been met over this period. It is with regrets that we have made the decision to terminate your employment.

Under your individual employment agreement, you are entitled to four weeks' notice, or payment in lieu thereof. We will pay you 4 weeks' salary in lieu of notice, which means your last day of employment will be today.

All books, documents, keys or any other property belonging or relating to the company's business and that of its customers, and any material accumulated during your employment, other than of a personal nature, should be returned as soon as possible.

Thank you for your contribution to The NBR. We take this opportunity to wish you well in your future endeavours.

[24] A conversation then followed where Ms Chan repeated the two options that were available to Mrs Johnson.

[25] Mrs Johnson left the meeting, preceded to her desk, and began packing up her personal belongings. She told everyone that she had been fired. She was vividly angry causing her fellow employees to become concerned. Several staff approached her desk to see what the matter was. After a period of time she left the office.

The NBR's meetings with staff

[26] Following Mrs Johnson leaving the office, Mr Khan asked the staff members at the NBR to attend a meeting. I heard evidence from Mr Khan, Ms Chan, Nicholas Grant and Duncan Bridgeman about the events that took place at that meeting. Having heard from these witnesses I am satisfied the following took place.

[27] Mr Khan called a meeting for everyone in the office to attend. Approximately 15 people were present. Mr Khan told the staff that Mrs Johnson had been given a generous offer. That was, if she resigned immediately she would be given 3 months' salary. She had refused the offer and because of this she was let go. He said she had not been doing a good job, that she had been given a lot of support and many chances, and that she had not improved.

[28] In the days that followed Mr Scott convened another meeting with his staff. This meeting was to discuss the NBR's future strategy. In the course of this meeting Mr Scott told those present that Mrs Johnson had been sacked and that "she deserved to be fired".

The NBR's discovery of the taking of confidential information by Mrs Johnson

[29] Following Mrs Johnson's departure from the NBR, it learnt that she had sent a number of emails from her NBR email account to her personal email account. These emails were sent on:

- a) 28 July 2017 - revenue numbers for July 2017.
- b) 14 September 2017 - subscription numbers together with a graph.
- c) 15 September 2017 – advertiser labels update and a copy of the NBR's Print Subscriber Database updated as at 7 June 2016.
- d) 18 September 2017 – the NBR's post codes and a copy of its Print Subscription Database updated as at 28 April 2017.

[30] The NBR considered that Mrs Johnson's actions in sending these emails to her personal email address had the potential to cause it significant damage and loss.

[31] On 6 December 2017 the NBR filed proceedings in the Auckland High Court. An interim injunction was made by the High Court on 13 December 2017. This ordered Mrs Johnson:¹

1. Not to deal with, distribute, disseminate or otherwise utilise any information belonging to or obtained from the applicant including but not limited to the applicant's Print Subscription Database, Digital Subscription Database and CRM Advertiser Database (the applicant's information)
2. To take all reasonably necessary steps to ensure the protection of the applicant's information.
3. Within 7 days of the date of any order, to file an affidavit with this Court and serve a copy on the applicant providing details of all or any of the applicant's information taken or retained by the respondent and all details of what has been done with that information, including any other person or entity to whom the information has, in whole or in part, been provided, or in any way disclosed to.

[32] In accordance with the orders made by the High Court, Mrs Johnson filed an affidavit in which she attached a schedule setting out the NBR's information that she had taken or retained. This schedule contained a number of additional documents that the NBR was previously unaware had been taken by Mrs Johnson. A number of these documents were taken when she packed up her desk on her last day. She deposed she had also retained hard copies of lists of advertising contacts and account lists and had continued to have access to the NBR's Advertisers Database after the termination of her employment.

[33] Mrs Johnson further deposed that she had distributed a copy of the email of 18 September 2017 to her lawyers for the purpose of obtaining legal advice and had blind copied her husband into this email. She had also forwarded a list of contacts derived from going through the NBR's CRM Advertisers Database, and her work email sent folder, to her new employer, Conferenz Limited.

[34] By consent, on 7 February 2018, the High Court's interim orders of 13 December 2017 were varied to permit Mrs Johnson to deal with, distribute, disseminate or otherwise utilise the documents in her possession for the purpose of advancing her employment claims in the employment jurisdiction.

¹ *Fourth Estate Holdings (2012) Ltd v Philippa Johnson* CIV 2017-404-283, 13 December 2017 per the Honourable Justice Lang.

[35] Negotiations between the parties then ensued and a settlement agreement was entered into between Mrs Johnson and the NBR on 28 March 2018. I shall return to discuss some of the relevant terms of this agreement later in this determination. Thereafter leave was granted by the High Court to the NBR to discontinue the proceedings against Mrs Johnson.

Issue 1: Unjustified Dismissal

The legal position

[36] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of the NBR, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[37] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether having regard to the resources available, the NBR sufficiently investigated the allegations, raised the concerns with Mrs Johnson, gave her a reasonable opportunity to respond and genuinely considered her explanation prior to dismissal.

[38] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mrs Johnson being treated unfairly.²

[39] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

Analysis

[40] I am satisfied the test of justification was not met. The NBR has sensibly conceded this.

² Section 103A(5), Employment Relations Act 2000.

[41] There were a number of serious defects in the process followed by the NBR that resulted in Mrs Johnson being treated unfairly. There was no investigation of any performance concerns before dismissal. There was no rising of any concerns with Mrs Johnson before her dismissal and she was not provided with access to any relevant information relied upon by the NBR in making its decision. There was no opportunity afforded to Mrs Johnson to respond to any concerns about her performance before dismissal. These defects were not minor and did result in Mrs Johnson being treated unfairly.

Finding on Issue One

[42] I confirm the preliminary indication provided to the parties at the conclusion of the investigation meeting. The NBR's decision to terminate Mrs Johnson's employment did not fall within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. I accordingly find that she was unjustifiably dismissed from her employment with the NBR.

Issue 2: Unjustified Disadvantage

[43] Mrs Johnson claims she was unjustifiably disadvantaged in the course of her employment by the NBR increasing her advertising budgets and, at the same time, adopting an approach of only targeting big spend advertisers and reducing the number of clients in her account portfolio. She alleges this made it difficult for her to achieve her targets.

The legal position

[44] Under s 103(1)(b) an employee may commence a personal grievance claim while still employed or after the employment has terminated, if one or more of the conditions of employment has been affected to the employee's disadvantage by an unjustifiable action by the employer.

[45] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause

for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

Analysis

[46] I am satisfied that Mrs Johnson's employment was not unjustifiably disadvantaged by the NBR's actions.

[47] While there was a substantial increase in Mrs Johnson's budget, this was discussed with Mrs Johnson before it was implemented and, at material times, Mrs Johnson represented verbally and in writing that it was achievable. During her employment Mrs Johnson was provided with support by Mr Lowe and Mr Khan to meet her budget. She raised no concern about the level of her budget, her ability to meet this, or the strategy that the NBR was using to generate revenue. In an email dated 3 August 2017 she advised Mr Khan:

... I am absolutely determined to make this work. GS [Mr S] is a trailblazer. He is getting his targets month after month despite all the odds so there is no reason why I shouldn't be reaching mine. I can sell. I know my product inside out. I have a great territory and I am not going to give in. I will keep working at this until it comes right or until you sack me – whichever comes first. On a bright note, I love what I am selling and believe in the NBR so I just need to achieve my targets month in and month out, for myself as much as for the NBR.

[48] I am satisfied the strategy that was implemented by the NBR to increase its revenue, namely by focussing its sales executives' attention on clients who it considered would generate work, was one that a fair and reasonable employer could have made in the circumstances.

Finding on Issue Two

[49] I confirm the preliminary indication provided to the parties at the conclusion of the investigation meeting. Mrs Johnson did not suffer an unjustified disadvantage to her employment.

Issue 3: Remedies

Lost Wages

[50] Section 123(1)(b) of the Act provides for the reimbursement by the NBR of the whole or any part of wages lost by Mrs Johnson as a result of her grievance.

Section 128(2) provides that I must order the NBR to pay Mrs Johnson the lesser of a sum equal to her lost remuneration or to three months' ordinary time remuneration. However, I have discretion to award greater compensation for remuneration lost than three months' equivalent.³

[51] Mrs Johnson claims lost wages in the sum of \$19,076.93. This sum is calculated by firstly taking the remuneration she would have earned at the NBR between her dismissal on 27 October 2017 and the date she obtained her current employment (12 March 2018). From this amount she has then deducted the four weeks' notice she received from the NBR and her earnings from Conferenz.

[52] Steve Scott gave evidence on Conferenz' behalf. He said there were two reasons why Conferenz terminated Mrs Johnson's employment. The first was because she had misrepresented the reason why her employment with the NBR came to an end. Mr Scott said Mrs Johnson told him that she had been made redundant. This representation was mirrored in the report that Conferenz had received from the agency who had initially interviewed Mrs Johnson.

[53] The second reason provided by Mr Scott was that Mrs Johnson had provided Conferenz with extensive information that belonged to the NBR. I shall return to discuss the nature of this confidential information later in this determination. Mr Scott considered this to be poor judgment on Mrs Johnson's part in not only having information that appeared to belong to the NBR but then seeking to share that information with Conferenz. Mr Scott said Conferenz is a business that relies on confidential information belonging to advertisers and customers. That information is valuable and required everyone within the business to exercise the utmost integrity.

[54] I am satisfied in the foregoing circumstances that the only wages that Mrs Johnson lost as a result of her grievance were those that she suffered prior to her commencing employment with Conferenz. At that point damages were crystallised. The loss that she suffered thereafter was attributable to Mrs Johnson's actions in misleading her new employer, and providing it with the NBR's confidential information, and not her personal grievance.

³ S 128(3).

Finding on Issue 3 - Wages

[55] I confirm the preliminary indication provided to the parties at the conclusion of the investigation meeting. Mrs Johnson has lost wages for the period from her termination to the date she commenced work with Conferenz.

[56] Mrs Johnson was paid four weeks' notice by the NBR i.e. until 24 November 2017. She commenced work with Conferenz on 30 November 2017. She has therefore suffered 1 week's lost wages which equals \$1,666.67 gross.

[57] NBR is ordered to pay to Mrs Johnson the sum of \$1,666.67 gross within 14 days of the date of this decision.

Compensation

[58] Mrs Johnson claims compensation in the sum of \$50,000 for her unjustified dismissal.

[59] In support of her claim Mrs Johnson gave evidence of the hurt, humiliation and loss of dignity that she has endured. She said she suffered from low self-esteem, lack of confidence and a deep sense of humiliation from the manner in which her termination came about. In addition, she said she felt intimidated and distressed by the actions taken by the NBR after her dismissal including it pursuing the claim in the High Court, threatening legal action against her for recording the dismissal meeting with Mr Khan, and through a text sent to her by Mr Scott.

[60] Before having her employment terminated by the NBR, Mrs Johnson said she had a blemish-free career in publishing both in New Zealand and the UK and a reputation that she was proud of. She now suffers from anxiety and stress and her reputation has, in her view, been damaged.

Analysis

[61] Mrs Johnson has suffered humiliation, loss of dignity and injury to her feelings following her termination. However, I am not satisfied that the sum she claims is warranted in the circumstances.

[62] Firstly, any reputational damage and distress that Mrs Johnson suffered was caused partly by her publishing her dismissal to her colleagues. It was Mrs Johnson

that told her colleagues in the first instance of her dismissal. Her anger led to the office as a whole becoming disturbed and colleagues' coming to see what was wrong. This led to office chatter. The comments that were made by Mr Khan and Mr Scott to the NBR's staff following Mrs Johnson's termination were, I understand, unknown to Mrs Johnson until recently.

[63] Secondly, at least in part, Mrs Johnson's distress was attributable to the High Court proceeding and the NBR's claim in the present case, where it took action against Mrs Johnson to protect its confidential information. Any harm suffered by Mrs Johnson as a result of the post-termination actions by the NBR was unrelated to her grievance.

[64] Thirdly, I take into account Mrs Johnson's taking of the NBR's confidential information. This was misconduct of a truly significant nature that warrants a reduction in the level of compensation awarded under s 123.⁴

[65] Taking the foregoing factors into account, together with the duration of employment, I consider the evidence warrants an award of compensation under s 123(1)(c)(i) of the Act in the sum of \$8,000. This sum is in accordance with other cases of unjustified dismissal recently issued by the Authority and takes into account the subsequently discovered misconduct.⁵

Finding on Issue 3 – Hurt and Humiliation Compensation

[66] The NBR is ordered to pay to Mrs Johnson the sum of \$8,000 pursuant to s 123(1)(c)(i). Payment must be made within 14 days of the date of this determination.

Issue 4: Contribution

[67] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal

⁴ *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136; *Salt v Fell* (2008) 5 NZELR 499 (COA) at [83], [104].

⁵ *Williams v BSL Produce Limited* [2018] NZERA Wellington 93, *Von Keisenberg v Alexander Group media Ltd & Anor* [2018] NZERA Auckland 323, *Kaur v UBNZ Corporation & ORS* [2018] NZERA Auckland 321, *Beloous v Eska Ltd* [2018] NZERA Auckland 316.

grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.⁶

[68] I agree with the submissions made by the parties that Mrs Johnson did not contribute to her personal grievance. I make no deduction to the remedies I have awarded.

Issue 5: Breach of Good Faith (Respondent)

[69] Section 4(1) of the Act requires parties to an employment relationship to deal with each other in good faith. Among other things, the duty of good faith requires parties not do anything to mislead or deceive each other, and be active and constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative.

[70] A party who fails to comply with the duty of good faith in s 4 is liable to a penalty if certain threshold criteria are met, namely that the failure was deliberate, serious, and sustained; or the failure was intended to undermine an employment relationship.

Did the NBR mislead or deceive Mrs Johnson as to the security of her employment?

[71] Mrs Johnson pleads that the NBR acted in breach of its good faith obligations in three ways.

[72] Firstly, by misleading her on the security of her employment. She submits Mr Khan led her to believe that her job was safe when he forwarded her copies of job advertisements in October 2017. She said he told her these were for Mr C and Mr S's jobs but she believes they were for her position. In addition, she submits that during the dismissal meeting on 27 October 2017, Mr Khan told her the NBR was shutting down its sales which she says was untrue.

[73] Mrs Johnson's evidence is disputed by Mr Khan and the NBR. They maintain the advertisements were for replacements for Mr S and Mr C's roles. In addition, Mr Khan denies telling Mrs Johnson that the NBR was shutting its sales division.

[74] Having heard from the parties I find, on balance, that the NBR did not mislead Mrs Johnson. It is more likely than not that Mr Khan was telling the truth when he

⁶ Section 124.

told Mrs Johnson that the two advertisements were to replace the two executives that had resigned. It is improbable that Mr Khan told Mrs Johnson that the sales team was going to be shut down. This would be inconsistent with the NBR advertising for replacements.

Did the NBR mislead or deceive Mrs Johnson as to nature of the meeting on 27 October 2017?

[75] Mrs Johnson pleaded that the NBR failed to act in good faith by describing the dismissal meeting as a “coffee and a heart to heart” when instead it intended to terminate her employment. Mrs Johnson submits that as a result she suffered stress and humiliation. I consider these aspects of Mrs Johnson’s claim for breach of good faith to have been adequately addressed by me in her claim for unjustified dismissal and in the remedies I have ordered in her favour. This claim is dismissed.

Did the NBR breach its obligation to be active and constructive in establishing and maintaining a productive employment relationship?

[76] Mrs Johnson further pleads that the NBR breached its obligation to be active and constructive in establishing and maintaining a productive employment relationship. It is alleged that it did this by failing to communicate any concerns it may have had about her performance, or her ability to reach her sales budgets and individual budgets. In addition, she was not provided with any feedback to this effect, or given any opportunity to provide input into how her performance could be improved to achieve the required sales budgets.

[77] The facts relied upon by Mrs Johnson to support this claim are the same as those relied upon to support her claim for unjustified dismissal. I consider these aspects of Mrs Johnson’s claim for breach of good faith to have been adequately addressed by me in her claim for unjustified dismissal. This claim is dismissed.

Issue 6: Issue estoppel

The Applicant’s submissions

[78] Mrs Johnson submits the NBR is estopped from receiving any remedy for her alleged breach of contract, or alleged breach of good faith. This is because, she submits, the issues and facts before the Authority are identical to those that have

already been resolved in the High Court pursuant to a settlement agreement executed by the parties on 28 March 2018.

[79] In support of her position Mrs Johnson's Counsel, Ms Stewart, referred to two Court of Appeal decisions that address issue estoppel. The most recent of these cases was the decision of *Van Heeren v Kidd* where the Court of Appeal stated:⁷

- a. *An issue estoppel arises where a judgment has determined an issue as an essential and fundamental step in the logic of the judgment and without which it could not stand*
- b. *The rule rests on two foundations:*
 - i. *the interest of the community in the determination of disputes and the finality and conclusiveness of judicial decisions; and*
 - ii. *the protection of individuals from repeated suits for the same cause.*

[80] The second decision relied upon by Mrs Johnson was that of *Beattie v Premier Events Group Ltd*.⁸ In that case the Appellant sought leave to appeal the decision of the High Court to refuse to strike out the High Court proceedings as an abuse of process. The Appellant contended that the High Court proceedings would involve litigation in the High Court of what they said were the same allegations, relating to the same events that had been addressed in the Employment Court proceedings. The Court of Appeal held that the High Court was correct not to strike out the proceeding on the basis that a judgment had not yet been made.

Analysis

[81] The foregoing cases make it clear that in order for an issue estoppel to arise, a judgment must have been made in regard to that issue. In the present case, no judgment was made by the High Court, other than the interim injunction, as the parties settled the matter. The interim injunction did not address penalties for Mrs Johnson's breach of confidentiality and nor could it have. The High Court does not have jurisdiction to entertain a claim under the Act for penalties. This is a matter that falls within the exclusive jurisdiction of the Authority. No issue estoppel arises.

⁷ *Van Heeren v Kidd* [2016] NZCA 401 at [1].

⁸ *Beattie v Premier Events Group Ltd* [2014] NZCA 184.

[82] For completeness, I also considered whether the settlement agreement precluded the NBR from pursuing a claim against Mrs Johnson. I am satisfied that it does not. The Agreement envisages the parties being able to pursue their respective employment claims in the Authority. This is clearly expressed in the background to the Agreement that provides “The parties have agreed to resolve those matters that are within the jurisdiction of the High Court on the terms and conditions set out in this agreement.” It is further reinforced at paragraphs 4 and 6 that provide:

[4] The parties agree that this agreement is in settlement only of the matters raised in the Proceeding. For the avoidance of any doubt, the terms of this agreement **do not amount to a settlement of any matters between the parties within the exclusive jurisdiction of the Employment Relations Authority and both parties retain and may pursue** any and all claims, disputes and grievances that are not settled by the settlement agreement and that they may have against each other arising from or related to the previous employment relationship.

[6] Notwithstanding clause 5, the parties may refer to the terms of this Settlement Agreement and any future employment claims brought against each other.”

(Emphasis added)

[83] The NBR is not estopped from pursuing its claims against Mrs Johnson.

Issue 7: Breach of Confidentiality – Applicant

[84] The NBR alleges that Mrs Johnson breached Clause 14 of the IEA, and a confidentiality agreement dated 30 May 2016, together with her implied duties of fidelity by taking confidential information belonging to the NBR.

[85] Clause 14 of the IEA provides:

The employee shall:

- a) Not use, divulge or communicate to any person any information, apart from that relevant to normal business with clients or to persons who have proper authority, relating to the employer’s business, or that of its principals, without the employer’s prior approval.
- b) Keep confidential during and after termination of employment, all the employer’s business agreements, tariffs or pricing information, customer and supplier names, private matters, and other confidential information in regard to the business of the employer, its employees and its principals and not disclose any such information to anyone.
- c) On termination of employment leave with the employer all books of accounts, records, papers, correspondence and any other documents,

electronic media or software concerning and/or containing reference to the business of the employer.

- d) Not copy any material described in (c) above for personal use or use by any unauthorised person.
- e) Keep the details of this employment agreement confidential.

[86] The confidentiality agreement provides:

The employee covenants that the employee will not during the continuance of or at any time after the termination of the employee's employment (except so far as is entirely necessary and proper in the ordinary course of the employee's employment) either directly or indirectly utilise, copy, record or divulge to any person (including employees of the employer) firm or company any knowledge or information as to the practice, business dealings or affairs of the employer, or its mode of business, or secrets pertaining to its business, or knowledge concerning its internal management and finances or its dealings with third parties and the public, or any other matters, knowledge or information which the employee may acquire (or may have already acquired) by reason of the employee's employment PROVIDED THAT this agreement shall cease to apply to any information if and only to the extent that the same shall become public knowledge.

The NBR's databases

[87] The NBR owns and maintains several databases that it started in 2008 and has regularly updated thereafter. Of relevance to this investigation are its Print Subscription Database, its Digital Subscription Database and its CRM Advertiser Database.

[88] The Print Subscription Database is the core of the NBR's business. It contains a full list of the name of subscribers to its print publication of the NBR, the company or organisation the subscriber works for or is associated with, the subscriber's postal address and, in some instances, their private residential address.

[89] The Digital Subscription Database contains a full list of the names of NBR digital subscribers; the company or organisation the subscriber works for or is associated with, their order history and their email addresses.

[90] The CRM Advertiser Database contains a full list of the names of parties who advertise with the NBR, the names of the appropriate contact people within the organisation and their contact details.

[91] During the course of Mrs Johnson's employment, she had access to each of these databases. She accessed the Digital Subscription Database and the CRM

Advertiser Database by logging into a website dashboard. The Print Subscription Database was not available directly by Mrs Johnson but she obtained versions of it when it was forwarded to her by the NBR's Subscriptions Director.

Analysis

[92] I am satisfied that Mrs Johnson breached the IEA, the confidentiality agreement and her implied duties of fidelity by:

- a) Using, divulging or communicating confidential information belonging to the NBR to third parties other than in the ordinary course of her employment. For example, the information provided to Conferenz, her lawyer, and her husband. She did not have the NBR's prior approval to do so. She has therefore breached Clause 14 (a) of the IEA.
- b) Failing, after termination of her employment, to keep confidential the NBR's customer and supplier names and other confidential information in regard to the NBR's business in breach of Clause 14 (b). Mrs Johnson accepted she accessed her historic work emails from her desktop, remotely accessed the CRM Advertisers' database, and reviewed hard copies of her and her colleagues' client portfolios. She then used this information to prepare a spreadsheet that she provided to her new employer, Conferenz. This information included not only the names of companies that had advertised with the NBR but also the names of the appropriate contact people at those organisations and their contact details. It took the NBR nearly 10 years to collate this information at significant cost and effort. It was confidential information and was commercially sensitive.
- c) Failing to return to the NBR information belonging to it on her termination in breach of Clause 14(c) of the IEA. On an undisclosed date, but prior to her termination, Mrs Johnson removed hard copies of her and her colleagues' client lists. She was aware she had this material when she left the NBR but failed to return it. She also failed to return the information that she had emailed to her personal email address on 28 July, 14, 15 and 18 September 2017. The later emails contained a copy of the NBR's Print Subscriber Database. This document contained 300 pages of information about NBR's print

subscribers including company identification, account names, position information and contact addresses.

- d) It is more likely than not that Mrs Johnson also breached Clause 14(d) of the IEA by copying information for her personal use.
- (i) Mrs Johnson could provide me with no plausible reason for her sending the information contained in her emails of 28 July, 14, 15 and 18 September 2017 to her personal email address. She did not work routinely from home and, even if she did, she had access to her work emails on her desktop home office computer and via her mobile. There was no dispute that it was not a common practice for her to send information to her home email address.
- (ii) Mrs Johnson could provide no explanation for her retaining hard copies of her colleagues' client portfolio lists. Ms Keene, who was called as a witness by Mrs Johnson, said it was not normal for the advertising executives to see or have copies of each other's client lists.

Finding

[93] I confirm the preliminary indication of findings provided to the parties at the conclusion of the investigation meeting. Namely, that Mrs Johnson breached Clause 14 of the IEA, the Confidentiality Agreement and her implied duties of fidelity.

Issue 8: Penalty – Breach of Confidentiality

[94] Under s134A of the Act, a party to an employment agreement who breaches it is liable to a penalty. In determining an applicable penalty the Authority must have regard to all relevant matters including those set out in s133A of the Act. In doing so it is helpful to follow the four step approach outlined by the Employment Court in *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited and Warrington Discount Tobacco Limited*.⁹

⁹ [2016 NZEmpC 143.

Step 1: Nature and number of breaches

[95] Mrs Johnson breached Clause 14 of her employment agreement multiple times. Her breaches include:

- a) Clause 14(a) - Using, divulging or communicating confidential information belonging to the NBR to third parties. This occurred on at least 6 occasions. For example:
 - Active leads list sent to Conferenz on 3 December 2017.
 - List of email contacts sent to Mrs Johnson's email address at Conferenz on 3 December 2017.
 - Active leads list sent to Mrs Johnson's email address at Conferenz on 3 December 2017.
 - List of Mrs Johnson's most recent contacts and advertising contacts sent to Mrs Johnson's email address at Conferenz on 5 December 2017.
 - Spreadsheet comprised of information obtained from Mrs Johnson's historic work sent emails, the CRM Advertisers' database, and hard copies of her and her colleagues' client portfolios, sent to Conferenz on 6 December 2017.
 - Copy of email of 7 June 2017, emailed to her home on 15 December 2017, together with attachments being lists of NBR print subscriber names and addresses, emailed to Mrs Johnson's lawyer and husband on 17 December 2017.
- b) Clause 14(b) - Failing, after termination of her employment, to keep confidential the NBR's customer and supplier names and other confidential information in regard to the NBR's business in breach of Clause 14 (b). This occurred on at least the 6 occasions outlined above.
- c) Clause 14(c) - Failing to return the NBR's information on her termination. This included hard copies of Mrs Johnson and her colleagues' client lists and the four emails sent between 28 July 2017 and 18 September 2017.

- d) Clause 14(d) - Copying information for her personal use. This occurred, at least 5 times prior to her termination, namely by way of the emails between 28 July 2017 and 18 September 2017 and the client lists. In addition, after termination, she copied the information from her work emails on at least one occasion, and from the CRM Advertiser's database on at least one occasion, in order to prepare the spreadsheet for Conferenz.

[96] I consider it appropriate to globalise the multiple breaches into the four categories of breaches set out above. I take a starting point of \$40,000.

Step 2: Severity of the Breach

[97] Step 2 involves the consideration of the severity of the breach to establish a provisional starting point for the penalty. This will include an adjustment for aggravating and mitigating factors in relation to the breach.

[98] There are several aggravating features.

[99] During the latter part of her employment Mrs Johnson emailed information to her home address on multiple occasions and took hard copies of not only her own, but her colleagues' client lists. This was done at a time when Mrs Johnson was aware that her job was in jeopardy and was actively seeking alternative employment. The information she emailed to her home email on 28 July 2017 was emailed within hours of her asking Mr Khan "Are you going to sack me?". The information emailed during September 2017 was emailed at a time when she said she was interviewing for roles with other organisations.

[100] It is more likely than not that Mrs Johnson took the NBR's information for the purpose of using it in the future. I am fortified in this finding by the events that subsequently unfolded. Within days of Mrs Johnson starting her new job with Conferenz, she compiled a spreadsheet that contained the information she had taken with her from the NBR. This spreadsheet also contained the information she had obtained after her termination when she had remotely accessed the NBR's databases and her historic emails. I am under no doubt that, at least by this time, Mrs Johnson knew that she was not permitted access to this information.

[101] But for the NBR's prompt actions in pursuing injunctive relief in the High Court prohibiting Mrs Johnson from distributing the information she had taken, and Conferenz' decision not to accept the information provided by Mrs Johnson, the NBR could have suffered serious damage.

[102] The mitigating factors warranting a reduction of any potential penalty are that Mrs Johnson has paid the NBR's legal fees in the High Court, albeit on a scale basis, and has provided an undertaking from herself and her husband not to use the confidential information. She also acknowledged her wrongdoing during the investigation meeting.

[103] I assess the degree of severity at 60%.

Step 3: Ability to pay penalty

[104] Step 3 is an assessment of Mrs Johnson's ability to pay. Mrs Johnson said that she does not own any assets in her personal name. She said she lives pay check to pay check. However, Mrs Johnson has the means to raise funds to pay any penalties. She advised that her father was funding her legal expenses which were approximately \$96,000. I accordingly make no reduction under this step.

Step 4: Proportionality of penalty

[105] Step 4 is to apply the proportionality principle. This is consideration of whether the potential penalty arrived at is proportionate to the breach and any harm occasioned by it. At this stage I must assess if the amount I have reached is just in all of the circumstances.

[106] Looking at recent Authority and Court imposed penalties I conclude the sum of \$9,000 is an appropriate penalty. This sum is proportionate to the breaches and is sufficient to act as a deterrent.

[107] I consider it appropriate that part of this penalty be paid to the NBR as it has suffered the impact of Mrs Johnson's breach and has been obliged to take steps to enforce its rights. I apply the same ratio of payment as Judge Inglis in *Lumsden v Skycity Management Limited* to reflect this.¹⁰

¹⁰ [2017] NZEmpC 30 at [69].

[108] Mrs Johnson is ordered to pay \$9,000 by way of penalty for her breach of the IEA. I direct that 75% of that amount (\$6,750) is to be paid to the NBR. The remaining 25% (\$2,250) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.

[109] Payment of the penalty is to be paid within 28 days of the date of this determination.

Issue 9: Breach of Good Faith (Applicant)

[110] The facts relied upon by the NBR to support this claim are the same as those relied upon to support its claim for breach of confidentiality. I consider these aspects of its claim to have therefore been addressed. This claim is dismissed.

Issue 10: Costs

[111] At the conclusion of the investigation meeting I provided the parties with a preliminary indication of my findings. This determination has largely confirmed those preliminary indications. My indications included that, as both parties were likely to be successful against each other in relation to their claims; it was likely that I would find costs to lie where they fall. In its submissions, the NBR has agreed with this approach. I am unclear on the position taken by Mrs Johnson. For this reason I reserve costs.

[112] The parties are encouraged to resolve any issue of costs between themselves. If they are unable to do so, and an Authority determination on costs is needed, Mrs Johnson may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the NBR will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Outcome

[113] The following orders are made:

- A. Mrs Johnson was unjustifiably dismissed.

- B. Mrs Johnson did not suffer an unjustified disadvantage to her employment.
- C. The NBR is ordered to pay to Mrs Johnson the following amounts within 14 days of the date of this determination:
 - a. The sum of \$1,666.67 gross for monies lost as a result of her personal grievance;
 - b. The sum of \$8,000 under s 123(1)(c)(i) of the Employment Relations Act 2000.
- D. Mrs Johnson breached the confidentiality terms of her employment agreement, together with her implied obligations of fidelity.
- E. Mrs Johnson must pay \$9,000.00 by way of penalty for breaches of the employment agreement. 75% of that amount (\$6,750) is to be paid to the NBR. The remaining 25% (\$2,250) is to be paid to the Employment Relations Authority. The Employment Relations Authority will then pay this sum into a Crown Bank Account.
- F. Payment of the penalty must be paid within 28 days of the date of this determination.
- G. Costs are reserved.

Jenni-Maree Trotman
Member of the Employment Relations Authority